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They are Not Gods: Lon L. Fuller, H.L.A. Hart and a proposed extension of the legal system equation: Freedom of the People, Equality for the People & Sovereignty by the People

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They are Not Gods

Lon L. Fuller, H.L.A. Hart and a proposed extension of the legal system equation

Freedom of the People, Equality for the People & Sovereignty by the People

> One of them holds a scepter, like a district judge, but is unable to destroy anyone who offends it. Another has a dagger in its right hand, and an ax, but cannot defend itself from war and robbers. From this it is evident that they are not gods; so do not fear them.
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> *The Letter of Jeremiah*, 6.14-6.16

Abstract

This paper offers a thought experiment that explores how a group of people might react if compelled to craft a legal system out of nothing but their pre-conceived ideas and the exigencies of a new and unknown environment. My analysis focuses on the theories of "legal systems" offered by Lon L. Fuller and H.L.A. Hart in the latter half of the twentieth century.[1] The question I ask is simply this: are these authors' theories of legal systems adequate? This question is answered with particular reference to observations made in the legal analysis embodied in a thought experiment. I suggest that both Fuller's and Hart's models ultimately fall short in their conceptions of a legitimate legal system. I conclude that while Fuller's 'inner morality of law' in the 'principles of legality' provides a satisfactory, albeit rudimentary, framework for a legal system, it is also bereft of concern for the fundamental connection between the legal system and its theoretical guarantors, the citizens. Moreover, I conclude that Hart, who agreed in part with Fuller's 'principles of legality'[2] yet clearly moved in another direction with his rules of recognition, conflated various

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[1] 1940-1990s.

[2] *Vide infra* on the 'Principles of Legality' and the discussion of Hart's Harvard book review of Fuller's Morality of Law. In brief, Hart felt that the principles of legality were fair enough for a working legal system, but they could not guarantee a moral outcome. See, for instance: Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller," *New York University Law Review* 83 (2008): 1152. For a number of articles discussing the 'principles of legality' debate within Hart and Fuller generally, see *New York University Law Review* 83 (2008).

incarnations of his rules and, like Fuller, he left out important considerations concerning the all important nexus between people and their legal systems. In addition to Fuller's eight tenets defining a legal system, all of which are discussed below, I suggest that three additional elements are required: freedom of the people, equality for the people, and sovereignty by the people.

Introduction

One way of thinking of this paper is to consider whether Fuller's and Hart's claims bear resemblance to the experience of our fictional thought experiment castaways in the development of their legal systems. The first part of this paper focuses on placing Hart's and Fuller's original debate in its proper context, precisely because this first exchange—which precipitated a series of insightful debates between the two—indicates clearly that they were ultimately able to agree on Fuller's principles of legality. The second part of this paper is the thought experiment itself, which is employed as a heuristic tool that discusses three distinct attempts by a castaway society to fashion a legal system. This thought experiment is then contrasted with experiences of what is prescribed by Fuller and Hart as prerequisites to a functioning legal system. The three attempts at government are made to roughly accord with familiar historical incarnations that most people will be familiar with: a monarchy, co-regency with senate, and a democratic experiment. In the final democratic stage, the society attempts to ground the three democratic principles I argue are necessary additions to Hart's and Fuller's agreed on legal system equation. In part three, I conduct a comparative analysis that studies the legal theories of Hart and Fuller so as to determine how they align or diverge with the experience of the proposed society as they struggled to find a workable legal system. I conclude that although Fuller's legal system is basically sound and functionally workable, it does not necessarily guarantee the prevention of abuses by governing powers operating

under its strictures. Constitutional instruments aimed at entrenching the protection of freedom, equality, and sovereignty for citizens are also required. Finally, the possible relationships between aspects of the democratic stage of development and similar ideas from contemporary legal philosophers are discussed.

Hart and Fuller in Context

The writings of both Hart and Fuller, in their efforts to craft a bare definition which could fit most rule of law nation states, turn out to be palpably bereft of any serious consideration of the three elements noted above. This is not meant to fault them, for to do so would be to forget the context in which their whole debate started, namely, the post war difficulty that German courts confronted in determining whether to identify the former Nazi rule as a legal system. From this crucial starting point, they went on in their writings to try and define the bare minimum necessary for a legal system so as to further support their answers to the original question posed.[3] My discussion here, while tangentially related to Hart's and Fuller's early debates, is not concerned, as Fuller and Hart were, with determining some kind of a bare minimum required for a legal system to be legitimate. This is precisely because I agree with Hart that even after Fuller's later principles of legality are implemented, immoral regimes can still operate under them. I instead take the principles of legality, and Hart's rules of recognition, as stepping points to suggest further elements which may be necessary in more adequately defining a morally acceptable legal system.

The thought experiment, which will follow the contextual discussion, concerns a small group of people marooned on an earth-like planet. There is no likelihood of escape and so I imagine how they would organize themselves in an effort to understand whether Hart's and

[3] Fuller, of course, was quite willing to insist that some of the legal actions of the Nazis during the war period were so immoral as to not be laws at all, whereas Hart warned against insisting that law must be moral in order to be "good" law. *Vide infra*.

Fuller's claims align with our group's developments over a long period of time, ultimately observing them at fairly complex stages of societal evolution and growth. What is important to remember is that these are not humans suffering from amnesia such that they have no recollection of their past lives. On the contrary, the castaways are people with minds full of pre-conceived ideas and bodies full of learned impulses. If we consider the sociological research of Peter Berger and Thomas Luckmann, we know that pre-conceived ideas are powerful and they offer a lineage that transcends the social and interacts with the very biology of our existence.[4] This paper acknowledges the usefulness of such pre-historical sociological theories, but the focus here is on the suggestion that, left to themselves, groups of humans will likely organize themselves in ways that, while perhaps appearing legal on the surface to a 21st century audience, are actually far more connected to the idea of social order. Eugen Elrich was one of the first to research and write at length on this subject, and one of his great contributions to the study of the ontological foundations of legal systems was his finding that societies are quite obviously older than the legal provisions which grew up in them; and hence, the social order *is* the legal system.[5]

Separating Fuller and Hart from their Chosen Forebears Pursuant to "Reform"
Bentham, Austin, and the Usual Suspects

A number of years ago I learned that former Chief Justice Brian Dickson of the Supreme Court of Canada once wryly remarked to an audience of judges and lawyers: "let's have no more talk of reform, things are bad enough as they are."[6] As the Chief Justice whose court first interpreted the *Canadian Charter of Rights and Freedoms*, beginning in 1982, Dickson

[4] Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y. : Doubleday, 1966); Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, New York: Doubleday, 1967).

[5] Eugen Ehrlich, "The Sociology of Law," *Harvard Law Review* 36.2 (1922): 132. "…is a legal system imaginable which consists of nothing other than the Social Order? This question must be answered in the affirmative if only for the reason that society is older than Legal Provisions and must have had some kind of ordering before Legal Provisions came into existence." See also page 139, "The state is older than state law."

[6] Chief Justice Allan MacEachren, *Conversation* 2004, UBC Faculty of Law.

steered the court through an era of sweeping reform in a number of areas within the law, and he remarked upon his retirement that not only had the *Charter* changed the way the judiciary viewed cases, but it also changed the way society viewed itself, as an evolving whole, a living tree.[7] Yet his cautionary and poignant remark about "reform" leaves a corollary question: was Dickson suggesting society might engage in too much reform? Or was there yet another implicit question, such as, perhaps, this: 'can legal reform move so fast as to jeopardize the progress already tentatively achieved?' One suspects that Dickson's comment was for dramatic effect, yet he was likely offering something near an affirmative answer regarding these questions.

This "reform," to which Dickson alluded, was, and is, part of an ongoing project in common law countries which has being engaged in, perhaps imperceptibly at times, for well over two-hundred years, beginning in earnest with the era of Jeremy Bentham.[8] Of course,

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[7] Chief Justice Brian Dickson, Speech, *Manitoba Law Journal* 20.2 (1991): 557-561.

[8] Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart, *The Collected Works of Jeremy Bentham: Principles of Legislation*, ed. J.H. Burns (London: The Athlone Press, 1970), 185-188. If we think back a moment about Bentham, we find an English jurist and polymath of a *sui generis* nature who was intellectually revolted by the backwards, overly complicated, arbitrary, and unjust state of the English legal system of his day. To put Bentham's purpose into a breath, he wanted to take laws out of the maze of records, reports, and treatises and have them all put into one "pure body of statutory law" (19.1, 232). For instance, Bentham ridiculed the fact that court records were stowed away in some dark cavernous place which was totally inaccessible to those whose fate depended on them. He noted that the trouble of finding these records, their scanty information and indecisiveness, meant that it was not more than once in a hundred that the judges employing the decisions could endure even looking at them. He writes,

> …if a fit of curiosity happens to take the judge, such an [sic] one as shall not take him thrice perhaps in a twelvemonth, they are handed down: if not they are let alone: one out of a thousand becomes a law: the nine hundred and ninety nine others remain waste paper. (15.3, 186)

Bentham is just as scathing on another source of law which lawyers and judges are still wrestling with, Holmes' "oracles of the law," the reports. Bentham writes that as the records are largely useless, another smaller collection of documents is assembled, in which, as he notes, one third, tenth, twentieth, or hundredth part of various cases are shown to the public, which if equally known would be just as likely to become law. He notes that sometimes you have a running history of a court, and then at other times a lacuna of thirty years of "darkness." He finds there is no telling whether you will get the beginning, middle, or end, of a cause; or the argument without decision or visa versa; sometimes the inferior court's decision without the superior which refutes it. According to Bentham, the reports are published by anyone that pleases, and as many as please, and where nobody publishes, no one cares; if the lawyer uses the case manuscripts to make money or executors find them in batches of bequeathed papers, so be it; and if either of these happens into the hands of a bookseller, he becomes a legislator. He writes:

one could go much further back and note important reforming legal crossroads like the inception of the Twelve Tables of Roman provenance, the Council of Nicaea, Magna Charta, Peace of Westphalia, the American and French Revolutions and their concomitant founding constitutional documents, etc. All these events had significant impacts on law becoming more public, more general, more ordered, and, ultimately, tending to give rise to human rights, *inter alia*. Yet it was not until Bentham's time that the concept of law *itself* came under acidic scrutiny,[9] and this tradition continued through the nineteenth and twentieth centuries up until the time of the two main subjects of this study, Lon L. Fuller and H.L.A. Hart. In terms of Bentham's late 18th and early 19th century context, his reforms have been characterized as markedly polemical:

> …it was the unrest that characterized the thought behind the French revolution that urged matters to a head. In this country the Utilitarian School of philosophy, headed at least in the realm of law by Jeremy Bentham, burst into polemics against our legal system. They called for reform not only in simplifying our legal procedure, but by attacking all that they regarded as archaic in the law. For many, indeed, codification was indicated as a remedy that might make the law both accessible and scientific. …their reforming zeal, coupled, perhaps, with the political effect of the Reform Act of 1832, succeeded in forcing upon Parliament the necessity of legislative reform, which has continued to the present time. Fortunately it was a more or less gradual process, which has developed rather than overturned the law. The old spirit remains, though most that is obsolete has from time to time been cut out as dead wood in the living tree. [10]

The wish to have reform checked, or slowed, in one form or another has been a recurring theme in both historical experience and the legal literature, and it has been concerned with, at least in part, the struggle of the positivist movement to strip the "law" of all unnecessary

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> Sometimes by commission from that high authority, a judge who had been dead and forgotten for half a century or for half a dozen centuries, starts up on a sudden out of his tomb, and takes his seat on the throne of legislation, overturning the establishments of the intervening periods… (15.4, 187)

So, all this in aid of the fact that with Bentham we are dealing with someone who lived at a time when the law was in the hands of the rich and/or bourgeois and only understandable to those who dealt with it on a daily basis, although Bentham seems to have regularly doubted even that.

[9] Taking the familiar analogy of the acid bath from O.W. Holmes "You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law, *The Path of the Law*, *Collected Legal Papers*, ed. Harold J. Laski (New York: Harcourt, Brace, and Howe, 1920), 174.

[10] Harold Potter, *An Historical Introduction to English Law and its Institutions*, 2nd rev. ed. (London: Sweet & Maxwell, 1943), 55.

transcendental[11] and metaphysical resonances. This word, resonances, was suggested by Robert Cover, who claimed that this positivistic revolution, which had gone on for over two centuries in a self conscious way, was aimed at stripping the religious, philosophical, and political resonances of "law" away.[12] Yet, he writes, such an enterprise is likely doomed to failure or only partial success because of the power of our many sacred narratives. Speaking from one of these narratives, Lon L. Fuller, as we shall see in some respect, was a checking theoretical perspective aimed at the repeated positivist claims from H.L.A. Hart that positivism could more responsibly delineate what "law" was in the wake of the informer cases in post World War II Germany.

I have laid out these cursory remarks on the history of legal development, much of which will be common knowledge to legal scholars, because I want to emphasize a sharp contrast between the context for reform in, say, Bentham's day, vis-à-vis Hart and Fuller's, which emerged some one hundred and fifty years later. I wish to give the reader a marked sense of the contextual and conceptual placement for the positivist legal tradition in post-war Anglo-American jurisprudence because this was not only the perspective promulgated by Hart, but it was also the popularity of this tradition generally which both worried and prompted Fuller to respond in 1940 with three important lectures that laid the foundations for a book entitled *The Law in Quest of Itself*,[13] a work in which the blame for the rise of Nazism itself was essentially laid at the feet of the positivists.[14]

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[11] I borrow this word in relation to law from Felix Cohen, his *Trascendental Nonsense*.

[12] Robert M. Cover, "The Folktales of Justice: Tales of Jurisdiction," *Capital University Law Review* 14 (1984-1985): 180.

[13] Lon L. Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940): Lecture II.

[14] *Vide infra*.

Following the Second World War, by some twelve years, and feeling the sting of Gustav Radbruch's erstwhile exit from positivist circles[15] due to the collapse of an unjust legal regime under the socialist Nazi regime, Hart responded to Fuller's redoubtable attack on positivism with his now famous Oliver Wendell Holmes Lecture at the Harvard Law School in 1957.[16] His rich defense of the value of the separability thesis within jurisprudence, an answer to Fuller's attack on positivism in *The Law in Quest of Itself*, began an ideological pendulum that swung back and forth between the two legal philosophers which continued for the rest of their lives. This exchange is commonly referred to as the Hart-Fuller debate, but could be more properly labeled the Fuller-Hart debates, since no one denies it was Fuller who first took the stage in 1940 – a fact that seems doubly clear from Hart's chiding rejoinder to Fuller at the end of his now famous essay.[17] Now, what of Fuller, Hart, and 'reform'?

Both Hart and Fuller, in their separate articles and treatises constituting this ideological melee, betray varying degrees of deference to past legal reformers such as Hobbes, Bentham, and Austin, with Hart claiming the closest lineal dependency in terms of *Weltanschauung* or world view. Yet it is a fact lost on no one that the context which prompted the Hart-Fuller exchanges was drastically different than that of, say, Holmes in the nineteenth century, or Bentham in the eighteenth, and so to mark Fuller or Hart as legal "reformers" might appear as somewhat of a non-sequitur.[18] The Fuller-Hart debates were not about 'reforming' legal systems, they were about finding how best to deal *post facto* with the 'deformed' moral code

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[15] H.L.A. Hart, "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71.4 (1958): 616. Fuller's response at, Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71.4 (1958): 630-672.

[16] Hart, *Positivism and the Separation of Law and Morals*, 593-629.

[17] Ibid., 627.

[18] This author is aware of the occasional contribution of Hart (i.e. the Hart-Devlin episode) to legal reform, as well as Fuller's efforts in the area of contract law, but in spite of this neither of these two philosophers can be thought of as affecting the scope of change brought about by either a Holmes or a Bentham.

of the defunct Nazis, and thus by implication, how best to resist tyranny wherever and whenever one might find it.[19]

[19] Due to the fact (*Vide infra*)that Hart and Fuller, in the Harvard papers, were both implying that their separate recommendations on how to resist immoral "laws" was important in and of itself, one of the things that occurred to me as I thought about the plighted society is how Hart's recommendation of opposing immoral laws would have gone over with a regency model [Hart, *Positivism and the Separation of Law and Morals*, 'Surely if we have learned anything from the history of morals it is that the thing to do with moral quandary is not to hide it' (619-620); '…we say that law may be law but too evil to be obeyed' (620). Fuller, *Positivism and Fidelity to Law*, 'Professor Hart castigates the German courts and Radbruch, not so much for what they believed had to be done, but because they failed to see that they were confronted by a moral dilemma of a sort that would have been immediately apparent to Bentham and Austin. By the simple dodge of saying, "When a statute is sufficiently evil it ceases to be law," they ran away from the problem they should have faced' (655). See also, Nicola Lacey, "Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate" *New York University Law Review*, 83 October (2008): 1059-1087. If laws can be evil, then more liberated people will be more likely to oppose them at some level. The individual should be able to evaluate the legitimacy of law making powers, along with a responsibility, not merely a right, to question authority (1080-1081). In Hart's view, it is not merely the positivist stance which equips one for resistance to tyranny; it is also to reserve judgment on the law's moral claim to obedience (1081)], as opposed to Fuller's endorsement of the view that one would be well within rights to ignore such as no law at all [Fuller, *Positivism and Fidelity to Law*, 'To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality - when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law' (660)].

The following table presents an admittedly provocative and yet suggestive thought flow of how both theorists might be asking our citizens to react to immoral laws.

	Iniquitous or immoral law - Fuller	**Iniquitous or immoral law - Hart**
Claim	Not law	Law
Individual's response	Ignore	Oppose
Justification	Does not have sufficient morality to be called law	Is a valid law but needs to be opposed
Resultant possible action	Ignore – overthrow the law maker	Openly oppose law to have it changed
Possible analog	French Resistance in World War II	Martyr
Outcome	Dishonest treatment (-) x immoral law (-) = **positive outcome (a chance to overthrow the system)**	Honest opposition (+) x immoral law (-) = **negative outcome (death at the hands of the law-maker)**

This table is merely putting Hart and Fuller's recommendations into one possible way of interpreting what they claimed to be the most successful way to resist tyranny. I have claimed Fuller's view, that laws which are so immoral can be thought of as not law, could lead to a situation where a person "dishonestly" ignores the immoral dictates of a state regime with the ultimate hope of overturning the body responsible for such iniquitous dictates: I further suggest the French Resistance would be a suitable analog. It seems to me that Hart's suggestion that we honestly and openly oppose such laws could be a far pricklier path to trod, and one which could get people killed quite regularly under regimes like the Nazis during World War II, although this is clearly not the only way to interpret his "oppose".

In the above example of an evolving society, we see that those who vociferously opposed immoral laws were done away with, while the majority simply ignored these dictates as not being worthy of the name, law. It would seem that at least on its face, Fuller's view, at least the way I have presented it, leads to a less dangerous kind of "opposition." In the post war situation which was the epicenter of the Harvard essays, we were told by

Unlike Jeremy Bentham and John Austin, Hart and Fuller were not stirred into action by a ponderously debilitating and bourgeois Western legal system. Rather, they were faced with the problems of contemporary legal systems that had ostensibly been cleansed by the advances of the modern era's utilitarian and positivist legal critique and yet had ended up plummeting into the terrifying rule of the Nazis during the run up to, and including, the Second World War. The exchanges between Fuller and Hart were essentially about the efficacy of the decision of post-war German courts to interpret the former Nazi legal regime as having been so immoral as to nullify their decrees on the basis that such laws were "contrary to the sound conscience and sense of justice of all decent human beings."[20] This was the response of the post-war German appeal court to the familiar account of the German woman who betrayed her soldier husband's confidence to the Nazis, leading ultimately to his death, in the 'Grudge Informer' case. Because of that decision to prosecute the woman under the German *Criminal Code* of 1871 and ignore her plea that she was only acting under more recent Nazi statute law, natural law seemed to have won a decisive victory over positivism, noted by Hart as "hysteria."[21] Yet in a very real sense, the positivist legal tradition, which, however incorrectly, was colloquially taken to mean "might is right"[22] or

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both theorists that although it would seem an academic distinction to make in peacetime, such a decision of how to resist immoral "laws" was important in and of itself [Hart, *Positivism and the Separation of Law and Morals*, 620].

[20] Hart, *Positivism and the Separation of Law and Morals*, 619. These were the appeal court's own words in their judgement of the Grudge Informer case. *Vide infra*. See also, another translation, at: David Dyzenhaus, "The Grudge Informer Case Revisited," *New York University Law Review* 83 (2008): 1032.

[21] Ibid., 619. see Hart's discussion generally at 618-619. See Fuller's redoubtable response at, Fuller, *Positivism and Fidelity to Law*, 648-657. The Grudge Informer case was a main impetus, if we take Hart's comments prima facie, for the initial exchanges between Fuller and Hart, and those exchanges ultimately led to Fuller's formulation of the 'Principles of Legality'. While etymologically connected to the later debate, there is no rational purpose to delve any further into the ramifications of that aspect of their debate here. For a full discussion of the Grudge Informer case, as it relates to Hart and Fuller, see: David Dyzenhaus, "The Grudge Informer Case Revisited," *New York University Law Review* 83 (2008): 1000-1034.

[22] Nicola Lacey, "H.L.A. Hart's rule of law: the limits of philosophy in historical perspective," *Quaderni fiorentini*, 36 (2007): 1203-1224. Lacey wrote: "In direct opposition to Hart's view, Radbruch argued that the positivist position was empirically associated with the unquestioningly compliant 'might is right' attitude widely

"law is law,"[23] was on trial – with Lon Fuller as prosecutor – for allegedly having led to the kind of abuses realized in the context of Nazi Germany.[24] Positively clear and yet morally reprehensible laws were made by the Nazis, and Hart recommended that it would be far more honest to treat these immoral laws as real laws deserving our vigorous opposition—corrected only by retroactively voiding them with another law[25] – than to strip them of the status of law because we judge them to be immoral.[26] Fuller, on the other hand, said he agreed with the German courts that such laws did not deserve the name of laws.[27]

With the crux of the matter for the Fuller-Hart exchanges on the table, there is one more legal reformer which I want to briefly discuss by way of introduction to the Hart-Fuller debates. Similar to Bentham, this reformer poignantly wrote that it was "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[28] In my estimation, there is no historical jurist who had more influence on Hart's claims in these various essays than Oliver Wendell Holmes, Jr. In contrast to the acerbic characterization of Holmes which emerges from Fuller's writings,[29] Hart's masterful Harvard essay betrays a theoretical reliance on this second jurist and polymath – next to Bentham – which sometimes reaches to outright dependence. I will discuss some of these observations below.

Alfred North Whitehead once famously wrote that "[t]he safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato,"[30]

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believed to have assisted the Nazis in their rise to power." [http://eprints.lse.ac.uk/3520/1/HLA_Harts_rule_of_law_(LSERO).pdf]: 6.

[23] Hart, *Positivism and the Separation of Law and Morals*, 618; cf. Lon L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart," *Harvard Law Review* 71 (4): 660.

[24] Fuller, *A Reply to Professor Hart*, 659.

[25] Ibid., 649.

[26] Hart, *Positivism and the Separation of Law and Morals*, 619.

[27] Fuller, *A Reply to Professor Hart*, 655-657.

[28] O.W. Holmes, "The Path of the Law," *Collected Legal Papers* ed. Harold J. Laski (New York: Harcourt, Brace, and Howe, 1920): 187.

[29] Ibid., 657-658; See also, Fuller, *The Law in Quest of Itself*, *Lecture II*, 92-95. Lecture III, 117.

[30] Whitehead. *Process and Reality*.

which is similar to what Talleyrand wrote of his friend Bentham, namely, that he was 'plundered by everybody.' I think the very same *ought* to be said about the influence of Oliver Wendell Holmes on the Anglo-American writers of jurisprudence coming after him. If one recalls that his ideas were the epicentre of the basic contentions of legal realists during the 1930s in America, and that long before Fuller and Hart, Holmes had, in his own writings, opened the subjects of penumbra and the core;[31] the is and ought of laws;[32] judge made law;[33] fidelity to law;[34] the problem of appealing to a higher morality;[35] the myth of a bounded axiomatic logic in judicial decision making;[36] and, most importantly, the confusion surrounding morality's relationship to law.[37] There is very little room for maneuver if we are trying to say there were legal theorists not directly influenced by his work.

H.L.A. Hart is right at the top of this list of Anglo-American jurists, and as one of the two most popular twentieth century legal philosophers, cheek by jowl *juxtim* Lon L. Fuller, I think it helpful to keep in mind the sheer weight of force exerted by the theoretical propositions of Holmes when reading H.L.A. Hart. In no way do I suggest, however, that Holmes began all these discussions,[38] or that Hart followed Holmes slavishly, nothing could be further from the truth. Yet, when one reads Hart's essay, for instance, and comes first upon the word "penumbra" in the context of his famous "vehicle" discussion and finds no citation to Holmes, anyone familiar with the latter's legal literature is taken aback. This

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[31] O.W. Holmes, "Law in Science and Science in Law: January 17, 1899" *Collected Legal Papers* ed. Harold J. Laski (New York: Harcourt, Brace, and Howe, 1920): 233; O.W. Holmes, The Common Law (Boston: Little, Brown and Company, 1948): Lecture III, 80, 127;

[32] O.W. Holmes, "Natural Law," *Harvard Law Review* 32 (1918), *Collected Legal Papers* ed. Harold J. Laski (New York: Harcourt, Brace, and Howe, 1920): 312.

[33] Holmes, The Path of the Law, 167-173; Holmes, "Law and the Court, February 13, 1915" *Collected Legal Papers*, 295.

[34] Holmes, *The Path of the Law*, 170-171, 179.

[35] Holmes, *Natural Law*, 312, 315.

[36] Holmes, *The Path of the Law*, 180-181.

[37] Holmes, *The Path of the Law*, 169-179.

[38] John Austin was clearly as much an influence on Holmes as anyone. Austin's turns of phrase show up in Holmes almost unchanged at times,

etymological observation is now part of the literature,[39] but I must admit some surprise at Hart's omission, especially given the Oliver Wendell Holmes Jr. Lecture context.[40]

In the following section, I will present a short thought experiment as a comparative aid in analyzing Hart's and Fuller's requirements for a legal system, which will be the focus of the latter section. Like Fuller, I have appealed to some exaggerated fact patterns while hoping that the reader will find the experience not wholly insufferable. The following thought experiment also has a wholly optional and expanded "pre-history" found in Appendix A which, if the reader chooses, canvasses some of the likely 'social order' issues which arise as small groups of people try to organize themselves.

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[39] Burr Henley, " 'Penumbra': The Roots of a Legal Metaphor," *Hastings Constitutional Law Quarterly* 15 (1987-1988): 81-100. Henley helpfully locates the first use of the word by Holmes in, O.W. Holmes, "The Theory of Torts," American Law Review 7 (1873): 652, 654, reprinted in *Harvard Law Review* 44 (1931): 773, 775.

[40] It may be helpful to think of these surprising omissions by appealing to an analogy. In the classic 1939 film *The Wizard of Oz*, one of the most poignant scenes many will recall is Toto, Dorothy's little dog, pulling back a curtain with his teeth to reveal the fact that what appeared to Dorothy and her companions as some awesome smoke-and-fire-ensconced apparition of a god-like entity, *the* Wizard of Oz, was actually only the product of the careful manipulations of a small man who hid behind a curtain. I think the some of jurisprudential scholars from the twentieth century can be safely brought inside such an analogy in the way they manipulate ideas at will to construct their own version of a grand theory – and if not a *grand* theory, for some would eschew such a "presumptuous" appellation, then simply their "critiques" of an indeterminate phenomenon known to us as law. The most shocking aspect of this "borrowing," in so many cases, is the lack of properly cited acknowledgement – examples would include the lack of Hart's citation for Fuller (*vide infra*) concerning his lack of one in *Concept of Law*; Hart's omission of a penumbra citation for Holmes in his *Harvard Law Review* piece (*vide infra*); Robert Cover's omission of a properly located citation for "Nomos", a word coined by Peter Berger and not Cover; etc. Such observations are not meant to under-value the contributions of these "jurists", but only to bring a degree of clarity and candour, those most precious of positivistic virtues, concerning the fact that each of them stands squarely on the foundational ideas of the jurists and philosophers who preceded them. As I have alluded to, I think Jeremy Bentham and O.W. Holmes have borne the lion's share of this load. One also might rightly want to add John Austin here, it certainly would be true where Hart in concerned. Yet, of the two former figures it could be fairly said that no two other figures in the Western legal tradition of the last three centuries has so boldly challenged the legitimacy of the theoretical and practical foundations of Western legal ideas and, in my opinion, no where is such a contextual marker more important than in the Fuller-Hart exchanges.

Wiping the *State* Clean: A Thought Experiment

> They will begin by taking the State and the manners of men, from which, as from a tablet, they will rub out the picture, and leave a clean surface. This is no easy task. But whether easy or not, herein will lie the difference between them and every other legislator,--they will have nothing to do either with individual or State, and will inscribe no laws, until they have either found, or themselves made, a clean surface.
>
> Socrates
> Plato's *Republic* (6.501A)

The Lead Up

A group of Canadian citizens were chosen by the North American Space Agency (NASA) to be passengers on one of the very first passenger flights into our Milky Way galaxy. Their flight ends in crisis due to a ship malfunction, and they are forced to land on a habitable planet a great distance away from earth with no possibility of rescue. Because of budgetary cutbacks, the failure of the mission, and a shaky world economy, NASA scraps the project and is prevented from sending anymore of these flawed vessels into space.

So, the group of thirteen people, eight women and five men, find themselves stranded on this planet. In due course, and using the survival gear and emergency supplies found onboard their crippled vessel, they are able to work with the raw materials already present in their new home, like trees and stones, to build protective shelters. They also are presented with reliable food sources in fruits and vegetables, as well as fish and meat from various animals which they find in ready supply on the planet. The full story of their first ten years is explained in Appendix A.

Suffice it to say, for the present, the group of thirteen flourished in their new home. Within a few hundred years they were a bustling society of over thirty-thousand people, settled and with no concerns other than how, now, to organize themselves politically. They had developed their food industries such that they had more than they could possibly use, and this was a major reason for the spike in their population growth. The climate they lived in was hot most of the year, and the winter season only lasted a few months and was relatively mild. One other important factor which impinged on their future was the fact that the foothill and river region wherein they had established their city was bounded by mountains on one side and a seemingly endless desert on the other. They found by going too far into the mountain region, they came across large crab-like creatures that had killed a number of citizens attempting to make the hazardous journey, and likewise when people ventured into the desert for exploration, they never returned, and were assumed to have died of heat exposure. The aforementioned shelled creatures became known as the Carapace Crabs,[41] and the scientific community gave them the Latin name, *invulnerabilis cancri*. With such palpable dangers and not yet having the necessary technology to overcome these dangers, although the society flourished and still had plenty of room, they were stuck with each other, in a very real sense.

With the population expected to double or triple every twenty years, the citizens of Beothuk – the name of their new home – grew restless and the weekly meetings became shouting matches between senior members of the different family clans who were arguing about better ways to politically organize themselves.

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[41] I borrow, quite obviously, from Hart with his rich fantasy analog. Hart, *Positivism and the Separation of Law and Morals*, 623.

The Monarchy

Because of armed conflict between clans over certain choice tracts of land, which had resulted in a number of deaths, the most influential and largest family clan, the Parker family, had taken it upon themselves to assign one of their own as temporary regent over the city. The policing and delivery of malcontents to group meetings for trial and punishment by the Parkers was appreciated by most citizens, but the ad hoc trials and punishment meted out engendered vociferous protest, especially when the death penalty was inflicted on those who had killed others in the inter-clan violence. The priestly class called a meeting and the heads of the family decided to let the Parker Queen, Emily Parker, continue her role as sole ruler, but henceforth she would have to make her edicts conform to the following two principles. First, her laws must protect people from arbitrarily violent acts, allowing them to live together relatively unharmed. Second, the laws must be general, applying to all those of whom the laws were aimed at addressing.

Queen Emily ruled with an iron fist and she felt this would be the wise course, encouraging the citizens to obedience and order. She crafted laws prohibiting certain injurious acts, such as murder, theft, destruction of property, and these written laws were kept under lock and key, for sake-keeping. She instituted a police force, and set up five associates of hers as judges, who decided for her on all cases, with no chance of appeal. She instituted a large nation-wide income tax which brought in large revenues which paid for the small group of public services, but were largely used to outfit the royal family and her palace, since she felt the symbolic strength of the monarchy would strengthen her citizens' civic pride. The citizens grew poorer and Queen Emily grew opulently rich, until her control of the food and technology resources meant citizens found their very livelihoods to be at her mercy.

After Queen Emily's family had ruled for 40 years, her son, King Barkman, was opposed by a number of poor revolutionaries who protested openly before the palace, and carried placards encouraging citizens to disobey certain immoral laws until they were changed. These plighted souls were entirely killed off by the King's troops. Another group of poor revolutionaries, led by middle class leaders who had been denied their former wealthy status under the Parker reign, formed a secret underground resistance, and they ignored all immoral dictates from the monarch as having no claim to be treated as laws in any way. This latter revolutionary group overthrew the king and had him publicly executed, but it ended up being debated for centuries whether that had been the proper thing to do.

Co-Regency and Senate

The middle class revolutionaries, the Cromwellians, had promised the poorer classes jobs if they would assist in the overthrow. Under the titular oversight of the priestly class, the Cromwellians instituted their own government of senators to be led by two co-regents, since a sole monarch had led to such terrible results. The co-regents, William and Mary (WM), promised that those defrauded of their wealth under the monarchy would be allowed to regain a measure of their family's previous status, and they assigned certain choice jobs in the Universities and Industry to these, as well as allowing them to run for the senate. WM also promised the poor that they would now have plenty of work, and be paid fairly. They were told that this political system offered them the best possible lifestyle, since the senators would serve the dual role of insuring power did not return to one person tyrannically, and they would also insure that the poor classes work would continue, because the senators'

profits depended on it. To this end, cast iron gates were placed around work sites throughout the nation with the slogan over each archway, "WORK SETS YOU FREE."[42] To make things more clear, the senatorial class was to be henceforth registered with the government as the Elder Class, and those of lower rank were to be registered as the Worker class.

To show everyone their sincerity, WM came up with eight principles of law-making which would also serve to limit political power and protect the people. Laws were then required to be general, available, prospective, clear, compatible with other laws, require nothing impossible, be consistent through time, and there must be congruence between official action and the law.[43] Laws continued to be enforced in the courts previously used by the Parker dynasty, and were published in small booklets which were given out for free at the courts. Yet many of the laws were met with opposition by the Worker class. Besides the laws which maintain basic security of the person, there was a new law against Workers purchasing property, one which prohibited Workers from being out at night past ten o'clock, another which stipulated Workers must work a six days a week. Alternatively, there were also new laws which stipulated that only those of the Elder class could serve as judges or lawyers, and a law which allowed that during a time of war or civil strife, for expediency's sake, rule would devolve to one person only, to be chosen by a majority of Elders. The Police force was only to enforce laws prohibiting violence against the person when it applied to Elders, since the Worker class was so large and would necessitate an overly large and prohibitively expensive force. It was felt by the regents that the workers could regulate themselves.

After over two hundred years of co-regency rule, the Elder class had become fabulously wealthy and powerful, and they had the reigns of industry and food production under their control. The poor were not happy, but could do virtually nothing to oppose such powerful landlords. Finally, something gave. The senatorial banquets were newly outfitted with two special metal goblets crafted by the poor for the co-regents, while the poor and Elder class drank out of wooden cups. After drinking wine from these metal goblets for a couple years, the co-regents came up with some very strange laws.

1. The oldest unmarried child in each family in the state should be surrendered to palace for re-assignment of duties beneficial to the state. Failure to do so will be interpreted against the parents as treason and actionable under the penalty of death.
2. The Elder class will forthwith be mounted on their favorite horses when hearing legal matters between citizens. Failure to do so will result in forfeiture of their estates to the co-regency and striping of rank.
3. All members of the Worker class must wear blue and green outfits while the Elder class must wear only purple and yellow.

After a number of choice laws bearing this stamp arose over a very short period of time, the poorer classes separated into two groups, one who opposed the laws vociferously and were executed for their insolence, and the other larger group who formed an underground resistance, led by one of their own, Spartacus, and treated the laws as if they did not even exist. This latter group expelled the co-regents and senators from the palace, and promptly

[42] These were the tragic words written over the gates of Auschwitz.
[43] Taking this right from Fuller, *The Morality of the Law*, 46-85.

exiled them to an abandoned outpost at the edge of the mountains where it was believed they would fittingly "take their chances" with the Carapace Crabs.

The Rule of the People for the People

> There is nothing necessarily irrational in the appeal to intuition to settle questions of priority. We must recognize the possibility that there is no way to get beyond a plurality of Principles.
>
> John Rawls, *A Theory of Justice*

The poor were understandably out of patience with the rule of the nobles, and they took control of all public hearings to determine a new path ahead. The people decided to institute thirty-three representatives of the people, each representing similarly sized sections of the state, and these would be elected by simple majority and known as the Council, which could propose and enact new laws, and also nullify obsolete statutes as well. They would serve six year terms and not ever be eligible to sit on the Council again. The Council was charged with drafting a new set principles to guide both the citizen and the judges, and it was decided by the first Council to retain the co-regency's eight principles of law-making: that laws must be general, available, prospective, clear, compatible with other laws, require nothing impossible, be consistent through time, and there must be congruence between official action and the law. In addition to this the Council added three more.

The People's Master Principles of Freedom, Equality, and Sovereignty

1. Laws must serve, first and foremost, the principle of the fundamental freedom of the person to make decisions regarding their own lives and bodies. In the case of a criminal trial involving any harm to a citizen, the guilty party proportionately forfeits these rights for themselves because they wholly or partially destroyed those protected aspects of another person's life. It will be for the people in their role as judges to delineate what rights remain to the offender.

2. Laws must not be interpreted so as to either threaten the financial stability of, or unjustly benefit, any sector of society: neither the workers, business owners, government employees, and whether these be children, adults, or the aged. In other words, the law may not be used to unfairly disadvantage or give advantage to any group vis-à-vis the others. This could only happen if it were to be justified as necessary for the application and operation of all three master principles.

3. Laws must respect the principle that the people themselves, in aggregate, are the sole guardians of the state. The wishes of a majority of citizens in the form of law must never be overridden by another law, a judge's ruling, or the creation of a new law by the Council. The people, in aggregate, are the only sovereign body constituting the state. As the people are the sole guardians of the state, if the Council or judiciary or police disregard the wishes of a majority of citizens, not only do they forfeit the protections guaranteed under these Master Principles for themselves, but it is also the people's duty to overthrow the guilty party by revolution and re-establish order by whatever means possible.

It was decided that only a very small set of prohibitive rules would be set in place against arbitrary violence and protection of property. The people decided instead that they wanted the law to grow naturally under their watchful eye as judges, so this was really a state of judge made, or common law.

It was decided that a system of thirty-three judges would be implemented throughout the state, and that these would be chosen by lottery, from all citizens who wished to be

considered for the posting. The only stipulations were that a doctor would have to clear them as being of sound mind, and they must be over the age of fifteen.[44] The thirty-three would be split into eleven courts of three, which would meet in community centers throughout the nation and decide all legal disputes by a majority – the former courthouses being converted into hospitals and university buildings to serve the people. The judges would serve four year terms at the end of which a new lottery and assignment of judges would take place, again, by lottery. No one could sit more than one term on the judiciary. Decisions were all recorded in reports and were treated as a way to preserve the growth of the people's law. They were treated as an aid in the determinations of the judges, but not determinative in and of themselves. If a citizen wanted to appeal any decision, they could take it to any of the other courts, and once they had exhausted all eleven courts and still wanted to appeal, the citizen could present their case to a meeting of the Council, and if Council believed it justified, it would go again before the thirty-three en mass in a public meeting. This final meeting of the thirty-three would be the final arbiter and a simple majority would decide.

The policing and correctional functions would be set up under the purview and direct authority of the Council, with stable employment at the lower levels of policing and constant refreshing at the highest levels of command.

The Result

This arrangement worked quite well, but as the centuries passed, technology increased, and the state grew, they had to make accommodations. Their military technology allowed them to finally deal with the Carapace Crabs, who once they saw they were beaten, retreated on what appeared to be a long march over the foothills and across the never-ending desert. So it seemed to the authorities that these creatures could survive anywhere, but they were allowed to leave in peace, in any event.

The Councils and judicial districts kept the thirty-three equation limited to populations of 500,000 people, but there were eight million people in the state now, so that meant sixteen Conciliar and judicial districts. There was no attempt to federate the separate districts, even though many were side by side, because it was discovered that the decisions arising from the people's judges were almost the same across the entire state, and where there were appeals, the party concerned was usually either given a favorable decision within a few appeals, or they were wasting their time and were turned down roundly by all eleven courts and the Council, and at great expense to themselves: a factor which duly curbed these occasions.

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[44] This idea has a unique resemblance to the claim of Rawls in *A Theory of Justice*: "Let us assume that each person beyond a certain age and possessed of the requisite intellectual capacity develops a sense of justice under normal circumstances. We acquire a skill in judging things to be just and unjust, and in supporting these judgements by reasons. Moreover, we ordinarily have some desire to act in accord with these pronouncements and expect a similar desire on the part of others" (46). Of course, some might wonder whether fifteen years of age is really this age, but I think if we restrict the criteria for someone to be intuitively able to mark justice as opposed to injustice, we might want to suggest an even earlier age for such an ability. But Rawls wishes for a sense of justice in reflective equilibrium, a state "reached after a person has weighed various conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions" (48). Here the pendulum swings back to the question of age, specifically asking, at what point will a person be considered to have "weighed" the conceptions and revised their judgment?

Fuller, then Hart, etc.

> That which is not just seems to be no law at all.
> Augustine, *De Libero Abitrio* i, 5

> Now though the science of legislation (or of positive law as it *ought* to be) is not the science of jurisprudence (or of positive law as it *is*), still the sciences are connected by numerous and indissoluble ties.
> John Austin, *The Science of Jurisprudence Determined*, xiv, 1832

Neither Fuller's 'eight principles' nor Hart's 'rules of recognition' were able to guarantee any morally satisfactory legal system for our castaway society in the first two stages of their development. Yet during the People's rule, three overriding principles were brought to bear on the society and its legal system, and it definitely faired better with these additional constitutional guarantees than without. That is what the thought experiment is meant to highlight, that Hart and Fuller's explanations of what a legal system consisted of are ultimately inadequate. I suggest that the three constitutional guarantees suggested in the above story, or something very akin to them, would also be required if we expected to avoid experiencing a legal system that could spiral downwards into immoral outcomes, as was tragically the case during the Second World War.

The discussion will now turn to how adequately Hart's and Fuller's theoretical speculations and suggestions about the requirements for a legal system adhere to the above thought experiment, with perhaps a word about which one better accounts for the realities of actual historical experience. Of course, my suggestions will only be that, a suggestion: certitude is the purview of the individual[45] and not the legal philosopher or historian. Before delving in, I want to lay out for the reader what materials I have chosen to consult, and in

[45] "Certitude is not the test of certainty. We have been cock-sure of many things that were not so." O.W. Holmes, *Natural Law*, 311.

what order. I chose to move chronologically through the material, if only for the sake of moving in the order which the authors themselves took. The following brief discussion cannot hope to account for these materials in any way that is comprehensive, but only in so far as I have found them instructive to the general tack of this particular study.

As indicated above, I put the beginning of this exchange in the hands of Fuller with his three Lectures turned monograph in 1940, *The Law in Quest of Itself*.[46] Next in line is the Oliver Wendell Holmes Lecture from Hart in 1957, which became the article, *Positivism and the Separation of Law and Morals*.[47] Following this, in the same issue of the *Harvard Law Review* is Fuller's reply, *Positivism and Fidelity to Law - A Reply to Professor Hart*.[48] Next in line, chronologically, is Hart's book, *The Concept of Law*, published in 1961.[49] Fuller then responds with a book of his own in 1964, *Morality and the Law*.[50] Hart responds to this in 1964 with a review of Fuller's monograph in the *Harvard Law Review*.[51] Although this is the proverbial end of the line where this discussion is concerned, I will briefly recommend two more of Fuller's contributions in the literature: *Two Principles of Association*,[52] a presentation made by Fuller in 1966, published subsequently in 1969 and most recently in 1981; also, *The Implicit Laws of Lawmaking*,[53] an edited selection from Fuller's 1968 book, *Anatomy of the Law*.

Winston Churchill once said to a group of students at Harrow School that the key to success was "Never give in," *inter alia*.[54] Perhaps no truer words could be spoken in regards

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[46] Fuller, Lon L. *The Law in Quest of Itself*. Chicago: The Foundation Press, 1940.
[47] *Supra*. Hart, *Positivism and the Separation of Law and Morals*, 1958.
[48] Supra. Fuller, *Positivism and Fidelity to Law*, 1958.
[49] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961;1994)
[50] Fuller, Lon L. *The Morality of Law*. New Haven and London: Yale University Press, 1964.
[51] H.L.A. Hart, "The Morality of Law," Book Review, *Harvard Law Review* 78 (1964-1965): 1281-1296)
[52] Lon L. Fuller, *Two Principles of Human Association. The Principles of Social Order*. Edited by Kenneth I. Winston. Durham, N.C.: Duke University Press, 1966; 1969; 1981. 67-85.
[53] Lon L. Fuller, *The Implicit Laws of Lawmaking*, *The Principles of Social Order*, 158-168, first published in Lon L. Fuller, *Anatomy of the Law* (New York: Frederick A. Praeger, 1968).
[54] Winston Churchill, Harrow School Speech, October 29, 1941.

to the tenacious and thoughtful efforts of Lon L. fuller and H.L.A. Hart in their joint exchanges.

The Law in Quest of Itself

The first two lectures/chapters of Fuller's book offer an attack on positivism, primarily aimed at the American Realists.[55] In lecture III, Fuller attempts to justify the natural law position, which happens to be his own. He begins by throwing a few theoretical jabs at the positivists, by noting that Austin learned his jurisprudence in the army,[56] and that with Holmes it was the same.[57] He claims that positivist philosophy offers an escape to faith rather than skepticism, presumably a faith in the purity of law.[58] To those who see in natural law an unhelpful illusion, which he pointed out was a similar problem with positivism, he asserts that under the illusion of natural law, people are allowed to push reason further and

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[55] In Lecture I, reproduced in Fuller's book *The Law in Quest of Itself*, the author presents the positivist theorist separating the *is* and *ought* in an effort to defend the law that is, while Natural law theorists serve the ought by refusing to make such a sharp distinction. Fuller points out that the first positivist, Thomas Hobbes, had 'natural reason' behind his positivism and thus it was seen as regrettable and yet important to Fuller that what Hobbes had understood as an ethical desideratum was later, in the writings of John Austin, being treated as something separate which existed outside of the objects it was created for. This jettisoning of natural law was a lamentable development in Fuller's estimation.

Lecture II is basically a theoretical attack on the realists, and Fuller candidly wonders, in concluding, whether the positivist claim that clear thinking in law is going to result from a stronger separation between the *is* and the *ought* was actually the case: a longstanding claim which was repeated by Hart in later works. He also repeats his lament that the positivists on the realist tack had abandoned the Hobbesian connection with a natural law concern for peace and order. The realist preoccupation with mere facts at the cost of jettisoning any concerns for natural law disturbed Fuller, and he attempted, rather unsuccessfully, to unseat Holmes' bad man to make his point. Fuller claims that Holmes' bad man is unrealistic based on his worry over a two dollar fine but apparently not concerned about losing his friends and customers. This is a mistaken view of Holmes, for his bad man calculates the risks involved versus the payoff for himself, and would not fall into this narrow analog suggested by Fuller.

Fuller thinks that the bad man arrives at his conclusion by asking, 'what are the chances the court will interfere with me' and that because the man does not answer by the letter of the law or by knowing his judge, but by putting himself in the judges shoes, he does so by doing looking through the eyes of a good man. Fuller's counter is very weak, since he misstates Holmes' analogy by assuming that there is an assumption that the bad man will want to know the black letter law and *all* about the judge, when in fact he is merely supposed to "want to know what the Massachusetts or English courts are likely to do in fact." If the bad man knows what the courts are *likely* to do, he knows the law as far as he is concerned; there need not be a moral calculation seeing the situation in the eyes of any "good" man.

[56] Fuller, *The Law in Quest of Itself*, 106.

[57] Ibid., 107.

[58] Ibid.

accomplish as much as they can.[59] Fuller also points to the fact that the bulk of human relations find their regulation outside the field of positive law.[60] This autonomous order is constantly changing and he seems to imply that the principles guiding this order work quite outside any rubric of positive laws.[61]

In the experience of the society discussed above, it would seem that under the people's rule, the reliance on the judges to guide the interpretation of laws was very much in Fuller's line of "pushing reason further," because it forced the people to come up with their own standards in the growth of their judge made law. For the people's rule, as I have cast it, this meant that adjudicative interpretation was not hamstrung by a set of positivistic commands and prohibitions. Also, Fuller's "autonomous order" can be seen in the stipulation that not only were the judges to interpret the law from their own perspective, a fact reinforced by the appeal process, but further that the stipulation of constantly changing the judges and Council would better allow for this autonomous order and its principles to impinge on the interpretation of law.

Another factor Fuller understood as supporting the positivist view of law was a flawed justification for democracy which rested on skepticism.[62] Since, as Fuller postulates about those so inclined, there is no justice, some arbitrary principle of order becomes necessary and thus since government requires the acquiescence of the governed, a majority rule is "logically" preferred.[63] Such a negative conception of democracy had, in Fuller's prescient

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[59] Ibid., 110.

[60] Ibid., 111.

[61] Ibid., 112-113. See generally: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll, intro. Roscoe Pound (Cambridge, Massachusetts: Harvard, 1936); Eugen Ehrlich, "The Sociology of Law," *Harvard Law Review* 36.2 (1922): 132; Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y. : Doubleday, 1966); Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, New York: Doubleday, 1967).

[62] Ibid., 120-121.

[63] Ibid., 121.

view, led to the disasters then occurring in Germany and Spain.[64] He saw the vision of a democratic and societal euthanizing of vested interests as a dangerous dream for economic revolution.[65] The rude awakening from this dream was borne out by both the futility of it and the fact that repressive violence could not fill the void left by a "defaulting principle of majority rule."[66]

Fuller gave this lecture in 1940, after the start of World War II, and so some of the impetus behind his whole outlook may be better assessed via a larger view of context. His lectures not only focused on the weakness of positivism from an etymological and historical point of view, but also importantly wound up by pointing to Nazism as the tragic end-point for such an unreasoned and "pure law" perspective. With his conclusion then presented, in part, he makes likely the most significant claim from the three lectures, *ideas should be more important than men*.[67] In Fuller's estimation, the greatness of democratic society is not in the numerical majority principle, but in the free market of ideas which can be allowed to flourish and compete for a citizen's mind.[68] In contrast, a dictatorship only allows the success of ideas which serve the interests of those enforcing it.[69] Ideas then become weapons in the struggle for position and power. [70]

Fuller presents a challenge to our imagined society here, I think at all stages, because the majority principle was likely the most consistently respected principle throughout. As Fuller points out, bare majorities cannot vouchsafe morally appropriate laws in every case and the possibility for either a majority to give power to an ultimately immoral regime, or that a majority supports an immoral course of action, can only be countered by a markedly

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[64] Ibid., 122.
[65] Ibid.
[66] Ibid.
[67] Ibid., 123.
[68] Ibid.
[69] Ibid.
[70] Ibid., 125.

principled approach to executing a legal system which, perhaps, the People's rule found under their three interpretive rules. Fuller would seem to have been correct in remarking that, at least in the case of Germany, the free market of ideas should have been more important than men.

Positivism and the Separation of Law and Morals

In his celebrated 1958 lecture/essay on legal systems, Hart devotes a small, albeit important, part of the paper to legal institutions. In part five of the essay, beginning at page 621, he offers the reader a glimpse of his own thoughts on what is necessary for a legal system to exist. He writes:

> …if a legal system did not have [rules forbidding the free use of violence and a minimum form of property] there would be no point in having any other rules at all. Such rules overlap with basic moral principles vetoing murder, violence, and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points, the statement that this is, in this sense, necessarily so. And why not call it a "natural" necessity?[71]

Here is Hart's minimum content of natural law, at least its first incarnation. Hart would further expound upon this minimum content in later texts, which I will touch on below. He also goes a little further, and attaches the need for generality, treating like cases alike, but this is, he says, justice in the administration *of* law, and not justice of *the* law.[72] Just how administration of the law is supposed to be separated from law *simpliciter* in a discussion about "legal systems" he does not say; yet he does note that both rules aimed at survival and generality do not preclude instances of legal systems which could meet both requirements and still be hideously oppressive.[73]

On this point, in the case of the society under consideration above, certainly the monarchy and co-regency were exemplary as far as one can tell from Hart's perspective in

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[71] Hart, *Positivism and the Separation of Law and Morals*, 623.
[72] Ibid., 624.
[73] Ibid.

this, his first essay. Rules which accounted for survival and mere generality were part of both regimes, but this did not stop them from treating large segments of the population in immoral ways through their respective laws. The monarchy and co-regency, in denying a "vast rightless slave population the minimum benefits of protection from violence,"[74] had done exactly what Hart said they could, and yet they still accounted for his minimum content. The experiences of our first two societal frameworks stands in stark contrast to John Rawls' suggestion, in the context of his own thought experiment, that there would be no injustice in giving greater benefits to a few as long as the position of those not so fortunate would be improved as a result.[75] Yet, the claim of the leadership in the co-regency was exactly that: the less fortunate would have an improved life based on the disparity of wealth distribution, because the senators wanted the profits that necessitated a work force, but such an ideal was not actually realized for very long.

Positivism and Fidelity to Law – A Reply to Professor Hart

At another point in Hart's essay, as Fuller points out in his reply, Hart provocatively suggests that what lies at the root of a legal system are "fundamental accepted rules specifying what the legislature must do to legislate."[76] Here Hart is verging on what would become his rule of recognition, which he later introduced in *The Concept of Law*, discussed in part below. Fuller laments that Hart "never takes the plunge,"[77] in this regard, and goes on to surmise: "He does not take it because he had a sure insight that it would forfeit the black-and-white distinction between law and morality that was the whole object of his Lectures."[78]

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[74] Ibid.

[75] Rawls, *A Theory of Justice* (Harvard: Harvard University Press, 1971), 15.

[76] Ibid., 603. Fuller, *Positivism and Fidelity to Law*, 639. Although Fuller gets the Hart quote wrong, perhaps because he was using an earlier draft in order to write his paper. Fuller quotes it as "fundamental accepted rules specifying the essential lawmaking procedures."

[77] Ibid., 640.

[78] Ibid.

Fuller's Harvard essay is similar to Hart's in that he does not betray a sense of what he believes must be present for a legal system to exist. This would follow later, in Fuller's *The Morality of the Law*. Picking up on Hart's lead, one of his points seems to be that the moral validity of the legal system comes not only from within it, but is extrinsic to it. Fuller writes variously: "[the fundamental rules] derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary,"[79] and "a constitution cannot lift itself unaided into legality; it cannot be law simply because it says it is… there must be a general belief that the constitution itself is necessary, right, and good."[80] Here Fuller seems to be filling in some details for Hart, of which Hart may have equivocated later on[81] with his 'rule of recognition'. In all fairness, though, Hart did bring the point up first, however inadequately in the eyes of Fuller.

The most consequential aspect of Fuller's reply, coming in part IV of his essay, is his claim that for law to exist there must be an inner morality to law. In Fuller's estimation, when law is considered as order, it contains an implicit morality which must be respected if we are to have anything called law, even, he writes, bad law.[82] This involves the ruler or rulers taking seriously their responsibilities and accepting that "minimum self-restraint that will create a meaningful connection between his words and his actions."[83] This "internal morality of law" compliments and works in concert with the external sort, alluded to above, whereby citizens and legal functionaries accord it the competency it is claiming.[84] Fuller

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[79] Ibid., 639.
[80] Ibid., 642.
[81] Waldron, Jeremy. "Positivism and Legality: Hart's Equivocal Response to Fuller." *New York University Law Review*, 83 October (2008): 1135-1169.
[82] Fuller, *Positivism and Fidelity to Law*, 645.
[83] Ibid., 644.
[84] Ibid., 645.

thinks that a deterioration of one morality will most likely result in the same happening with the other.[85]

Pursuant to Fuller's claims here, with all stages of the legal development engaged in by our imagined society, there was, at least to begin with, both an internal and external morality operating at some level. The monarchy was ushered in during a time of upheaval and the citizens recognized the need for violence to be dealt with, and so accorded the Parker family's head the competency they needed to rule. On the other hand, Queen Emily, though not particularly friendly, displayed a marked symmetry between her words and her actions. The same could be said of the co-regency and senatorial period, for at least the first part of their rule. When the co-regents began passing laws which were no longer simply oppressive but also illogical, and thus tending to dis-order, the middle class and the poorer classes denied the rulers the competence, or external morality, which Fuller correctly predicted would react reciprocally in relation to the decline in internal morality. The People's rule clearly evidenced both internal and external aspects, yet both were, at least in some sense, within the citizen themselves.

The Concept of Law

For this discussion, chapters five, six and nine of Hart's *Concept of Law* are keenly relevant. In Chapter Five, Hart lays out his version of what is necessary for a legal system to exist, that being primary and secondary rules. Hart postulates two types of rules: primary rules, which proclaim that people must abstain from certain activities while, in some cases, imposing duties on them; and secondary rules, which confer powers, but also speak to the treatment and use of the primary rules.[86] Hart then makes a very astounding and

[85] Ibid.
[86] Hart, *Concept of Law*, 81.

overconfident claim that he, not Austin or anyone else, has thus found the key to the science of jurisprudence.[87] Such overconfidence marks Hart's work in a number of places, but this ranks among the weightiest pieces of his swagger.

Queen Emily certainly did not have much in the way of primary rules, although she offered some of the basics, such as protection of the person from arbitrary violence. What stood out perhaps more was the two legal principles enshrined as law themselves, secondary rules, which guided the creation of laws. For the co-regents, similar primary rules were adopted, but a further set of secondary rules/principles arose connoting what laws had to conform to in their creation and execution, but those principles by themselves did not prevent the co-regents from creating immoral laws. Yet, according to Hart's equation, there existed in both examples some indication of primary and secondary rules, and thus they were "legal systems". The people's rule added three more secondary, interpretive considerations, which spoke to freedom of the person, equality, and sovereignty; yet their primary focus was on letting the law develop in the courts at the behest of their own judgment, and their list of primary rules was short. Yet again, it seems to meet Hart's simple requirements.

Hart also suggests that the aspects of internal and external are of great importance to understanding the law. The internal point of view belongs to the person in society who accepts the rules and uses them as guides to conduct, whereas the external point of view is indicative of the person who observes the rules, knows they are there, but does not accept them as guides to their conduct.[88] Perhaps the internal point of view pursuant to the rules of Queen Emily and the co-regents were only adopted by those who stood to benefit, especially in times of great oppression. The rank and file who ultimately rebelled, however they chose to do so, would seem to be candidates for the external point of view. The People's rule,

[87] Ibid.
[88] Ibid., 89.

however, would have the possibility of a majority of people operating from the internal point of view, since their law was set up not only to protect them, but to emanate *from* them.

Hart claims that most primitive societies have a majority of people who live by the rules seen from an internal point of view.[89] He also asserts that primitive societies are run under the primary rules of obligation, and that if such a society is to exist, any malefactors operating from the external would have to be in the minority.[90] Hart points to defects in those societies using the primary rules alone, and marks them as: first, uncertainty, since there are no texts or officials to decide the hard cases; and second, the static nature of the rules, meaning they could not deliberately change the rules without another set of rules; and third, a system of primary rules is inefficient, since there is no delegated body to enforce sanctions or determine whether actions did indeed breach the rule, it is left to individuals, or perhaps at times the group, to mete out punishment.[91] The answer for each of these defects is to supplement the primary rules with secondary ones. Secondary rules are all concerned with the primary rules, specifying how they are to be used.[92] The remedy for uncertainty is a rule of recognition. These are the features of a rule taken as a conclusive affirmation that such is a valid rule to be supported by the social pressure exerted.[93] For instance, the reference to a list of official rules as authoritative gives evidence of a rule of recognition at work.[94] The authoritative mark, in this case, introduces a legal system of a unified set.[95] The remedy for the static nature of primary rules is to employ secondary rules of change which allow for the creation of new rules and the abolition of old ones.[96] The remedy for

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[89] Ibid., 92.
[90] Ibid., 91-92.
[91] Ibid., 92-94.
[92] Ibid., 94.
[93] Ibid.
[94] Ibid., 95.
[95] Ibid.
[96] Ibid.

inefficiencies is the rules of adjudication which allow individuals to make authoritative determinations of whether a primary rule has been broken or not.[97] The rule of adjudication is also intrinsically tied to a rule of recognition because the judges, by making determinations on rule breach, are continually arriving at other judgments as to what the rules are.[98]

There is much to suggest, though, that Hart's dismissive treatment of systems that employ "primary" rules has little grounding in anything like empirical evidence. His three criticisms of these kinds of systems – if one could even speculate as to what a society as bounded to internal considerations might look like – are unconvincing if only for the reason that they are all solely based on the Western legal evolution of certainty, malleability, and enforcement, and there are even obvious contradictions within the first two of these three goals. It is impossible to imagine the great anthropologist Bronislaw Malinowski,[99] or noted sociologists Berger & Luckmann,[100] being convinced by Hart's oversimplification that primary rule societies are bound to an internal perspective.

The rule of recognition in all three systems of law was confined to those people who had a literal stake in its execution. At first, only the monarch and her allies, then the regents and senators, and finally, the whole society. The one thing seemingly different, though, at least

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[97] Ibid., 96-97.

[98] Ibid., 97.

[99] Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Harcourt, Brace and Company, 1940). Malinowski writes, "Anthropology is still to most laymen and to many specialists mainly an object of antiquarian interest. Savagery is still synonymous with absurd, cruel, and eccentric customs, with quaint superstitions and revolting practices. Sexual license, infanticide, head-hunting, couvades, cannibalism and what not, have made anthropology attractive reading to many, a subject of curiosity rather than of serious scholarship to others. There are, however, certain aspects of anthropology which are of a genuine scientific character, in that they do not lead us beyond empirical fact into realms of uncontrollable conjecture, in that they widen our knowledge of human nature, and are capable of direct application." (1). "We are assured [by anthropologist Dr. Rivers] that 'unwitting' or 'intuitive methods', 'instinctive submission' and some mysterious 'group sentiment' account for law, order communism and sexual promiscuity alike! This sounds altogether like a Bolshevik paradise, but is certainly not correct in reference to Melanesian societies, which I know at first hand." (11). See also, page 30.

[100] L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y. : Doubleday, 1966), 49:Berger and Luckmann point to three main "activities" of humankind in their social construction of reality. Externalization is ongoing in human activity, objectification is the naming of things, and internalization is the adoption of the activities and meanings one is confronted with.

with the People's systems, is that the "list of official rules," which they could point to as a "unified set," involved not only primary and secondary rules, but mostly judge made law, which was in a constant state of growth and flux. Hart would likely place this under the rule of adjudication.

In Chapter Seven, Hart discusses the foundations of a legal system. Hart claims the rule of recognition is an ultimate rule.[101] Such an idea is best understood, according to Hart, by a chain of legal reasoning whereby the question of a rule's validity is traced back from a statute giving the minister power to make law, all the way back to the source of the law-making power, which is the fact that the 'Queen in Parliament enacts the law.'[102] Here, in this lacuna beyond which exists no law validating this one, resides the rule of recognition.[103]

Whenever the courts, lawyers, and other people recognize statutes, they are engaging the rule of recognition, and thereby confirming the rule's validity, not only to themselves alone, but as valid in the general operation of the system.[104] This is problematic since the judge or lawyer might only be employing a selective acceptance by adopting key tenets of the system from an internal perspective, but merely offering lip-service to everything else – externally – as superfluous. In other words, it does not seem clear that officials necessarily accept rules internally, especially if one thinks of crooked judges, or judges who use their decisions to support political views while sacrificing the aims of the laws they purport to interpret.

Hart's basic point, as I read it in this passage of his book, seems to be that the word "assume," as in 'they assume the law is valid,' is the wrong word to use if everyone lives according to these various rules of recognition.[105] He seems to think the word presupposed

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[101] Hart, *Concept of Law*, 105.
[102] Ibid., 107.
[103] Ibid.
[104] Ibid., 108.
[105] Ibid., 108-109.

is a better fit.[106] In one sense, he is simply saying we can presuppose the rule of recognition's validity because that is how everyone behaves with reference to the rules, it is a fact.[107] Hart concludes that Austin's habitual obedience to the sovereign can be jettisoned in favour of his rule of recognition, but as suggested, Hart's formulation is not without difficulties.[108]

Hart then concludes that there are two minimum conditions necessary and sufficient for the existence of a legal system. First, the rules of behaviour that are valid via the system's ultimate criteria for validity must be generally obeyed and its rules of recognition, which delineate the criteria of legal validity, must be accepted as common public standards of "official behaviour by its officials."[109] The first aspect relates to the private citizen and the second to officials.[110] There exists, then, an inherent duality between the obedience from ordinary citizens and acceptance of secondary rules by officials.[111] At this point an observation can be made. Hart seemed to constantly change his two requirements as he went further into his discussion. One recalls the minimum content necessary from the Holmes lecture, and then in Chapter Five, primary and secondary rules, and here in Chapter Six, obedience from citizens and recognition from officials. This tendency to shift boundaries makes it, I think, more difficult to say exactly what the elusive "two" requirements actually are.

In terms of the last incarnation of the two requirements—the general obedience of citizens to validly enacted rules and the acceptance by officials of the various rules of recognition—we see that in the monarchy, both requirements were met, as well as during the co-regency, although the idea of what the "ultimate criteria for validity" was in the case of

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[106] Ibid.
[107] Ibid., 110.
[108] Ibid.
[109] Ibid., 116.
[110] Ibid., 116-117.
[111] Ibid., 117.

these two systems might be doubted. The obedience of citizens was only a superficial and external characteristic of most citizens: but as Hart notes below, even if every citizen was of this ilk, as long as the officials played by the rules of recognition, a legal system was still possible.

Hart ends by writing something striking: he says that in extreme cases, normative use of legal language such as 'this is a valid rule' might be confined to officials only, and this would produce a sheep-like society, where the sheep/citizens end up in the slaughter house, but there is no reason to think it might not exist, or for denying it the title of 'legal system.'[112] If we think back to the pre-revolutionary contexts in the thought experiment, there is no reasonable way one can refer to those times as being in the cradle of a legal system; quite the contrary. Hart's argument falls apart here, in my opinion. He demurs that anyone might deny these horrific political arrangements the appellation of "legal system," and yet the citizenry have no real internal or external commitment to the tyranny which is systematically destroying them and their rights and freedoms. In trying to produce a bare minimum, he implies a context similar to Dante's inferno and asks us to agree with him that, because the servants of the Devil obey his normative legal language and have, perhaps – but does it really matter? – internal and external commitments, hell itself is a legal system of sorts. On the contrary, I suggest that to be a legal system, there must be more than a mere modicum of commitment by a small cadre of privileged state servants; in fact, the commitment of the people in aggregate is also fundamental. This takes place both in the more distant act of requiring strong majority votes, and the more intimate acts of political responsibility and decision-making by an executive and judiciary that are always forced to apply their plurality

[112] Ibid.

of principles[113] to each new situation and who understand that their roles are circumscribed by finite terms for the benefit of the state as a whole. The three refining principles I have suggested focusing on—protecting a people's freedom, equality, and sovereignty—would not allow for the skeleton crew of believers that Hart imagines, and I suggest that a legal scheme would only be legitimate when these three principles, or others like them, are used to guide each aspect of the political life of the community.

Yet when we read Hart's argument in *Concept of Law*, we reasonably infer the whole Nazi conversation from the Harvard essays. Hart is emphasizing, again, the importance of the separability thesis in showing that laws can be so immoral as to lead to the death of large segments of society while still bearing the name 'laws.' Certainly in the examples of the monarchy and co-regency, towards the end of their reigns, there were a number of people who were led to the "slaughter house," and many more were subjected to oppressive laws, but according to Hart these are still valid legal systems, and he stubbornly maintains that no matter how bad things get—one thinks not only of the Nazis, but also the centuries of inquisition and burning of heretics and witches, or the decimation of indigenous populations, and other atrocities just as evil—we must think of these historical realities as examples of valid legal systems. Quite clearly, the People's rule in the experiment was one wherein the citizens were the officials, at least in a purposive sense according to their constitutional aims for law-making. The rule of recognition would be just as strong or stronger amongst the citizens vis-à-vis the officials, and so perhaps, in some respects, Hart's equation is turned on its head, even though the two criteria are met.

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[113] John Rawls, *A Theory of Justice*, (Harvard: Harvard University Press, 1971), 41. We must recognize the possibility that there is no way to get beyond a plurality of Principles.

In Chapter Nine, on *Law and Morals*, Hart once again discusses his all important acknowledgement of a "minimum content" of natural law. He concedes certain rules of conduct must inhere for a society to be viable, and are part of a common element in law and conventional morality. "Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law."[114]

He then sets up Natural Law's purposive or reasoned aims as "truisms," such as *Human Vulnerability*, which implies that since humans can commit violent acts which end the lives of others, it is necessary for some kind of restraint—hence laws. Yet he points out—oddly—this is not a necessary truth since if we had invulnerable exoskeletons, like other creatures, there is no reason for the command, Thou Shall Not Kill.[115] Second, *Approximate Equality*, since even the strongest and smartest people have to sleep, and this makes mutual forbearance necessary.[116] *Limited Altruism*, being the fact that men are neither angels nor devils, but somewhere in between; and again, mutual forbearances are possible and necessary.[117] *Limited Resources* make some form of property law necessary for reasons connected to the protection of food resources. Hart claims that even this is not necessary, and suggests humans may have been designed like plants, to extract food from the air.[118] *Limited Understanding of Strength and Will* goes to the fact that rules for people, property and promises are obvious (I wonder why?), and most people are willing to make the sacrifices involved to enjoy the benefits conferred in the long run.[119]

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[114] Ibid., 193.
[115] Ibid., 194-195.
[116] Ibid., 195.
[117] Ibid.
[118] Ibid., 196.
[119] Ibid., 197.

This whole section from Hart comes off as his attempt to trump Fuller's 'internal morality of law' by noting that these "truisms" can be conceded as a minimum content of natural law because, without them, there might well be no human existence, or if there was, it would be a Hobbsian "nasty, brutish, and short" existence.[120] Much of the rest of the chapter is a reiteration of his recommendation from the Holmes lecture that it is far better to take a wider view of laws being either moral or immoral, than to take the narrower view of natural law which expunges immoral laws as no laws. Hart writes that people may choose not to obey because they are the arbiters of morality, and this may lead to anarchy.[121] Another simplification comes when you have a person called upon to obey an evil rule, and it seems irrelevant whether they think the law is valid, they must do what morality requires.[122] The further question from Hart is, do I submit to, or do we punish retroactively, problems of morality and justice which need to be considered separately, since they are not solved by denying them the status of law?[123] Distinguishing a law's invalidity from its immorality enables a view of the distinct issues, whereas the narrow view could blind us to them. [124]

Since much of this chapter is a repetition of earlier themes, a word about his last claim is all that is needed here. In the case of the thought experiment's revolutionaries, some of them opposed outright, and were martyred for their stance, while others ignored the laws and overthrew the government itself. Hart is right in that for the brief period between the immoral laws and the re-institution of government, there was what may be called "anarchy" as the revolutionaries brought disorder to an immoral regime so as to topple it. Yet he provides no real proof of the value of the separability thesis other than that, in a time of

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[120] Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing Company, 1994), 1.13.9, 76.
[121] Ibid., 211.
[122] Ibid.
[123] Ibid.
[124] Ibid.

peace, we may want to keep the issues "separate" and "distinct" as we attempt to have immoral laws changed or redressed. In a time of crisis, such as the Nazi regime, Hart does not really offer any clear answer as to how this separation on a wider view of law will actually help resist the tyranny.[125]

To some degree, Hart's ideas in the *Concept of Law*, in the chapters discussed here, do seem to bear out, in broad strokes, some of the political experiences of the society under discussion, but only at the beginning of each new stage of development. The problems begin when our society comes unglued because of the oppression of people. The main problem with Hart's ideas on what is required for a legal system are their fluctuating nature: changing from an existing minimum content of natural law, without which there would be anarchy, then on to primary and secondary rules, and finally to his rules of recognition, which, as it turns out, need only be recognized by a tiny cadre of interested parties, even at the detriment or destruction of the majority of the citizenry.[126] The three stages of our society began with citizens embracing the new order because of the forced departure of erstwhile gross injustices.

Surely one could agree with Hart that there were "basic moral principles"[127] amounting to a "'natural' necessity"[128] at the beginning of each stage, and that there were clear examples of primary and secondary rules, and finally that we noticed general obedience to valid rules by citizens and acceptance of the rules of recognition by officials. Yet during the societal revolutions, the initial 'basic moral principles' alluded to by Hart become rather equivocal, since the ruling power engaged in what citizens understood as "a free use of violence"[129] and

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[125] See footnote 19.
[126] Ibid., 117.
[127] Hart, *Positivism and the Separation of Law and Morals*, 623.
[128] Ibid.
[129] Ibid.

yet the ruling power engaged this behavior to ostensibly bring order to the state. If we recall Hart's later insistence that as long as state officials accept their rules of recognition we have a legal system, then we are forced to interpret these free uses of violence as legitimate and, consequently, a key aspect of his Harvard essay concession to natural law advocates dies hard on its heels. Since the primary and secondary rules could apply in any context, no matter how morally reprehensible, the fact that they endured the death and carnage brought on in our transformative crisis periods means very little indeed. Again, if there are primary and secondary rules in Dante's depiction of Hell, who is going to close ranks with Hart and offer a defense that, in his rules, we have the ultimate description of a legal system. Finally, with Hart's last incarnation concerning the necessaries for a legal system, general obedience to valid laws and official acceptance of the recognition rules, we have the most compelling problems given our society's story. First, during the crises, there was nothing like general obedience to "validly" enacted rules; in fact, there were a great number in open rebellion who were killed; but there were state officials doing the killing and here again we are faced with Hart's bold assertion that as long as you have officials accepting the rules of recognition, you have a legal system.[130] We might be tempted to seize on his first requirement of general obedience and say that because there was none, there was no legal system. Hart's Achilles-heel-like insistence on the validity of legal systems wherein only state officials have to be equipped with recognitions leaves us wondering whether he ever did decide whether the requirements were a singular 'state official recognition'[131] or a dual 'general obedience *and* state official recognition.'[132]

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[130] Hart, *Concept of Law*, 117.
[131] Ibid.
[132] Ibid., 116.

The Morality of Law

In his book, *The Morality of Law*,[133] Fuller lays out the eight demands of law's inner morality. In likely the most decisive step taken by either Hart or Fuller in the course of their correspondence, Fuller is specific about eight qualities which would give one justification for citing the existence of a legal system. These aspects were also styled the 'principles of legality' by Fuller. In response, Hart retorted that of all the names Fuller used this was the least confusing.[134] The designation "principles of legality" has taken root in the literature,[135] although Fuller's inner morality of law is the more appropriate terminology.

Fuller said that laws must be *general*, and this, noted above, has been emphasized by Hart as well, in his minimum content of natural law. Fuller writes, "there must be rules."[136] By this he means that simply moving case-by-case in a society trying to establish law and order without rules is not often, perhaps ever, going to work.[137] Yet, as with the People's rule, that is basically what they were trying to achieve: a set of laws which would arise from the people's judges on a case-by-case basis, with only a modicum of primary rules to insure basic protections. All three manifestations of rule were able to adhere to generality, but regularly with the existence of abuses.

Fuller requires that laws for a valid legal system must be generally and readily available, *promulgation*, and must be published, although not necessarily known to each citizen in detail.[138] With the monarchy, the laws were kept out of the public eye, and with the co-regents this was corrected. With the People's rule the laws were available from the courts,

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[133] Fuller, Lon L. *The Morality of Law*. New Haven and London: Yale University Press, 1964.
[134] Hart, *The Morality of Law*, Book Review, 1284.
[135] Waldron, Jeremy. "Positivism and Legality: Hart's Equivocal Response to Fuller." *New York University Law Review*, 83 October (2008): 1136.
[136] Fuller, *The Morality of Law*, 46.
[137] Ibid.
[138] Ibid., 51.

and mostly in the pages of the reports. Fuller stipulates that laws must also be generally prospective in nature, but that *retroactive* statutes are sometimes necessary to cure past injustices.[139] This fact, for Fuller, is a positive contribution to the inner morality of law.[140] Laws must also be clear, and he writes that "a specious clarity can be more damaging than an honest open-ended vagueness."[141] The important aspect of this demand is legislative *clarity*.[142] Fuller does not think you can depend on courts to make vague laws clear.[143] And yet, here, Fuller parts ways with the People's rule since they were giving the judiciary the largest role, largely because they saw the lay-judiciary as essentially connected to their main aim which was to keep the rule of the state and its laws – in essence, the sovereignty – in the hands of the people.

In terms of *contradiction*, Fuller thought that speaking of incompatibility, repugnancy, or inconvenience made more sense, since formal logic assigns contradictions a null value.[144] He acknowledges the existence of this problem, but for a legal system to exist, he argues, they should be kept to a minimum.[145] Laws *should not require the impossible*, as a rule, but strict liability would be an allowable exception to the internal morality of law since it was akin to a tax outweighing the dangers inherent in certain societal behaviours.[146] He also notes that our notions of what is impossible are determined by presuppositions about humans and the universe that are subject to change.[147] Law should remain relatively *consistent* through time, and he noted that harm can result from legislative inconstancy.[148] Basically, laws should not

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[139] Ibid., 53.
[140] Ibid., 55.
[141] Ibid., 64.
[142] Ibid., 63-65.
[143] Ibid., 64.
[144] Ibid., 69.
[145] Ibid., 65-70.
[146] Ibid., 75.
[147] Ibid., 79.
[148] Ibid., 80.

be changing too fast, leading to injustice, which is precisely the point Chief Justice Dickson made, alluded to earlier. Perhaps the co-regency could be blamed with not adhering to this principle wholly, but it would seem that with the People's rule, with the lack of legislation and reliance on judge-made law, this principle could reasonably be seen to be in danger of being breached regularly since a simply majority out of three could change the direction of the law in any given case.

Lastly, and perhaps most importantly, there needs to be *congruence between official action and the law*: basically, this refers to due process and the right of appeal.[149] Judges are charged with ensuring this, although the correction of abuse may be dependent on the wealth of the parties to bring the issue before the court.[150] Fuller thinks it is really an issue of interpretation of the law,[151] for instance in *Heydon's* case where the court asked what societal problem was the statute meant to deal with and then decided in favor of the most effective solution.[152] Instead of Gray's atomistic conception of drafter's intention, focusing on things instead of ideas,[153] Fuller suggests the analog of an inventor's son trying to finish a creation half-finished by his father. He asks, what was its purpose, and looking for an underlying principle of the invention, the "true reason of the remedy." He suggests judges are doing the same thing.[154]

Perhaps the People's rule comes out better on this count, since they had to follow the secondary rules/principles which must guide their decisions, and thus they were given a mandate in terms of purpose to gauge what meaning would best suit the situation under

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[149] Ibid., 81.
[150] Ibid.
[151] Ibid., 82.
[152] Ibid., 82-83.
[153] Ibid., 84.
[154] Ibid., 85

consideration. The monarch's judges were mere pawns; and the co-regents little better. Because they all came from one class, neither would likely have engaged a purposive analysis.

Hart's Review

Hart candidly admitted at the outset of his review of Fuller's *The Morality of Law*:

> I am haunted by the fear that our starting points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work. So it may be that where I find the author's thought obscure it is really profound and out of my reach. I wish that I dare hope that where he finds my thought misguided it is really, or even merely, clear.[155]

Of all the things written between the two theorists, this, in some ways, which comes from the more direct of the two interlocutors, was the most sensible thing said about their relationship. One is tempted to infer here that what may be going on is more akin to children trying to outdo one another on a playground, albeit quite an elaborate and mostly theoretical playground. The part of the review I will draw from is that which concerns Fuller's chapter, here under consideration, on the eight principles of legality. Hart lauds Fuller's acknowledgement that with the exception of promulgation, all the other requirements' satisfaction are really a matter of degree.[156] Hart agrees with Fuller's suggestion that courts employ these principles of legality as consisting of an objective part of the inner logic of law, with perhaps an inherently neutral aspect to them.[157]

Hart, though, parts ways with Fuller in so far as the latter wants to classify these principles as a "morality," per se, since it breeds confusion.[158] Hart explains that by talking about the special morality of law it is misleading because these principles apply to any rule

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[155] Hart, *The Morality of Law*, Book Review, 1281.
[156] Ibid., 1284.
[157] Ibid., 1285.
[158] Ibid.

guided activity, such as games, as well as to lawyers and judges.[159] Hart says the confusion created is primarily between the notions of purposive activity and morality. He cites poisoning as a provocative example of a purposive activity, which can be shown to have internal principles, and yet is clearly not a morally driven enterprise.[160] Using "morality" only blurs the distinction between efficiency for a purpose and "those final judgments about activities and purposes with which morality in its various forms is concerned."[161]

In closing his comments on this section of the book, Hart says something striking, as he so often does:

> It may be that the author's argument proceeds as it does because he has treated my modest remark that the inner morality of law is "compatible with very great iniquity" as if I had said that it was compatible with every sort of iniquitous aim, vague or specific. I did not say this, because, of course, it is false; just as it is false that clear laws are compatible with every sort of good aim, vague or specific. It is of course perfectly true, as the author stresses throughout the book, that, for example, the Nazi government in pursuit of monstrous aims often violated the principles of legality, notably in order to pass secret enactments designed to give retrospective cover to vast illegalities. It is also quite generally true that a regime bent on monstrous policies will often want the cover of secrecy and vague, indefinable laws if it is not certain of general support for its policies or finds it necessary to conciliate external opinion. But this is a matter of the varying popularity and strength of governments, not of any necessary incompatibility between government according to the principles of legality and wicked ends.[162]

Here is what seems to me a paradigmatic response from Hart, which, as Jeremy Waldron has noted concerning Hart's work generally, seems more like an effort to make Fuller look confused and talking at cross purposes than it does to make his own perspective clear.[163] When Hart wrote the comment "compatible with very great iniquity,"[164] it was a prosaic

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[159] Ibid., 1286.
[160] Ibid.
[161] Ibid.
[162] Ibid., 1288.
[163] Jeremy Waldron, *Hart's Equivocal Response to Fuller*. Jeremy Waldron makes two conclusions: first is that Fuller's response to Hart remains importantly suggestive for current jurisprudence, since notwithstanding Hart's attempt to make Fuller look confounded, he essentially presented the same ideas in different clothes, and thus the former wrestling with the latter's ideas suggests much more work still awaits (1167-68). Second, jurisprudence is disfigured by the separability thesis, especially when stated in dogmatic ways (1168). Many of Hart's insights would still remain intact, such as the attack on the command theory, etc, even if he had disabused himself of the notion that social aspects determinative of a legal system had no moral significance (1168).
[164] Hart, *Concept of Law*, 207.

winding up of a criticism against Fuller's discussion of the principles of legality as the "inner morality of law." Yet right before he made the final comment, in the process of chiding Fuller, whom he seems to have made a point of deliberately not citing/acknowledging, which should have had his Oxford copy editors reeling, he writes, "if this is what the necessary connection between law and morality means, we may accept it. It is unfortunately compatible with very great iniquity."[165] At the time, Hart offered no qualification to this statement, and he merely added it later with no acknowledgement of his earlier misstatement, which seems somewhat of a regrettable ploy: but again, it came to be characteristic of Hart to change his tune whenever it suited him.

Conclusion

The law is whatever the nobles do.
Franz Kafka, *The Problem of our Laws*

Certainly during the monarchy and co-regency, law was indeed what the nobles did, or at the very least what the monarch and his or her cronies did. The halls of history are filled with examples of this kind of "law", and one only has to think of the last two-thousand years in Europe, never mind the rest of the world, to be surfeited with more proofs of this reality than might be reasonably calculable. Even during the last century in common law countries, one of the observations raised and discussed by myself and my colleagues was that if judges are truly making the law, as the legal realists and critical legal scholars claim, and if judges have characteristically been white upper class men over the last few centuries, then perhaps law has continued to be "whatever the nobles" say it is in a very real sense—at least up until recently. With the opening of law school doors to more classes of people than merely the affluent of society, there are certainly more than nobles sitting on the bench. It may be a

[165] Ibid.

bleak perspective, perhaps, but if true it speaks to what may need to be "undone" versus what we often characterize must be "done" today in the business of legal reform.

I suggest the People's rule as a possible way of imagining an alternative way of engaging law, more akin to the checks and balances used in the political arena, and this I felt would provide the starkest contrast to any kind of arrangement wherein inequities were seen as a necessary evil which benefited the few so that the many could at least live unharmed and in relative comfort.[166] There is a close relation in the People's rule to the suggestions of Robert Cover. He wrote:

> My position is very close to a classical anarchist one – with anarchy understood to mean the absence of rulers, not the absence of law. Law, I argued, is a bridge in normative space connecting [our understanding of] the "world-that-is" (including the norms that 'govern' and the gap between those norms and the present behavior of all actors) with our projections of alternative "worlds-that-might-be" (including alternative norms that might 'govern' and alternative juxtapositions of imagined actions with those imagined systems of norms. In this theory, law is neither to be wholly identified with the understanding of the present state of affairs nor with the imagined alternatives, It is the bridge – the committed social behavior which constitutes the way a group of people will attempt to get from here to there. Law connects "reality" to alternity constituting a new reality with a bridge built out of committed social behavior. Thus, visions of the future are more or less strongly determinative of the bridge which is "law" depending upon the commitment and social organization of the people who hold them.[167]

The People's rule was an attempt to encourage the "worlds-that-might-be" in at least one sense, since it was the citizens who were constantly attempting to construct the "bridge" to the future in their own construction of the law, with little or no influence able to exert itself contrary to their wishes, with the exception of the principles of legality and their three additional protections for freedom, equality, and sovereignty. The constant refreshing of such "construction-workers" based on the form which the People's rule expressed itself

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[166] This is the perspective of John Rawls. Rawls, *A Theory of Justice* (Harvard: Harvard University Press, 1971), 15.

[167] Robert Cover, *Folktales of Justice*, 181.

meant that new narratives were constantly being adopted into legal interpretation and, ideally, they would result in Cover's idea of the redeeming function of law.[168]

Taken to another level of abstraction and idealness, I might wish for the People's rule to result in John Rawls' principles of justice such "that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[169] Although, Rawls' justice as fairness thought experiment precedes the formation of government,[170] and so either our People's rule needs to be re-envisioned through the lens of a Rawlsian initial position, or the People's own principle of equality, may result in enough of a guard to allow principles of justice to be formulated above and beyond their initial three. It is interesting to note that from the perspective of the original position, one of Rawls' three principles are also chosen under the People's rule, that of equal liberty.[171] He also similarly suggests the restriction of social and economic inequalities,[172] but the People's rule did not merely restrict social and economic inequalities, it outlawed them, unless they could be shown to be justified as necessary to the application and operation of all three.[173]

I also think that, at points, the People's rule verges on Ronald Dworkin's "third and independent ideal" of integrity,[174] as a possible "Neptune"[175] residing behind the guiding principles of law creation and adjudication. It may be argued that the People's rule never

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[168] Ibid., 203.

[169] John Rawls, *A Theory of Justice*, 11. Rawls writes interestingly in another place, "if we assume that the correct regulative principle for anything depends on the nature of that thing, and that the plurality of distinct persons with separate systems of ends is an essential feature of human societies, we should not expect the principles of social choice to be utilitarian" (29). Rawls prefers a contract theory, his justice as fairness suggestion, against the classic utilitarian postulations of justice espoused by the likes of Bentham et al.

[170] Ibid.

[171] Ibid., 30.

[172] Ibid.

[173] *Vide supra.*

[174] Ronald Dworkin, *Law's Empire* (Cambridge, Mass. : Belknap Press of Harvard University Press, 1986), 178.

[175] Ibid., 183.

explicitly embraces integrity on its face, but at a deeper level of abstraction I would suggest that the form of the judiciary and government, by forcing decisions into the hands of citizens rather than civil servants, is implicitly embracing integrity by making the interpretation and creation of law subject to a wide swath of community reflection, and this by definition. The People's rule is connected to the community as a collective of individuals involved in choices about justice based on principle, and Dworkin similarly sees the equation for integrity moving in the same direction, towards the person. He writes:

> The expressive value is confirmed in a way appropriate to common membership in a community governed by political integrity and to see each other as making this attempt, even when they disagree about exactly what integrity requires in particular circumstances. Political obligation is then not just a matter of obeying the discrete political decisions of the community one by one, as political philosophers usually represent it. It becomes a more protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme.[176]

With the People's rule, citizens have the responsibility to identify for themselves and their communities what precisely their scheme of principle will look like. Indeed, it is both an individual and community declaration.

In terms of Hart and Fuller, the idealistic rule of the people did accord to Hart's requirements for a legal system in that there were primary and secondary rules employed. Moreover, there was certainly a rule of recognition that was broadly representative of the majority of both citizens and officials; yet, as discussed above, the line between these two groups was purposely made less clear in the organizing principles of their society. The protection of the person, equality amongst the various segments of society in the engagement of law interpretation or creation, and the sovereignty directive aimed all the

[176] Ibid., 190. See also 213: On a societies choice of the model of principle, Dworkin writes: "It makes these responsibilities fully personal: it commands that no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded left on the battlefield, to the crusade for justice overall."

state's power at the individual, but whether such a scheme could work in practice is, to date, unknown due to the lack of any suitable analog or bench test in reality.

I presented the first two familiar models of monarchy and a version of modified oligarchy to attempt to make Hart's point clear that, even with principles, or secondary rules aimed at guiding the enforcement of primary rules, and all the principles of legality hitting on all eight cylinders, immoral laws were not only possible under these two systems, but as we all know, both possible and rather likely given the fact that so much power devolves into so few hands. Again, history is weighed down to the point of being immovable with examples of these types of societal arrangements, vast numbers of which have for centuries hidden behind nomenclature such as the label "legal system."

Kenneth I. Winston wrote of Fuller that "[i]n Fuller's view, the only permissible form of legislation is the sort that lets individuals plan their own lives."[177] This was claimed in the context of Fuller's seeing legislation as a minimum restraint which allows people to seek their own versions of the good, to allow them to be as fully self determined as possible.[178] Under the People's rule, legislation was kept to an even more humble minimum, perhaps too much so, but the trajectory of self determination is plain and here we have a tangible connection to Fuller's ideas, and perhaps even his ideals.

Of the two theorists, Fuller seems to have more to say about the essence of a legal system in his principles of legality, whereas Hart is concerned only with ensuring a bare minimum of content to natural law, primarily because *his* main point from the beginning was a concern to preserve the value of the separabilility thesis as a way to think more clearly and correctly about the separation of law and morals. The chosen models for Hart on this theme

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[177] Kenneth I. Winston, *The Principles of Social Order*, 158.
[178] Ibid.

were, quite clearly, the writings of Jeremy Bentham, John Austin, and O.W. Holmes.[179] It would seem the most salient part of either of their explanatory models is Fuller's principles of legality, not least because in the end it seemed he had Hart's full agreement that these were indeed a necessary set of criteria/principles which needed to be fulfilled if one wanted to identify a "legal system". Hart may have demurred on giving it the name "morality", but both theorists were admittedly agreeing on the same set of principles, and these, in large part, seem to be the largest original contribution made by the Fuller-Hart exchanges to the larger field of legal philosophy.

In this paper I have used the instrumentality of a thought experiment to suggest to the reader that, in agreement with Hart, not even the laudable eight principles of legality are going to guarantee morally satisfactory legal systems. My suggestion of three additional overriding principles introduced during the people's rule was an effort to show that without constitutional safeguards such as these, Hart would remain correct in his observation that immoral regimes could still operate under the eight principles, as indeed was demonstrated in the reign of the co-regency and senate. In no way do I suggest that the three overriding principles laid out in this paper are comprehensive or could not be improved upon in some way; rather, they simply reflect relevant social concerns and mirror similar expressions of constitutional protections in Western societies, such as in Canada with its *Charter of Rights and Freedoms*.

This paper has been focused on a thought experiment to amplify the point that neither Fuller's 'eight principles' nor Hart's 'rules of recognition' offer a guarantee of morally satisfactory legal systems. Something more is plainly needed. I have concluded that while Fuller's 'inner morality of law' in the 'principles of legality' does provide a satisfactory basic

[179] John Austin, *The Province of Jurisprudence Determined.* London: John Murray, Albemarle Street, 1832.

framework for a legal system, they are also palpably bereft of a primary concern for the fundamental connection between the legal system and its theoretical guarantors, the citizens. Hart, who agreed in part with Fuller's 'principles of legality,'[180] but clearly went in another direction with his rules of recognition, both conflated various incarnations of his rules and, he too, left out important considerations concerning the all important nexus between peoples and their legal systems. I have here suggested a way to deal with these important omissions, by noting that in concert with constitutional guarantees aimed at freedom of the people, equality for the people, and sovereignty by the people, Hart's and Fuller's principles of legality and rules of recognition could well be near what is required for, not merely a "legal system" simpliciter, but, more importantly, a morally acceptable legal system.

[180] *Vide infra* on the 'Principles of Legality' and the discussion of Hart's Harvard book review of Fuller's Morality of Law. In brief, Hart felt that the principles of legality were fair enough for a working legal system, but they could not guarantee a moral outcome. See, for instance: Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller," *New York University Law Review* 83 (2008): 1152. For a number of articles discussing the 'principles of legality' debate within Hart and Fuller generally, see *New York University Law Review* 83 (2008).

Appendix A – Thought Experiment Background

Wiping the *state* clean

A 'thought experiment'

> They will begin by taking the State and the manners of men, from which, as from a tablet, they will rub out the picture, and leave a clean surface. This is no easy task. But whether easy or not, herein will lie the difference between them and every other legislator,--they will have nothing to do either with individual or State, and will inscribe no laws, until they have either found, or themselves made, a clean surface.
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> Socrates
> Plato's *Republic* (6.501A)

The North American Space Agency (NASA) recently embarked on a series of missions to space using a new fusion propulsion technology which allowed them to send unmanned ships in to the far reaches of our Milky Way galaxy. NASA's new space-flight technology, designed in cooperation with scientists from a number of countries, allows these specially designed spacecraft to travel hundreds of light-years in only a matter of weeks. These unmanned drone ships have returned with very rich data about the nature of a number of different planets, two of which have been shown to be very much like earth. NASA has since assigned both of these planet's names. The one closest to us – seventy light years away – has been named Adam, and the furthest of the two – two-hundred-fifteen light years away – has been named Eve. The imaging data from these missions has confirmed that both Eve and Adam have large land masses surrounded and bounded by massive bodies of water, similar to earth. Further, the Geometric Resolution of the Hubble telescopic cameras on board the ships has shown images which clearly reveal an abundance of rich vegetation and a myriad of animals living in the varied climate zones of the two planets. So far, though, nothing resembling human life has been verified based on these images.

After five drone ships successfully completed their scouting missions, NASA then sent three separate missions with astronauts for better managing of the imaging equipment. The crews were able to view the planets first hand and better calibrate the on board cameras which, because of their distance from earth, could not be controlled from the earth in the same way satellites are. NASA could not attempt a landing on either of the two planets for two reasons: first, the United Nations Security Council has forbid it for the time being, and, in any event, there would be no way for them, once landed, to re-launch. These missions were observational and information gathering only.

As each separate voyage was hugely expensive, NASA, in conjunction with the World Bank and the International Monetary Fund, invited countries to consider a large financial donation to the space program in return for thirteen seats on one of these missions. Canada was the first country who subscribed to the program, and as such they were scheduled to go first – much to the chagrin of other countries who felt they should have been first in line, most notably the countries which make up the United Nations Security Council.

Canada's political parties had a debate in Parliament on which group of Canadians should be the ones sent, and a brouhaha broke out lasting two weeks with the media fueling the controversy over whether it should be regular tax-paying citizens, bureaucrats, or scientists that would make up the passenger manifest. The federal government tried to refer the question to the Supreme Court of Canada, but the request was refused on the grounds

that the issue was not a question affecting the law, except, perhaps, they conceded, a tangential connection to Section 15 of the *Charter of Rights and Freedoms*, guaranteeing equal treatment before and under the law. Finally, a vote proceeded and citizens won by a narrow margin over bureaucrats, scientists only receiving a paltry two votes.

The federal government set up a website at which Canadians could apply to be chosen for this special voyage. To be eligible, contenders were required to have sound health and had to have been between the ages of twelve and forty-five. There were three categories citizens could apply under: family's with children, couples, and single people. Over three-million applications from across Canada were submitted, and within three weeks after the deadline for submission, the successful candidates were chosen. First, one family of three was chosen, Irene and Steve, and their twelve year old daughter, Faith. One newly married couple, Bing and Beth, and one gay couple, Carin and Wendy, were also chosen. In the singles category, three men, Koda, Ahmad, and Francois, and three women, Jing Wei, Winona, and Shakina were successful. These thirteen Canadians were chosen as representative of Canada's diverse citizenry, and spent a month in training with NASA in preparation for their journey.

The ship required four NASA astronauts to pilot and crew the ship, and so that brought the manifest up to seventeen people. The day came and they said goodbye to loved ones and off they went. They first came to the planet Adam, and stayed in its orbit for three days, suitably impressed by live camera images of the wildlife and foliage they witnessed on Adam's surface. Then, they were off to see Eve. After their journey of many days from Adam, they finally slowed and they were soon in Eve's orbit. Eve is approximately three times the size of Earth, and NASA had therefore scheduled two weeks in which to Orbit the planet and get as much information as they could.

After only one day in Eve's orbit, something alarming happened. The cabin of the craft, complete with modest cabins for everyone and a common seating area, suddenly went dark, and the solar-powered emergency lighting brought back a dim glow. This startled the passengers, to say the least. After a few minutes, one of the pilots came into the passenger cabin with a noticeably distressed look on his face. He told everyone to get into their seats and belt themselves in; they were going to try and fix the problem with on-board power and then make preparations to leave Eve's orbit sooner than planned. The passengers talked amongst themselves for a while and after about an hour, the power came back on. A few minutes later, three of the pilots came to the cabin area, all looking flustered and sweating profusely. They explained to everyone that although they managed to get the onboard power working again, the fusion rocket propulsion system had problems with its magnetic confinement component, and thus attempting to leave orbit and get on their return trajectory back to earth would be impossible given the ship's condition. They announced that they had talked among themselves and decided to try, while the propulsion and electrical systems still worked, to land the ship on Eve's surface. This, they stressed, meant a better than fair chance everyone would be ok, and that it was the only reasonable alternative which presented itself. They told everyone that, once landed, they would attempt contact with NASA using String Satellites, which had been placed at intervals along the route during previous missions. They assured everyone, that rescue would be possible, but likely take some time. They, of course, knew that rescue was unlikely, but they did not want to start a panic, and they felt that while there was a slim hope of it, they did not want to rule it out.

Steve and Irene went to the ship's galley and came back with a small case of miniature Scotch and Vodka bottles, and some soda drinks, and passed them out to those who wanted. The pilots came back and got some for themselves, as well. Ahmad and Shakina suggested

the group say a prayer for everyone's safety, and no one seemed to mind the idea. Ahmad prayed a short but forceful prayer, entreating God's help, and then a pilot's voice came over the intercom insisting that everyone get back in their seats and buckle up because they were going to power into the descent in the next couple minutes.

The descent at first seemed fairly uneventful, and the chief pilot reassured the passengers at many points that entry into Eve's atmosphere was going well. The pilots had fairly detailed image maps of Eve's surface, based on previous data, and they chose to position themselves to touch down on a large tract of arid land which bordered a river system and a large inland body of water. As the ship got closer and closer to Eve's surface, Koda pointed out some emerald and purple colored mountains far off in the distance. Soon the mountains faded from view and all they could see was the contrast of the large body of blue water against the dry expanse of land on which they were going to set down.

The Captain ordered everyone to insure they were belted in and he sounded exasperated. He said they had got the rear landing gear down but the nose gear was not dropping. They could see the ground coming up beneath them and soon everyone felt a large jolt, the rear wheels had touched down. The Captain had the ship's nose pitched up for as long as he could manage, as the craft slowed, but they were still moving at around one-hundred and fifty miles an hour. He announced to the passengers he was going to let the nose down, and there was every hope of a safe landing, but he asked them to brace themselves for the next few minutes. Everyone felt the shuttle slowing somewhat as the airplane leveled out and the nose began to come about even. Then the nose pitched down and there was a loud thud followed by sharp jolting bounces, and then the awful bellowing sound of the frame of the ship being stressed to the breaking point by the ship's weight. Finally, they slowed a little more, and then a loud shout came from over the intercom followed by the shrieks of tearing metal and dust flying up and into the cabin. The massive hull slid to a halt.

Dust came wafting in to the cabin area and the passengers looked up the walkway to the cockpit which ended abruptly in a twist of metal, and all they saw beyond was the blue of the sky; the nose of the ship had obviously severed in the landing. Koda pulled himself out and jumped on to the ground and through the plumes of dust he saw the other part of the plane behind them a-ways and beside the furrowed path created by the ship sliding to a stop. Carin, Wendy, and Irene checked on everyone and no one was seriously injured, and eventually everyone was pulled out to safety. Everyone was in a state of shock, and there were many tears. Steve and Koda ran to the cockpit section and there was a significant fire and smoke pluming out of the open end, and then they saw one of the pilots, lying badly injured on the ground, only meters away from the wreckage. They both ran and picked him up as carefully as they could and moved him away to a safe distance. There was severe bleeding, so Koda and Steve took off their shirts and made tourniquets for the pilots two legs, which were badly cut. Steve asked the pilot if he could speak, and the pilot nodded a little and lifted his finger as if to say "wait." Steve looked to see if the other pilots had made it. They had not. Koda had some water with him and offered it to the man who gratefully but with much effort accepted it. The man motioned for Steve to come closer, and his eyes told them both it was near the end. He said to Steve, "take my key clip from my belt, and go the back of the ship to storage container five; get it all out, that is what matters now." The pilot complained of being cold, and the two men covered him the best they could, and then the poor fellow passed away.

Once all thirteen passengers were safely off the ship, Steve and Koda told everyone what had happened to the Pilots, and about the keys. They noticed the cabin section of the ship was throwing occasional sparks and smoldering so Steve said they should go get whatever

was in that storage container in case all the shorting-out started a fire. Wendy, Carin, Koda, Steve, and Ahmad climbed back in the ship and started throwing everything out of the ship on to the ground, where the others moved it a distance away from the ship. Steve and Koda reached the six storage lockers and opened the number five door. Inside were aluminum cases, twelve of them, which they did not bother to try and open but just passed them along and got them off the ship. There were other keys on the pilot's clip, which opened the other doors, but these compartments were either empty or filled with computer circuit boards and other miscellaneous electronic equipment. They decided to get everything else useful off first, and then, if there was time, to come back for these. The last case of the pantry storage unit was just being thrown down by Carin when flames started climbing the walls of the ship towards the opening and she shouted for everyone to get out. Koda was the last person out, and just as he came running over to the group, the remains of the ship started to burn in earnest. They all agreed that they should get the supplies and themselves over towards the body of water they had seen as they landed. They had noticed trees along the shore, and they needed cover from the hot sun.

Once to the water's edge, they found out it was fresh and so it was discussed they would be able to find its river source for reliable drinking water, but for the time being, they tried to organize the best they could. In the twelve aluminum suitcases were emergency supplies, which NASA had put aboard the ship. There were four large nylon tents, twenty lightweight compact sleeping bags, a variety of dried foods, cooking utensils, and a water purification module, among other things. There was also one case which, when opened, turned out to be a control panel with the word STRING super-imposed on the symbol, GE. They quickly deduced this must have been what the pilot had mentioned to them, as a means of sending messages to earth via the String Satellites. Gusting wind carried dust which blew through the long narrow line of poplar-like trees alongside the lake, so it was agreed they should close this case and build shelter.

Once the tents were pitched in and amongst the trees, a meeting was called by Steve to plan the next step. Most of them were exhausted and wanted to simply lie down in the tents to process what had happened, but Steve and Irene encouraged everyone to have a quick talk before doing anything further. Steve suggested they figure out who was sleeping where, and where they were going to store supplies etc. He said:

"Ok, were all upset right now, but we know very little about this place, and I think that until we know more, we need to establish some basic ground rules, for everyone's safety."

"While I agree with you, I take some offense that you have assumed the leadership role by calling this meeting without discussing it with the rest of us," Carin said.

"Ok, you're right. But this has been an emergency situation, and I just act on instinct."

Ahmad stood up, "I agree with Steve, we need come to some kind of consensus about our general plan here, before any of us just wander off somewhere, or take supplies without the others knowing. We have limited supplies, and until we find another food source, we have to insure that all of us are getting the benefit from the little we have."

"Exactly," said Irene. "No one is going to be the leader per se, but can we at least agree that until we decide as a group, no one will go out of earshot without first telling the group."

There were some sighs and more tears, but everyone nodded assent to staying close for the time being. *This was their first rule.*

1. No one can wander off or go out of earshot or take supplies without all of the others knowing first.

On her own initiative, Irene wrote this on a pad of paper in a clipboard from the ship, and kept it in one of the aluminum suitcases for safety. Wendy stood up, "I propose that tomorrow morning, after we sleep on it, that we meet as a group to discuss using this String machine, and also talk about the food situation."

Everyone assented to this as well, and strangely, no arrangements were discussed about the tents. People just occupied them without discussion. Steve, Irene, and Faith occupied one, the two couples used another two, and the three single women took the last one. The single guys agreed between themselves to use some extra sleeping bags to build themselves a makeshift tent using the trees and some rope that came in the emergency cases.

The group spent the rest of the afternoon looking through the cases and stowing things in their tents, and having a look around. There were dead trees lying amongst the standing poplars and Koda, with the help of Jing Wei, Bing and Beth, arranged a fire pit in the middle of their makeshift camp using stones from the lakeshore, and then, with matches from supplies, started a fire.

After eating whatever they could lay their hands on for supper, everyone, including Faith who had slept most of the afternoon, gathered around the fire, using large rocks and logs to sit on.

Irene and Steve had been married for fifteen years, he was a fireman and she practiced law before starting a home business to be able to spend more time with Faith. They were originally from Toronto, but had moved to Edmonton when Faith was five years old for Steve's work. Bing and Beth were newlyweds, Bing a second generation Chinese-Canadian who sold life insurance, and Beth was an interior designer who had grown up in small town Saskatchewan. Carin and Wendy had been together for ten years; Carin having come from South Africa in her twenties and earned her Ph.D. in Sociology at the University of Toronto, and now taught law at Osgoode Hall Law School, while Wendy had a storefront pottery shop on Yonge Street. Koda, was a Native North American Ojibwe, hailing originally from the Northeast Lake Superior area, and had recently become the director of a Native Community Center in Sudbury, Ontario. Ahmad was a first generation Iranian Canadian, and a computer programmer from Vancouver, BC. Francois hailed from Quebec City in Quebec, and had a publishing business which he inherited from his Father. Jing Wei was a first generation Chinese Canadian who was going to school for accounting, and had taken a year off to travel. Shakina was an African Canadian who worked as a school teacher in St. John's, Newfoundland. Winona was a First Nations Sioux, who grew up in rural Manitoba, then moved to Winnipeg to go to school and get her law degree. She had recently opened a restorative justice centre in downtown Winnipeg.

Most everyone shared a little about themselves at Irene's suggestion, and being that their sleep schedule was already behind given their routine aboard ship, most signaled a desire to turn in. Koda and Winona agreed to stay up for the first watch while everyone else went to their beds. It was agreed by all that they would keep two hour watches during the night and keep the fire going. Most everyone had working watches or clocks and they just reset them according to the sun going down for the time being, and the next day they would set them to the sun at its high point.

Faith woke up at first light to find Bing and Beth sitting by the fire, and she sat down beside them. Beth put her arm around her and Bing got a pot and filled it up with lake water, put a purification tablet in it and boiled it for coffee. The emergency supplies had a variety of foodstuffs, and more coffee than any other single drink. Everyone cherished the foresight of those who had assembled the supplies on that count.

The sounds and talk soon had everyone up, and they ate something and had multiple pots of coffee, everyone agreeing that after what they had been through, a strong dose of caffeine was in order. The morning sun was well up and the coolness of night was replaced with moderate warmth, and it was agreed they should gather for a meeting.

The fire had died down some, and Koda advised keeping the fire burning low throughout the day, even with the heat, so that starting fires later would be very quick, and would not necessitate the use of matches. The supply of firewood was plentiful as there was fallen trees strewn all along the grove of poplars that stretched off in each direction around the edge of the lake, and far in the distance were the mountains everyone had seen from the ship yesterday.

The group talked about what would their priorities should be, and there was both agreement and disagreement. They agreed that, come what may, they would vote on all important matters, and anyone who voted agreed in advance to accept the decision. This way, the voting had integrity and a degree of fairness. Those who did not wish to vote would not be forced to do so, but Carin and Steve agreed that such a decision would need to be justified, because someone may be in the position to hold back a swing vote on an important choice the group needed to make. Bing and Beth brought up the point, 'why go to the trouble of creating rules for actions which have not happened;' they felt that to do such would waste valuable time and effort which was clearly better spent on survival. Irene added a rejoinder by noting that such a view would be in keeping with the idea of the growth of law as they had known it in Canada, under the common law. Others voiced concern that actions like theft and violence should be outlawed in any event, but Bing convinced enough of the group, and they engaged their first law for the first time and voted: Bing's proposition winning out by two votes. *This was their second rule.*

2. Rules/laws will be made at the behest of a majority vote of all group members as the need for such rules arises.

Then, disagreement. A group led by Steve – Irene, Bing, Beth, Koda, Winona – agreed their main goal should be to build some kind of durable shelter out of logs, like a longhouse, since no one knew if the calm weather was going to last, and better protection against the elements and especially wildlife was likely going to be necessary, especially keeping in mind the kinds of animals they had seen in live images from the ship. Another part of the group, led by Carin, - Wendy, Francois, Shakina, Ahmad, Jing Wei – felt they should attempt to move closer to the mountains, and along the lake's edge until they came to the mountains or the river which fed the lake. This way, they would have more reliable drinking water and better access to animals and vegetation for food. Bing countered that where there is food, there will be natural predators and, without protection, they may fall prey to such.

There was a vote and it was split six to six. It would take Faith to break the deadlock. As she was asleep, Carin said to Steve and Irene that she was all for Faith having a vote, but not one informed by the bias of her parents, so it was agreed they would wake her and Bing would present one side and Shakina the other, and she could then decide. She was woken by her mother from napping, and she was told what they had been discussing. After listening to both sides, Faith spoke:

> I just had this weird dream and in it I was walking in the sand with a man who looked like one of the pilots, and he brought me to the side of a lake. We sat under a tree and ate a sandwich together. He gave me a necklace and placed it around my neck, and on it

were ancient letters, which looked similar to the letters WX (אֵשׁ). He told me they meant fire. Fish began to jump in the lake in front of us, and then the man got up and said, "It is time for me to go. Stay close to the fire, you will be fine." As he walked away, someone called me so I turned around, and then Mom woke me up."

Everyone was quiet, and waited for her to say something more. Faith told everyone that she really just wanted to stay where they were for the time being, and so she agreed with Bing's suggestion, and it was agreed, begrudgingly in a few cases, that the group would try and build some kind of more permanent shelter. *This was their third rule.*

3. The group must remain at the lakeside camp and build shelter there, before venturing out any further.

They also unanimously agreed that three volunteers – Ahmad, Winona, and Wendy – would go through the food supplies, making a list of everything they had and keeping anything which had been taken from cold storage separate for more immediate consumption. Koda suggested they dig a pit in the ground and then seal some foodstuffs in a few of the empty suitcases and then bury them to keep them cool. These kinds of non-contested issues were not considered worthy of voting for inclusion with their few rules.

Francois and Jing Wei, being the most computer savvy of the bunch, agreed to be in charge of seeing if they could make the String Satellite machine work, and so they took it into the girls' tent and set to work.

Koda volunteered an idea for shelter based on his experience growing up in the Atikameksheng Anishnawbek community (Whitefish Lake First Nations) just west of Sudbury, Ontario, where he had worked alongside his grandfather in the building of traditional wood structures and carvings. Koda was unanimously put in charge, as no one aside from him had ever worked in construction. One of the suitcases was equipped with a variety of tools, and there was a hacksaw amongst them with some extra blades as well as a small hatchet. By midday they were able to fell a number of trees, and although the satellite communication system was not yet figured out, Francois had managed to get the water purification module running. It required only fresh water in, and in an hour or so, the solar powered system had turned lake water into drinking water, but it was not efficient given the number of people needing water regularly.

Everyone was tired after that first day, and after an accounting of their food and making a conservative estimate, Ahmad, Wendy and Winona agreed there was enough for about three months, at two meals a day each. Koda and Steve reassured everyone that with the presence of fish in the lake, which everyone could see at dusk breaking the surface to eat bugs, food wood not likely be an issue. Carin suggested that once the house was underway that her and two others go on a day trip to see if they could find a river, and perhaps such a trip would yield some food ideas. Bing reminded Carin about rule #3 which insisted that the lakeside shelter must come first.

Steve had also been noticing that Francois had taken a number of the small bottles of vodka and been drinking them during the construction of the shelter, and yet no one was saying anything. Steve brought the point up one night at dinner and he suggested that they come up with some kind of consequence since Francois had been breaking their very first rule, "No one can… take supplies…." Francois protested saying that vodka could not be considered supplies since when the group made the first rule, it was to protect essential supplies, primarily food and shelter goods. Consequently, he maintained, they were trying to

punish him for something that was not even prohibited at the time it happened. Everyone disagreed, and Ahmad suggested they think of some kind of consequence for the breaking of the #1 rule and everyone signalled agreement. Suggestions were tabled and finally it was voted on that punishment for this first law should be at the discretion of a majority vote, and they decided to keep the bottles of liquor away from him by locking the cases and keeping them in other peoples' tents. Francois let some verbal invective fly at the group and walked away in protest. The first law was then altered to allow for a majority vote on deciding punishment.

That second night, Francois and Shakina volunteered to do the first watch by the fire, and it had been known to everyone on the flight that they had grown quite fond of one another during the two weeks they had been in space. They sat next to each other and Francois pulled out a number of vodka bottles he had hid in his sleeping bag which the group missed and shared a couple with her. They talked about the group's decisions earlier, in hushed tones, and Francois told her he was very upset that everyone showed such a lack of courage and had treated him so pedantically. He explained to her how in his opinion the String computing system was shot, likely caused by the heavy jolting the craft experienced on impact. He then told her something which surprised her, he said he intended to go out on his own during the night. He explained to her that his Army Reserve survival training along with one of the two fold-out back packs which were part of the emergency supplies would allow him to pack enough food for at least two months, in which time he would have easily settled near the mountains where he was positive there would be enough wildlife, edible fruit, and vegetation to keep him going for years.

She was stunned by what she heard, but listened on. Francois said he saw an obvious rift developing between Steve and Carin, not to mention himself, and did not want to wait around until the group disintegrated, the food supplies dwindled, and the realization that no one was getting off the planet forced everyone into a fight for survival against one another. He said he could not be sure about this, but with his own life on the line, he was not about to take any chances. He then asked her if she wanted to come with him, guaranteeing that with him her chances of survival went up tenfold. She agreed and the two made plans.

Carin and Wendy relieved them on watch while the two conspirators pretended to go back to their shelters.

The morning of the fourth day everyone was woken by Steve shouting at the top of his lungs. He could see from the cache of supplies that much was missing. "Francois is gone!!" he shouted angrily. "Where's Shakina!!? Shouted Jing Wei, and she began to cry, clinging to Winona who looked blankly over to Koda. It had not been two days and not only had two people deserted, but the supplies were cut by two-thirds, except, ironically, for the electronic gadgetry which was virtually useless anyway. Also, the two had also made off with both of the fold-out backpacks.

It was also revealed on that particular morning that Steve had been keeping a secret. In a particular case holding two flare guns which everyone had known about, secreted away underneath these, in another compartment, were three pistols with ammo, all of which Francois had neatly taken. Carin was livid when she realized Steve had done such a stupid thing as to omit informing everyone about the guns. She yelled at him to his face until Ahmad stepped in and pulled her away. Ahmad looked at Steve, "She is right, it was foolish and dangerous for you to keep us in the dark about these guns. You should face consequences for this since although you did not actually take the supplies, you effectively did so by not letting us know about them. We could have used them in self defence or at least secured them so they could not be stolen, and now they are gone, and could even be

used against us, God forbid." At Ahmad's leading they took a quick vote and a majority agreed that he should be punished, but it proved a deuce difficult to figure out what this would be. The finally agreed that he would prepare the midday meal for a month.

Winona took a weeping Jing Wei over to the fire and sat down, consoling her. Koda sat opposite them and added wood to the fire, it was still early morning and quite cold. Soon, Faith came from her tent and went straight to the fire and sat on the other side of Jing Wei, holding her. Everyone joined them except Steve.

They still had enough food for about one month left, and soon after eating some breakfast, they all got to work on the shelter. By the next day, led by Koda, they had a total of forty logs cut and de-branched. Winona made a fishing net out of string and rope which were part of the gear they had taken from the ship, and with the help of Beth and Jing Wei, she was able to fashion quite a large one. Early the next morning, Koda and Steve walked out a small peninsula, waded in up to their waists and set their net with lines back to shore. They waited on the beach until the fish started to break the surface of the water and then pulled the net in. The net brought in plenty of trout-like fish. They had fish for breakfast and everyone was greatly relieved that such a plentiful food source had been realized. Once they had eaten, Ahmad encouraged everyone to join him in saying a prayer of thanks to God for this provision, and a few of the group joined him but others were palpably uncomfortable with the idea.

By the fourth day, Koda marked out the dimensions of the log house, which was to run about fifty feet long by fifteen feet wide. The notching of the logs took quite a bit of work, but with everyone pitching in, they made great progress. Another piece of encouraging news on that day was that Wendy, an avid gardener, had noticed some plants which looked very similar to potatoes, and she dug them up to find they were very much like a potato, only much larger. After a hard day of working, Bing cooked up fish and potatoes for everyone, and the mood had certainly improved on this count.

By the fifth day, notwithstanding the progress they were making on the long house, another disagreement arose. Ahmad was very keen on giving thanks to God in the group context, and this bothered some, who felt such expressions were best kept personal. The issue was pregnant one morning after breakfast, and so Winona broke the silence and suggested they talk about it openly. It was revealed that everyone except Bing, had some kind of belief in God, but there were obvious differences about how such a belief played out in daily life. Winona talked some of a holistic approach, a life-way, which reflected her reliance on the Great Spirit, Manitou, who had created all things. Koda indicated he also saw God in this way. Beth had been raised a Catholic, and she indicated that she believed in God, and found solace in the teachings of the Church, but she did not feel comfortable praying with people outside her faith. Ahmad had been raised Muslim, and surely believed in God, but he had come to practice his religion in simple expressions, and did not adhere to the many ceremonial practices which he felt encumbered his ability to connect with other people. Carin and Wendy both expressed a similar belief to one another that God was the creator, but was not intrinsically connected to one gender, as traditional religions had insisted. They believed God was a source of comfort, but did not require being constantly talked to. Irene and Steve were members of a Presbyterian Church, yet they expressed that they did not mind praying as a group, regardless of who was praying. They also felt that religion was a very personal issue, and that each person was separately responsible to God for their actions. Jing Wei, expressed a belief that harmony in the group was the best indicator that God was present, and that any religious expression should build group

cohesion and keep people committed to rituals which remind them of their duty to one another.

Everyone was quiet for a moment, and then Faith spoke. "Most of you believe in a God who is there to help us, and some of you believe that expressing this corporately is important. The way you think of God might be different, but the outcomes all seem very similar: God created everything and is here to help us. We all seem to agree on this. Perhaps we can go forward on this issue knowing that we share a unity in this regard, and if there are some who wish to employ ritual or corporate expressions towards God then they should be able to do so. "Faith is right," said Bing. "While I do not personally believe, it seems that belief in God is axiomatic with all of you, so unity on the bare plane of belief may help to bring some of the cohesion which Jing Wei talked about. I would be willing to assent to, and practice, anything which made the group more cohesive."

Ahmad suggested that perhaps once a week, a place could be chosen where those who wish to could express themselves towards God could do so as a group. He volunteered himself to lead such a meeting, and also asked that the group allow him and a few others to be able to fashion rules for the meetings so that they were orderly and respectful. Everyone voted that this non-compulsory gathering would be acceptable, but it was insisted that such a practice should never interfere with the group's sovereignty in making decisions about their future. *This was their fourth rule.*

4. Those in the group who wish to will meet once a week, in a place to be determined, to practice religious worship together *as* a group. The group representative who organizes the meeting (in the first instance, Ahmad) will be allowed to draft rules of procedure and conduct which will allow an orderly and respectful service. The sovereignty of the group will remain paramount in regard to these gatherings.

On the morning of the sixth day, another surprise. Carin, Wendy, Bing, and Beth were gone from their tents and there was a large note attached to a sitting log a few meters from the fire. The note read:

> Since the house since almost ready for the roof, we decided to go for a morning foray along the lake shore and see if we might find some other vegetation for food, we plan to be back by noon.

Everyone was a bit shocked. Irene said, "They broke the rule." The rest looked at her. "We agreed that until the shelter was finished no one should leave the group, and what's more, they didn't even ask." Everyone agreed that such a move had been foolhardy and not merely because they broke a rule, but because they had no idea what wildlife occupied the shoreline nearer the mountains. "This cannot work" Ahmad asserted. "We cannot be working at cross-purposes here, some kind of consequence will have to attach to their leaving like this." Steve and Irene agreed, and Koda seemed to assent as well. Winona, Jing Wei, and Faith did not say anything.

Steve maintained that since the four who had gone were breaking the rule, voting on their punishment was forfeited by them, and everyone agreed this was fair. In the supplies were a series of locks for the suitcases with two keys for each, and for each of them which still had supplies in them, Steve and Ahmad locked them and kept the keys for themselves. Winnona pointed out that since Steve was still serving his punishment for deceiving the group about the guns, it seemed counter-intuitive to let him keep the keys and she also

pointed out that both genders should be represented when punishments are enforced. It was decided that she, and not Steve, would keep the keys. The group had decided that locking the cases against these four was a fair way of meeting out consequence because these kinds of prohibited adventures would be less attractive if there were no supplies to take on the journey. They decreed that the four who broke the group rule would not be allowed in to the food supplies without Winnona or Ahmad.

The group did not return at noon, and by later in the afternoon, everyone was quite concerned. While eating supper, they heard shouts from a distance and Koda ran out to the lakeshore and saw three figures walking hurriedly towards the camp. Koda ran to them to cut the distance. Exhausted, Beth exclaimed, "Bing is hurt badly, and we could not move him without causing him great pain. Please get Steve and I will take you to him." Koda ran back, got Steve, and learning that he was a two hour walk away, they opened the cases, grabbed some provisions and stopped to talk to Ahmad before running to catch up with Koda and Beth. He said to Ahmad that the discipline should be explained with everyone present and not to say anything just yet.

Bing had fallen off a large boulder on a rocky patch of the lakeshore, and was lying on his back between a small crevasse betwixt two of these boulders. When they arrived, Beth saw wolves gathering on the rocks and screamed. They began yelling at the animals and Koda grabbed a staff and ran up on the rocks, beating them away, upon which they scattered in to the darkened grove of trees. Bing was badly hurt and had cuts on his head and legs. The three of them managed to get him out, with much effort, and after wrapping a shirt around the small cuts in his leg and head, Steve and Koda took turns carrying Bing on their backs on the way back to camp.

Using vodka as a pain killer for Bing, Koda and Winona reset the leg with branches, and secured them as Bing rested unconscious by the fire. Carin and Wendy had gone to their tent as soon as they arrived back at camp, and everyone soon turned in for the night.

The seventh day began around the fire, with Ahmad and Winnona explaining to Carin, Wendy, and Beth, how the group had agreed that for breaking the agreed rules, some consequence would have to follow. "But we did not vote on it!" said Carin. "How can you make rules without a vote? We all agreed on this. Ahmad looked at her, "once you broke the trust of the group, you lost the right to vote, at least on this matter. You jeopardized us all by not committing to the task at hand which is building the house, not going on trips without authorization from the group."

"This is a joke!" exclaimed Wendy. "Who are any of you to think you can arbitrarily assume authority and give us consequences?" Koda then spoke, "the group is sovereign, and as a group we decided to commit to the shelter first and then venture out. We are only taking authority for the group, not over the group."

"I understand," said Beth. "It was wrong to go and I knew it, but Bing said it would be fine to go just for the morning. I regret it now."

Ahmad stood up, "the consequence will be that none of you will be allowed in the cases with food or equipment, without Steve or I, until the house is finished and we have done a number of day trips to ascertain what the surroundings are like. Then the cases will remain unlocked as before."

Everyone was silent. Carin looked around at the others to gauge their reaction to what was taking place. She saw there was obvious discomfort with Jing Wei, but the others just stared back at her blankly. Strangely, the discussion ceased, and no more was said that day. Bing recovered and was talking some but he had obviously been weakened by the loss of blood.

The group continued to build under Koda's direction, and meals were prepared by Jing Wei, with the help of Bing who did whatever could be done from his place near the fire. The supply of fish and potatoes was more than enough for what they required, and Koda had even begun to smoke some of the fish, with the idea of both eating it and storing some underground, in case their new home had any kind of winter season.

Ahmad's weekly religious meetings were well attended, and since he, Beth, and Faith were the only ones interested in coming up with religious standards for the meetings – most thinking it was unimportant – they came up with a set of rules to keep order in the group. They talked amongst themselves that these rules should be different from the group, who merely enacted rules to survive. The religious group's rules would be based on moral principles and devotion to God. These are the first five rules they came up with.

1. God is one, over all, and to be obeyed and worshipped above all.
2. People ought to care for one another as themselves.
3. The leader of the religious services must have control over which expressions of worship are appropriate, and may ban or encourage any she or he feels necessary.
4. The sacred day of worship to God is Saturday, according to the seven day calendar we are familiar with from our former lives.
5. A council of three religious service members appointed by the leader of the services will vote on all additions to these basic rules, with a simple majority dictating results.

This first council of three decided that these were both simple and functional rules which in time would allow for a broad spectrum of expressions. The rules were written down by Irene in the clipboard pad, like the other rules, but under a different heading: *Rules for Religious Practice and Observance.*

A week later, the group had finished putting up the walls and roof of the house, and everyone was quite amazed at what they had accomplished. It was only a bare structure with nothing built inside, but now the tents were moved inside and some small smoke holes were cut out of the roof and another fire pit created in the middle of the building near the entrance. They fashioned a door which could lock from the inside every night, and these accomplishments brought a great degree of comfort to all.

A month later, a number of trips towards the mountain had been taken, and finally one afternoon there came back news from a scouting party made up of Koda, Ahmad, and Carin, that they had found a river, just like Carin had said they might. A regular schedule of trips were then taken each week to retrieve fresh water for the group, in any containers or bottles that came off the ship. Wild animals did not seem to pose a problem during the day, and they did not venture out at night in any event.

The group decided to rebuild another bigger shelter beside the river, and so little by little, they did day trips to fell trees in that area for such a purpose. The burned hulls of the ship did not provide much, but the group was able to make use of such things as metal hinges and some metal panels which they found could be bent into vessels for water etc.

Within six months, a long house, eighty feet in length and fifteen feet wide was built at the new riverside location, along with two other smaller huts for storage and food. After some time trying to get the String machine to work, the group gave up, satisfying themselves with the belief that one day NASA would come for them, but planning as if they never would, just to be safe. Bing and Beth were pregnant, as well as Koda and Winonna, who had struck up a close relationship. Carin wanted to get pregnant also, and Beth, based on her

experience as a nurse, said such a thing was easily arranged. Ahmad and Jing Wei became a couple, and after a ceremony of sorts, they were married.

While no more was said of the Bing incident and the consequences which followed for those responsible, it was decided by all that if they were going to have rules to live by, they ought to be written down and available to everyone, so that everyone would be without excuse if something did happen. They inscribed the rules on dried out slate tablets with a small set of punches from the tools that came with the emergency supplies. There was plenty of slate on the rocky section of the lakeshore. For each rule of conduct they agreed on and inscribed, there was a corresponding consequence which the group decided on as well. Taking food from their general stores, for instance, without notifying the group, would result in a week of double work duties. With Irene's help from her experience as a lawyer, they generated rules against actions they felt would damage the integrity of the group, such as theft, conspiring with others, and assault & battery, amongst many other things. They also made a rule against killing another human being, leaving the punishment for this most serious crime up to a group decision at the time of judgment.

A couple years later, Francois and Shakina showed up with two children of their own, and despite their former crime, the group decided that as long as they agreed to abide and live under the sovereignty of the group and its rules, all would be forgiven. Francois and Shakina agreed to the conditions and made their home with the rest. They revealed to the group the existence of a number of fruits on the mountainside, and so regular forays began for both fruits and to hunt a deer-like creature, which Francois and Shakina had been using for food as well. They were then up to fifteen people in the group.

In ten years time, the community had grown by twenty-one, due to all the new children coming from the couples. Steve and Irene had three more children, Winonna and Koda had four, Ahmad and Jing Wei, had two, Bing and Beth, five, and Francois and Shakina had another five as well. Carin was also able, twice, to get pregnant and so she and Wendy had two children. Some of the couples had miscarriages along the way and some difficult births, but in general the births went well. Beth and Winnona, having some experience with assisting births, then became the group's medical people, and the two of them began experimenting with herbs and roots for medicinal purposes. Beth wrote as much as she could remember from her registered nurse training and Winnona wrote as much as she could remember down from her volunteer work as a midwife and her experience with naturopaths. The long house remained the central meeting place, but each family had its own large log building now, but all within sight of the main camp.

The slate tablets with the rules were kept under lock and key and protected from the elements in the main hall in a secure place, and the group had established a once-a-week gathering at which they discussed matters and passed new rules if necessary.

Ahmad, had kept his religious gatherings going on a weekly basis, and all families attended the short services, but a few still refused to participate in the prayers. Ahmad, along with Beth, Irene, and Jing Wei, had written out a number of ideas from their separate sacred texts which they could remember and these were considered secondary texts to the five initial rules. The five rules, and the other religious thoughts were inscribed on slate tablets, and kept in a locked case right beside the one holding the group's rules. The two identical cases sat side by side in a large wooden chest in the main hall.

The group also felt, that they should be able to rename the new planet, if they were going to be stuck there. Suggestions and cases were made for a few ideas, but Winonna's idea won hands down. She told the story of the Beothuk Nation of Newfoundland, who, due to encroachment on their territory, European diseases, and European violence, were

finally forced into extinction. Winonna reminded everyone that they were also in a new-found-land and thus she suggested their new home be named after this Nation, and in was unanimously agreed. Beothuk was the name of the new planet. She arranged a ceremony and feast that night around the community fire to celebrate the naming, and everyone attended.

Meanwhile, back on earth, NASA interpreted the break in communication, with knowledge of the troubles the ship was having in Eve's orbit, as proof positive that everyone had tragically died in some kind of regrettable accident. The economy had taken a turn for the worse, and five of the world's top economic powers were in such bad condition that various segments of the populations based on class, race, and religion, began to show signs of possible revolt. The gold standard was re-instituted in an effort to stabilize the global economy, but since some countries had hoarded most of it to themselves during the reign of the American dollar, the future looked bleak for the rest of the world.

NASA, for its part, was being run on a skeleton crew and its funding had been cut back severely. The Canadian government, under the understandable provocation from family members, pressed the space agency to send another mission to determine what happened to their loved ones, but in the midst of the global crisis, such an expensive venture was out of the question.