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The Poisoning of the Rule of Law

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Abstract

Discussions of Nazi law tend to centre upon Fuller's desiderata of the rule of law. Whilst not disputing this connection, this essay argues that tyranny and oppression are marked by the (ab)use of law to invade the domain proper to individual moral thinking, and to transform citizens into models of conformity to whatever values the tyrant cherishes. Its main consideration is how a community can recover from periods of tyranny, and how the law can recover its dignity having shown itself capable of evil uses. So, it is focused more on 'substantive' rather than 'procedural' morality.

Keywords: *tyranny; justice; rule of law*

There are times when law appears on the intellectual landscape as an instrument of organized state power. At such times, the issue in question is not whether, as an abstract possibility, laws are capable of being divorced from standards of justice (this is evidently possible); but whether a governing regime that has deliberately set itself in opposition to those standards can do so effectively, maintaining its power and enforcing its will through the mechanisms and institutions of law. The question is this: Can law, whilst fully remaining 'law', systematically dismantle just and reasonable ways of living, serving either some perverted ideology or the private interest of a governing elite?

This image of law as a mere instrument of power has obvious associations with latter-day legal positivism: the idea that the "existence of law is one thing; its merit or demerit is another";[1] "that law might be law though it failed to conform with the minimum requirements of morality";[2] or that "conformity to the rule of law also enables the law to serve bad purposes ... just as the fact that a sharp knife can be used to harm."[3] But these ideas are merely present echoes of a viewpoint on law that has ever gripped the imagination of thinkers in the western intellectual tradition. Thucydides's history reports the Athenian delegation's stance, in the midst of war, as reducing questions of law and justice to matters of self-interest: "right ... is only in question between equals in power, while the

1. John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law: Vol I*, 5th ed by Robert Campbell (John Murray, 1885) at 214.
2. HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harvard L Rev 593 at 618.
3. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) at 225.

strong do what they can and the weak suffer what they must."[4] Later Roman jurists, despite their belief that law [*lex*] is a kind of right [*ius*], largely concurred in Ulpian's famous dictum that "whatever the prince resolves upon has the force of law."[5] This view of law does not lie exclusively in the direction of an incipient positivism, however. It does not depend upon the Machiavellian analysis of power, by which the lawgiver's successor "might employ for evil purposes the power which [his predecessor] had used only for good ends."[6] Nor does it require the Hobbesian identification of justice with distinctly civil standards.[7] No less a figure than Saint Augustine declared that the law of the earthly state resembles the relative and distorted form of justice which obtains within a gang of criminals.[8]

Thus, at times, it will seem difficult or even foolish to connect law with values or ideas that are genuinely 'good'. Instead, it will seem that it is the arduous task of persons of good will to keep alive the flame of justice through the periods of darkness, until such time as the embers of civility can be rekindled.[9] In the face of the extreme depredations of which human beings are capable, precisely through law, the idea that legality itself is a noble thing will appear as an ill-afforded piety. And yet: in those times of reconstruction, when humanity emerges from periods of evil, how else but through law are the flames of civility to be relit? At points such as this, the law discards its image as an instrument. For the effort of reconstruction is not, in the minds of those who undertake it, the effort to wrest back a useful tool from the side of oppression, but a reassertion of the purpose of law as nothing except justice: the recovery of strands of civility which were never entirely expunged, however corrupted or deliberately marginalized. (The relative justice of the criminal gang is nevertheless a kind of justice.) Because it is in the law that we find the most visible expression of our values, we will find their residue even amid the ruin of legal systems that have been perverted to serve the absolute will of a terrible dictator.

How are these apparently divided aspects of law to be reconciled? The question is a significant one and not merely a definitional dispute. An understanding of law is necessarily ordained to some practical end. It may, for example, be motivated by a need for objective detachment from more immediate questions of how a person, or all persons, ought to act. Such questions are pre-eminently practical

4. Thucydides, *History of the Peloponnesian War*, translated by Richard Crawley (JM Dent & Sons, 1933) at 394 (V.89). See also *ibid* at 101 (II.5) & 224-26 (III.82-84).
5. Dig 1.4.1 (Ulpian) [*Quod principi placuit legis habet vigorem*].
6. Niccolo Machiavelli, "Discourses on the First Ten Books of Titus Livius" in Christian Edward Detmold, ed, *Historical, Political, & Diplomatic Writings of Niccolo Machiavelli* (Houghton, Mifflin & Co, 1891) at 121 (Book I.9).
7. "By a Good Law, I mean not a Just Law: for no Law can be Unjust. The Law is made by the Sovereign Power, and all that is done by such Power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust." Thomas Hobbes, *Hobbes's Leviathan* (Clarendon Press, 1929) at 268 (ch XXX [182]) [Hobbes, *Leviathan*].
8. See Saint Augustine, *The City of God (De Civitate Dei) in Two Volumes: Volume One,* translated by John Healey, ed by RVG Tasker (JM Dent & Sons, 1957) at 115 (Book IV.4).
9. See David B Hart, "Christ and Nothing" (2003) 2003:136 First Things 47. I am grateful to Kristine Kalanges for directing me to this article, and for her thoughts on it.

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questions, but the desire for detachment from them is itself intelligible only when directed to some practical end: the desire for clarity of thought as a necessary prelude to practical deliberation, for example, or for an understanding of the defects inherent in a pre-legal culture which the establishment of legal ways of proceeding is intended to cure.[10] As Hart himself observes, the practical deliberations of those subject to the law may vary as to their end: for some it lies in the enjoyment of benefits that are worth the cost of conformity; for others, "disinterested interest" in others besides themselves, or an unreflective continuity with historical forms; and yet others, respect for the law or its substantive ideals.[11] To these can be added, perhaps, the perspective of the wielder of sovereign power who wishes to know how far they can go in utilizing law for the purposes of self-interest or repression.

Hart refers to these viewpoints as 'internal'; but it would be more accurate to refer to them as the sustaining attitudes necessary for law. For they are not mere 'feelings' of compulsion or restriction but (in Hart's words) "critical [and] reflective,"[12] that is to say, rationally considered, conclusions in the absence of which rule through law would become impossible.[13] But as sustaining attitudes, the various viewpoints mentioned by Hart (and other viewpoints, such as that of the criminal) are not all equal either in significance or importance. On the one hand, the more-or-less prudential attitudes of unenthusiastic conformity, indifference, or, at the extreme, deliberate manipulation of law for private gain, represent a watering-down of the rational commitments which underpin the law's authority in a state.[14] On the other hand, too reverential an attitude, unreflective in its own turn in the worship of law-*as*-law, may just as easily subvert the purposes of law in securing a good life for the community on just terms.

I propose to take up the invitation implicit within these observations—to reflect upon the character of law—from a specific angle. One might naturally be inclined to adopt the perspective arising out of the work of Lon Fuller, that of the importance of the 'rule of law, not men'. That concept reaches back at least as far as Plato, but it is Fuller who connects it to the idea of legality itself: the idea that the function of law is to "rescue [the human being] from the blind play of chance and to put him safely on the road to purposeful and creative activity."[15] This concept has been developed into a thesis concerning the establishment of zones of autonomy in which the citizens of the community enjoy a degree of independence from their fellow citizens, as well as from their governments.[16]

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10. See HLA Hart, *The Concept of Law*, 3rd ed (Oxford University Press, 2012) at 18-24, 35-42, 51-71, 80-91.
11. *Ibid* at 196, 197, 203. See also *ibid* at 232.
12. *Ibid* at 57.
13. See *ibid* at 196.
14. See John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford University Press, 2011) at 13-16.
15. Lon L Fuller, *The Morality of Law*, 2nd ed (Yale University Press, 1969) at 9.
16. See in particular NE Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007) at chs 1 & 3. See more recently NE Simmonds, "The Bondwoman's Son and the Beautiful Soul" (2013) 58:2 Am J Juris 111 [Simmonds, "The Bondwoman's Son"].

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The resulting idea adds substance to Fuller's claim to have identified an 'internal morality of law', as distinct from its 'external' or substantive morality. Important though this dimension of legality is, I wish in the present essay to consider the importance of a different and, in some ways, more important aspect of law: that of the law's distinction between those questions (of practical reason) that properly belong to the state to decide and impose on its citizens, and those questions (moral questions) that properly pertain only to citizens as individuals. Failure to mark this distinction encourages tyranny and provides the potential to degrade a community's sense of morality. At the same time, unless we institutionalize our moral values and practices, such values are apt to unravel or disappear altogether.

I. The General Shape of the Problem

Any attempt to analyze the purpose of law in human communities must encounter the idea of justice, both its presence in systems of law, and its absence, perhaps from those very same systems of law. We might thus reflect upon the law's embodiment of standards of justice that permeate its role as a bastion of public order. But in so doing, we are evoking two distinct ideas of justice between which it is difficult cleanly to differentiate: between the justice that is an aspect of the social peace and good life of the community, the *temporalis tranquillitas civitas*, the agglomeration of temporal human goods which it is the purpose of law to cultivate and maintain;[17] and the justice of which Augustine speaks, that is, the objective measure of human acts and laws, the transcendent harmony and right fellowship [*consociatio*] which is the truth of this temporal order and the object of its struggles.[18] The temptation to regard this duality as an intra-legal phenomenon is surely a strong one, favoured in some moods by Fuller himself,[19] but also by Ronald Dworkin[20] and others. The image of the law purifying itself through its own concepts, doctrines, and practices, is one that engenders trust in legal institutions, suggesting that the values of such institutions will (taken as a suitable whole) never stray too far from the values of the right-thinking citizen.[21] This invites a number of questions, the first of which is: Which values/components of the just community are properly the sphere of legal institutions, and which are properly a matter for individual reflection? We should not regard this question as suggesting individual reflection is a matter of radically subjective reasoning (that is, as denoting an absence of genuine moral standards that apply to all). Individual reflection is itself a search for the truth of one's moral situation.

17. See St Thomas Aquinas, *Summa Theologiae: Editio Leonina* (*Leonine Commission, 1906*) at I-II.98.1c [Aquinas, *ST*] [all quotations translated by author]. The same idea plays a vital role in the thought of Hobbes.
18. See Aquinas, *ST* II-II.25.5c; Eric Voegelin, *Order and History* (*Volume 2*): *The World of the Polis* (University of Missouri Press, 2000) at 68.
19. See Lon L Fuller, "Lecture III" in *The Law in Quest of Itself* (Beacon Press, 1966) 97.
20. See Ronald Dworkin, *Law's Empire* (Fontana, 1986).
21. On this trustfulness, see Sylvie Delacroix, *Habitual Ethics?* (Hart, 2022) at ch 4.II, ch 5.I.B, ch 6.I.

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What is the central feature of law or legal systems that is lost when their cultural achievements are systematically dismantled in furtherance of tyranny or sheer immorality? My suggestion, as I have said, is this: they erode the very distinction between that dimension of morality which is legally commanded because it is necessary to the common good, and that dimension of morality that is properly left to individual decision. Again, the distinction I am proposing is not that (for example) certain prohibitions of the criminal law (such as theft or rape) express demands of morality common to all people, whereas certain other, extra-legal values, apply only to some. It is that there are intrinsic limits to what law can justly pursue as ends: when we say that law is 'the administration of justice', we are referring to justice in the first of the two senses mentioned above, the *temporalis tranquillitas civitas*. Other matters are properly left to individual judgment. An example: the law demands honesty in interpersonal dealings to the extent that (a) deliberate acts of misleading in relation to valuable transactions are criminally punishable, (b) certain omissions made to descriptions of products in contract law are actionable, and (c) use is made of equitable instruments. To this extent, law requires honesty, but it is far from demanding complete or perfect honesty. One can see this in the role played by silence in the law of misrepresentation: complete candour is not required.[22] Nor is honesty more generally required in social interpersonal dealings. Thus whilst honesty about one's qualifications is necessary in contracts of employment, at least to the extent that employers may seek private law remedies in damages and voiding of the contract, a person can generally lie to all family and friends within the latitude established by equity. A's romantic partner, B, can lie to A about a minor illness in order to establish an alibi for B's romantic tryst with C. D might invent a story as to his/her whereabouts yesterday in order to cover for the fact that he/she simply forgot about a meeting and thus stood up E, a friend. In the natural law tradition, this distinction is expressed in the following way: that the law requires you to be a good *citizen*, but does not require you to be a good *person*. (Liberal theories have their own version of this distinction, e.g., that we are bound by Covenant to others in a commonwealth, but not in our thoughts and actions outside that covenant.)[23]

This distinction, between what one owes as a citizen and what one must do in order to be a good person, is to be found in different forms in the work of many philosophers. It appears most clearly in that of Aquinas, who observes that it is not part of the law's function to repress all vices,[24] nor to command the acts of all the virtues:[25]

> The purpose of human law is to guide the human being to virtue, not suddenly, but only gradually. Thus it does not place upon the multitude of imperfect human beings the burdens of those who are already virtuous, so that they should abstain

22. See *SPS Groundworks & Building Ltd v Mahil*, [2022] EWCH 371 (QB).
23. See especially Thomas Hobbes, *De Cive or The Citizen*, ed by Sterling P Lamprecht (Appleton Century Crofts, 1949) at 43-44 (ch III.3).
24. See Aquinas, *ST, supra* note 17 at I-II.96.2c.
25. See *ibid* at I-II.96.3, ad 1.

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> from all evil. Otherwise, imperfect persons, being unable to live up to precepts of that kind, would burst forth into yet greater evils.[26]

Aquinas further observes that a person may do a virtuous act for one of two reasons: (i) because it is prescribed by the law, or (ii) because it is virtuous, specifically: because it is what a virtuous person would do.[27] This way of stating the question is essentially Aristotelian, in a way that is important to the analysis of this essay. For when Aristotle poses the question 'How do people deliberate?', he states the opinion (i) that, if what we wish for is what is really and genuinely *good*, then it is impossible to wish for what is evil (which is false); but (ii) if what we wish for is merely apparently good, then the object pursued is not an object of wishing, i.e., a *good*, by nature.[28] In line with his usual method, Aristotle draws truth from both sides of the conundrum, finally arguing that if we wish to understand what is good, and genuinely—practically—wish for the good, then we must follow the example of the virtuous person.[29] This may strike some readers as unsatisfactory, for was it not the object of virtue that Aristotle's discussion was intended to define? But this sense of dissatisfaction is quickly dispelled by the realization that it is (is it not?) relatively easy to determine that a view belongs within a spectrum of values that are, confidently, good: the avoidance of harming the innocent; the avoidance of negligence, fraud, violence; the practice of kindness, generosity, magnanimity; acts of charity (love); and fidelity, honesty, valour. There is no need to add to this list, for what is important is that such forms of action are identifiable as *good* without any further doubt, except perhaps on the part of an absolute immoralist such as Plato's Callicles. Aristotle famously refines these notions—or regards them as refinable—by the doctrine of the mean, wherein he distinguishes between the 'real mean' (what a virtue objectively requires by the fully virtuous person) and the 'mean for oneself' (what a virtue requires of a person given the natural level of valour, etc., within that person, such that what requires a low level of valour in the naturally valorous person in a given situation, would require a heroic or even unattainable level of valour in one who is naturally cowardly).[30] And yet the coward should not follow the example of other cowards, nor the foolhardy, but the truly valorous person. The idea that one should follow the example of the virtuous person is, therefore not empty.

These reflections are important for the present essay because I suggest that the defining feature of the abuse of law, its descent into darkness and incivility, is the intrusion of law into areas of personal morality to which it does not belong. The thesis is a strong one, for it regards, for example, theocratic states upheld by 'morality police' (e.g., in Wahhabist versions of *sharia*) as instances of law that are not merely repressive but uncivil. One of the most terrifying features of

26. *Ibid* at I-II.96.3c.
27. See *ibid* at I-II.96.3 ad 2.
28. See Aristotle, *Nicomachean Ethics* at III.4.1113a15-27.
29. See St Thomas Aquinas, *Commentary on Aristotle's* Nicomachean Ethics at III.10.494.
30. See generally Aristotle, *Nicomachean Ethics*, *supra* note 28 at Book II.

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Hobbes's vision of law in *Leviathan* is its assertion of a monopoly of interpretation over moral matters, and its compulsion of action (*in foro externo*) even if those who disagree with the sovereign are able to do so in private (*in foro interno*).[31] For such disagreement becomes more unlikely the more that the state cracks down upon forms of behaviour that express such disagreement. Similarly, the Stalinist and Nazi tyrannies were characterized not by repression alone, but by the extension of legal regulation into every area of private life: an official morality which sought to remake individuals in the light of party ideology, or otherwise, send them to their deaths. One must not only *act* a certain way, but *be* a certain way. Nigel Simmonds rightly discusses the propensity for repressive regimes to operate at least partially outside of law: to mete out punishments and executions where no positive law has been broken, or where the judicial process has not taken place.[32] But much worse (as an aspect of repressive regimes) is the use of law and legal institutions for starkly ideological ends. When the law encroaches upon the domain of personal morality—the area mapped out by the virtues—it exceeds its natural authority. For the law is strictly concerned with only one virtue: the virtue of justice.

Some clarification is necessary. Aristotle is clear that the law is the administration of justice and not of, for example, moderation. But he argues that beyond the particular kind of justice which consists in giving to another person what is due to them, there lies the field of general (or what he calls 'legal') justice, which ranges over the other virtues insofar as they pertain to one's relations to others. Thus it is generally not the business of the law to enjoin citizens to courageous acts: stoicism or courage in the face of serious illness is undoubtedly good for a person in that position, but its failure does not per se take what is due from others. But in times of national emergency, when the state must conscript its citizens to defend the realm, justice (action for the sake of a good that is common, and hence pertaining to others) may require courage from each person, the avoidance of desertion in the face of enemy fire, commitment to stand with one's comrades on the front line, and so on. But, to reiterate, the law is only concerned with virtues other than justice insofar as they become matters for justice, that is, for the common good. This might suggest that the realm of private morality is one of perfectionism. There is no doubt some truth to this: it is of course part of the very idea of virtue that a person, by constant practice, tends toward perfection, the full sharing of the virtue in question. Yet one must take care with this image not to suggest that the law is concerned with virtue up to some threshold and beyond which one aims at perfection in virtue. Any such image must be resisted. For the present claim is that the law must not encroach on the realm of private morality *as a domain of practical reason*, irrespective of whether a person attains the virtues *at all*. For a person may become an inveterate liar, adulterer, or miser without in any way breaking the law. The law's concern is the common good; it is not

31. See e.g. Hobbes, *Leviathan*, *supra* note 7 at 110-23 (ch XV).
32. See NE Simmonds, "Law as a Moral Idea" (2005) 55:1 UTLJ 61. See also "Preface to Part Three: III" in Hannah Arendt, *The Origins of Totalitarianism* (Penguin, 1967) xxxvi-xxxix.

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concerned with shaping the kind of person one comes to be. This is not the preserve of natural law theories, but can be found in some of the central texts of liberalism, for example in Mill's memorable words:

> No argument, we may suppose, can now be needed, against permitting a legislature or an executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear. . . . and, speaking generally, it is not, in constitutional countries, to be apprehended, that the government, whether completely responsible to the people or not, will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public.[33]

A warning is appropriate here: the foregoing is not an endorsement of a liberal harm principle according to which the purpose of law is only to prevent individuals from using violence upon each other, their moral formation being a matter of indifference to the state; nor that the state must remain agnostic about values that are controversial or contentious. For it is a human good to be educated in ethics, and to develop as a moral person: for (as Aristotle says) the good person is a truly happy person, whereas the bad achieve only measures of happiness;[34] and it is the function of law to enforce virtue in the hope that it will become a permanent disposition in those subject to its rule.[35] The state rightly requires young people to receive an education in a range of subjects, not only for the purposes of acquiring gainful employment, but also for their wellbeing and development.[36] Education in morals is distinct from indoctrination (and so proper for the state to impose) in that the purpose of the former, unlike the latter, is to enhance personal autonomy, choice, and practical wisdom in every person so that they become, in Saint Paul's memorable phrase, "a law to themselves."[37] For a degree of moral education is required, beyond the basics of the criminal law and law of tort, if those basics are to be widely pursued: if one only knows that theft is an act for which one will be punished, one is less likely to abide by it than if one understands its point as an integral part of a good and reasonable life. Such an education discloses not only that such acts lead to unwanted consequences, but that they are not good or valuable things to do in terms of one's own moral formation. The precise boundary between legitimate state intervention in personal lives and the stirrings of oppression is notoriously hard to draw. But the Catholic Church's articulation and extensive exploration of the doctrine of 'subsidiarity'[38] supplies important guidance on the limits of the state's role: the primary sources of moral education are

33. John Stuart Mill, *On Liberty*, ed by Alburey Castell (Appleton Century Crofts, 1947) at 15-16 (ch II).
34. See Aristotle, *Nicomachean Ethics*, *supra* note 28 at I.5.1095b15-30.
35. See *ibid* at II.1.1103b4-5.
36. In societies without a developed state authority, education of the young by elders and the family still takes place.
37. Romans 2:14.
38. See e.g. Pius XI, *Quadragesimo Anno* (1931) at § 79, online: *Vatican Pius XI Encyclicals* www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html. On the educative function of legal rules, see Thomas Pink, "Law and the Normativity of Obligation" (2014) 5:1 Jurisprudence 1.

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the family, civic associations, churches, and local communities; by nourishing and upholding these institutions, the state 'universalizes', within that political community, the values that they foster. But it should be emphasized that this is a subsidiary function: freedom is eroded where governmental authorities slide into a 'confessional state'.[39]

Suárez, adopting a thesis of Aristotle, observes that the laws must be adapted to the community, not the community to the laws.[40] Though he does not treat the question squarely, Suárez closely follows Aquinas in arguing that the natural law consists in what is necessary for righteousness.[41] One of the first things to happen under a tyranny is to use the law to shape citizens into righteous men and women *according to the ideal of righteousness envisaged by the tyrant*. Thus, Aquinas states that although the positive law is orientated toward making citizens good, it frequently makes citizens good not absolutely speaking, but only with regard to this or that polity.[42] Later natural law thinkers put the point more directly in the language of rights. Hobbes, like Vasquez and Grotius before him, acknowledges that there are certain baselines beyond which a state cannot go in pursuit of its aims: for example, a citizen always has a right of self defense against evil acts (including of the state), and even (for Hobbes) the right to escape from custody when one is legitimately held by the state power. Grotius draws a distinction between an *aptitudo*, something one deserves as a matter of justice, and a *facultas*, a "moral quality" or right in the strict sense, defining in relation to each citizen, when taken together, what is juridically *theirs*, *suum*.[43] This domain corresponds to that which each person needs in order to remain alive, whatever kind of political society they live in (and Grotius concedes that there are many different, more or less morally appealing, forms of human community). Thus there are certain baselines which no state can lawfully trespass: to do so would be *ultra vires*, beyond the lawful power of the state. For while no state has the lawful power to enact injustice, to trespass upon such baselines is seriously unjust—not to be tolerated, as milder injustices are, as incidents of a legal order which achieves a good measure of justice and commitment to the common good.

This, then, is the main thesis of the essay: that all forms of tyranny unjustly expand the sphere of law into the area of private morality in an attempt to engineer the citizen after the image held by the state government. In doing so, they bring about a departure from the concept of law at least equal in significance to that of breaches of the rule of law in Fuller's sense. For he admits that the various desiderata of the rule of law are never fully realized in any legal order (e.g., in the common law, the law is sometimes expressed or 'promulgated' at the point of

39. For these purposes one can distinguish the Emperor Constantine's decriminalisation of Christian practice and persecution from his subsequent unification of church and state, effectively rendering apostasy a capital crime.
40. See Francisco Suárez, *De Legibus* I.VII.2, citing Aristotle, *Politics* at IV.1.1289a.
41. See Suárez, *supra* note 40 at II.VII.1.
42. See Aquinas, *ST*, *supra* note 17 at I-II.92.1c. For general thoughts on tyranny, see Finnis, *supra* note 14 at 272.
43. Hugo Grotius, *On the Law of War and Peace* (*De jure belli ac pacis*), I.1.iv-v [translated by author].

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application, contravening the principle that laws should be published, prospective, applied as found in previous legal instruments, etc.). We tolerate such breaches of rule through law because of the benefits of legal rule. No system of law fully instantiates the idea of rule through law, but they remain more or less benign. Contrast this with the case in which a state government passes laws which encroach upon the sphere of private morality. Even a relatively minor infringement of private moral life is far more troubling than a deficit in any of Fuller's desiderata. For it signals an intent not only to stifle moral debate, but to remake citizens in terms of the state's preferred ideology: of what it is to *be*, and not merely to *do*.

Part of what it means 'to be'—that is, part of what constitutes one as oneself—is one's radical freedom to decide upon one's own values: not only moral values but also, for example, aesthetic judgments, political views, and the meaning of romantic attachments. One facet of tyranny is the suppression of individual moral judgment. What does this entail? I discuss this in the next section.

II. The Darkness and the Light

In a recent article, Nigel Simmonds writes that "Hart's legal positivism displaces the authority of institutions and emphasizes the independence of personal moral judgment."[44] He adds that "[w]hile such a position has an obvious appeal, we should not fail to acknowledge the extent to which values are articulated within established practices."[45] The foregoing discussion should serve to establish that a concern with independence of moral judgment need not stem from an incipient legal positivism. It may just as well emerge from the natural law theorist's concern to distinguish legal obligation from personal sin, and to avoid the awful conditions in which the law becomes the primary instrument for punishing sinful actions, supplanting both the individual's conscience and the sacred authority of the Church. Simmonds goes on to say:

> Such assertions of individual moral integrity in the face of power and conformity have their appeal for all of us. But they also have their problems, trading as they often do upon a rather flat and unqualified distinction between conventional opinion and transcendent moral truth, or worldly wisdom and the inner light.[46]

Simmonds may well be correct to say that such perspectives 'often' turn upon a distinction of this kind. But they do not have to. As argued above, the realm of personal morality is an individual's search for moral truth or correct practical reason. The search for truth (of any kind) certainly supposes a highly dense matrix of social practices, not least practices of language. It supposes the existence of certain cultural possibilities: the citizen of a modern liberal polity is confronted by choices that are simply not available to a medieval peasant, for example. And, as

44. Simmonds, "The Bondwoman's Son", *supra* note 16 at 111.
45. *Ibid*.
46. *Ibid* at 112.

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both Aristotle and Aquinas observe, it supposes shared moral understandings, and only in the light of broadly correct understandings is it possible to reason correctly about practical matters.[47] Consequently it is generally only in an enlightened society that the lucky ones are able to perceive moral truths concerning their situation. (One may speak of the Church as a living tradition in this sense, nourished by the sacraments and informed by the Apostolic succession.) At the same time, individual moral judgment is not entirely a matter of immersion in social practices and institutions, for the reason that these are never fully just. Even those communities nurtured by the water and the Spirit are often far from just, may be informed by imperfect ideologies, or subject to unfortunate political tendencies. There is absolutely no guarantee that social institutions inhabit sound moral values. Such values are always, in an important sense, transcendent.

Simmonds is worried that a point of view which places considerable importance on private moral judgment rests upon "a moral metaphysic wherein abstractly conceived principles confront neutrally described facts."[48] There is no doubt that certain forms of moral philosophy hold just that. But neither Aristotle nor Aquinas hold such a view. This can be illustrated as follows: think of the classical question (announced in Plato's *Euthyphro*) whether, for example, we admire a painting because it is beautiful, or whether it is beautiful because we admire it. We might expect a natural law theorist in the Aristotelian-Thomist tradition to argue that we admire the painting because it is objectively beautiful. This is what constitutes the judgment that it is practically reasonable to gaze at the painting for extended periods (perhaps all one's life), as opposed to the insanity or unreason of staring at a scrap of paper with a single pen-stroke inscribed upon it. But this is not quite Aquinas's position. For he regards the root of all human action as a kind of love, and we cannot be moved by the painting without that love kindling our powers of reason and aesthetic sensibility. Thus the question of what is truly good, and derivatively of what to do, depends upon a two-way process between objects of human thought and action on the one hand, and rational desire on the other. There are no 'neutrally described facts'.

As Simmonds goes on to say, "In evil times, the decay of customs and habits can diminish and eventually extinguish the spirit, for our most intimate sentiments can evolve and be sustained only in the context of structured social intercourse."[49] This is surely correct, but the decay brought about by the twilight of social institutions is most pronounced when it is deliberate: when existing forms of moral reflection are directly targeted and laid waste by laws that seek to remake the citizen by invading the terrain of individual choice. Simmonds rightly states that the rule of law is "only possible to the extent that the concept [of law] is a living part of our shared moral fabric. We transform ourselves, and our moral landscape, through the structures of thought and practice that we collectively

47. See e.g. Aquinas, *ST*, *supra* note 17 at I-II.94.4c (reporting Caesar's belief that the Germanic tribes commonly held theft to be morally permissible).
48. Simmonds, "The Bondwoman's Son", *supra* note 16 at 111.
49. *Ibid* at 112 [footnote omitted].

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create, and the idea of law is a part of that complex process of self-transformation."[50] But he offers no more than a throwaway remark concerning the danger that law poses for those very aspects of *self*-transformation:

> Admittedly, there may be dark times when such a posture may be inappropriate, not so much because of a lack of tolerably good men and women, but because those good men and women are locked into a situation where great heroism, and great clarity of understanding, would be required to avoid becoming enmeshed in evil. Cf. Hegel … "It is only in times when the world of actuality is hollow, spiritless, and unstable, that an individual may be allowed to take refuge from actuality in his inner life." Hegel should have added that, in truly evil times, one can be so dehumanized as to be robbed of any possibility of an inner life that could provide a satisfactory refuge.[51]

This passage acknowledges the terrible impact that perverse customs, values, and practices may have on the possibility of inner life, that is, the formulation, understanding, and search for practical truths. But those same customs, values, and practices, that same common life, can be deliberately poisoned by law, when a legal system is taken over by a dangerous ideologue. Law is in fact the most powerful instrument for the dismantling of ways of life that enjoy(ed) freedom of practical judgment, notwithstanding the protections afforded by the rule of law. Of course, tyrants often have good reason to disregard such protections alongside the use of law as an instrument of individual re-programming. Thus in 'truly evil times', not only the internal morality of law, but also the law's external morality, will be progressively eroded in the light of this or that ideology.[52] Simmonds is alive to the problem: "Clearly, one should not always act with unreflective conformity, nor should one allow the law, or conventional moral views, conclusively to determine one's own moral judgment."[53] But how can we—or citizens living under a repressive regime—prevent the law from determining individual judgment if it engages morality police, closes down access to educational institutions, and reinforces values that already exist insofar as they serve a conservative political agenda? How do we keep alive the flame of civility and truth, without it being extinguished? Suppose we adopt the following approach: we seek to comprehend the true nature of our situation; that we hold on to the understanding that we are *not* property even when the state treats us as property?

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50. *Ibid* at 116.

51. *Ibid* at 117, n 15, citing GWF Hegel, *Elements of the Philosophy of Right*, translated by HB Nisbet, ed by Allen W Wood (Cambridge University Press, 1991) at 166-67 (§138). Elsewhere, Simmonds states that "liberals came to understand that, while any tolerable political community must rest upon shared values, those public values are to some extent separable from many of the concerns which centrally inform the private lives of citizens." NE Simmonds, "Constitutional Rights, Civility and Artifice" (2019) 78:1 Cambridge LJ 175 at 176.

52. See Sean Coyle, *Natural Law and Modern Society* (Oxford University Press, 2023) II.1. See also Simmonds, "Constitutional Rights, Civility and Artifice", *supra* note 51. I distance myself from Simmonds's concept of civility, and particularly the nature of the supposed contrast between the ancient and modern modes of law and life.

53. Simmonds, "The Bondwoman's Son", *supra* note 16 at 124.

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Toward the end of his argument, Simmonds raises the question of how the free person compares to the slave, even if the former possesses fewer actual liberties than the latter: he concludes that the quality the slave lacks, but the free person has, is "freedom as independence," that is, legal rights behind which one can order one's life as one chooses, a series of spaces in which a person enjoys independence from the will of another.[54] Again, Simmonds connects this insight to the question of the rule of law, but it can just as well be deployed against efforts to smother individual opinion using the weight of the law. The two are in fact connected: as Simmonds elsewhere demonstrates, a ruthlessly repressive tyrant who wishes to create obedience to a given set of norms is best served by departing from the rule of law and acting directly against citizens whom it supposes are hostile to its aims.[55] For the regime's actual aims are to engender obedience to an *ideology*, not merely a set of norms: the set of norms will always fall short of the ideology because they have to be created, through highly technical procedures, according to recognized legal language and existing conceptual structures, rendered in such a way that they are justiciable, i.e., comprise offences, duties, and punishments, all of which must be well defined enough to apply. Yet governance through such norms is obviously essential to the aims of even the most repressive and arbitrary ruler. Furthermore, there is a high degree of convergence over the criteria of the rule of law, whereas there is no such easy consensus on questions of conventional morality and its limits. Consequently, a community is likely to identify the law as a source of suppression only in retrospect, once it has already begun the slow march down into darkness and incivility. Nevertheless, close attention to the law's encroachment upon areas of personal morality may alert us to abuses of legal procedure well before any breaches are detected in the desiderata of legality.

Now, it might be thought that the area I am designating as the 'area of personal morality' is hopelessly imprecise, or even fundamentally contested. One person's view that individual taxation is an encroachment upon their basic liberties clashes with another's view that such taxation for certain groups ought to be raised. Simmonds argues that morality should be regarded as a winding road, "inherited from our forebears," and not a straight line devised by the philosopher.[56] Inhabited and somewhat mundane forms such as friendship, courage, fidelity, etc., tell us more than the philosopher's principles. But it must be remembered that the winding road, the past, contains error as well as truth; folly as well as wisdom; left as well as right; and so on: snakes as well as ladders. One must learn to take a stand on such issues and be ready to admit that the historically most successful ideas are not necessarily those that command our acceptance. In just the same way, there are visions of friendship that are superior to others; forms of courage that are genuine and some that are not. We need not emulate Plato's philosopher in the *Republic* to understand that our workaday forms answer to core

54. *Ibid*.
55. See Simmonds, *Law as a Moral Idea*, *supra* note 16.
56. Simmonds, "The Bondwoman's Son", *supra* note 16 at 126 [footnote omitted].

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moral precepts, such as that one must never intentionally harm the innocent, a precept which has not always been honoured in times of war, and thereby might otherwise be regarded as a licit means of attack. Experience may teach many lessons; but if we follow only the winding road, we will miss the existence of what Aquinas terms the 'primary precepts' of morality: precepts which hold true for everyone everywhere and without exception.[57] As august a body as the Catholic Church regards Aquinas as an authority for moral teaching, a 'straight line'.[58] It is up to each individual to inform their own conscience, but this very freedom is not boundless (nor do I interpret Simmonds as saying it is).

Permit me a short digression: Simmonds suggests that a familiar way of dealing with the problem is to treat philosophical inquiry into morality as the attempt to theorize moral "intuitions," identified by inward reflection which the philosopher then hopes and assumes to be to a significant degree shared, but that this assumption is "not much discussed."[59] But in fact the assumption *is* "much discussed" by one tradition in legal philosophy: natural law theory. Here is not the place for even an outline of what natural law theorists discuss in relation to the above. Let this be sufficient: one's conscience is fundamentally free yet requires to be educated through received wisdom both of one's teachers and the Church, by Divine law (God's law as directly revealed to us), and above all, one's own practical reason which shares with others in God's eternal law, in the words of the Psalmist, "The light of Thy countenance, O Lord, is signed upon us."[60]

To resume: one's moral conscience is structured according to basic moral precepts (to avoid dishonesty, violence, incivility, etc.) which, even if not shared universally, are sufficiently prevalent as to indicate a rough area of agreement in 'personal morality', as well as thereby indicating a range of individual moral freedom in which it is up to each person to decide for themselves the values they believe in: the soldier as well as the pacifist, the entrepreneur, and the monk. The law's invasion of these spaces involves both the erosion of that moral freedom and the corruption, distortion, or redefinition of the universally shared values. This is especially the case if the community, both professionals and lay people, regard law as essentially value-neutral, that is, an instrument that can serve the cause of repression just as well as it can serve the good.[61] We must, as Simmonds says, be wary of the "ever-present possibility of darkness,"[62] for "all of the values

57. See e.g. Aquinas, *ST*, *supra* note 17 at I-II.94.2c.
58. See Leo XIII, *Aeterni Patris* (1879) online: *Vatican Leo XIII Encyclicals* www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris.html.
59. Simmonds, "The Bondwoman's Son", *supra* note 16 at 127.
60. Aquinas, *ST*, *supra* note 17 at I-II.91.2c, citing Psalm 4:7. Aquinas clarifies that the Psalmist implies "that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light" (*ibid*).
61. I choose my words carefully here, for I do not think that 'evil' designates a cause as such (though of course a cause may be evil); yet I do think 'good' and 'goodness' are projects one can coherently pursue, for they demand multifarious considerations and devolve into more basic goods, the institutionalization of which it is proper to ponder.
62. Simmonds, "The Bondwoman's Son", *supra* note 16 at 132.

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and practices that jointly compose the good society are open to evisceration and corruption."[63] But we must add: they can become so precisely through *law*.

III. No Way Out?

I mentioned above that the only way to keep alive the flames of civility in the dark times is to remember one's former agency, and to comprehend the truth of one's present situation. The first of these is less difficult than the second. Nazi propaganda likened those of Jewish descent to 'pigs' and 'rats'.[64] Despite the cramped, impoverished, and squalid nature of the ghettos, the fundamental difference between human beings and animals would not perceptively narrow. The character of human agency as such does not change, and is not perceived to change. In regard to the second, however, the state's disinformation can deprive the despised group (or the whole community) of the basic truth of their predicament, and this can compromise the sense of one's own agency. At every stage, from the concentration into the ghettos and the looting and destruction of Jewish property, to the boarding of the trains bound for the death camps, Jewish men and women convinced themselves that their compliance would ensure that the Nazi state would leave them alone.[65] To be deprived of knowledge of one's situation in this way is to be completely disorientated and robbed of a sense of one's agency: one does not know how to act, or what the consequences of action might be. The power of disinformation concerning Jews in Nazi Germany was such as to destroy the moral compass of many ordinary Germans as well, by constant bombardment with false values, fear of reprisals in the face of dissent, and the manipulation of pre-existing prejudices.

Notice how these features of oppression, often and correctly connected to depredations of the rule of law (in Fuller's sense), also produce detriments to the human condition that are not limited to such depredations. They pertain to the positive law: not its stripping away of protected rights, but its invasion of the realm of the personal and the private; its indoctrination of its own people. This feature of legal oppression is not confined to examples drawn from Germany in World War II and the theocratic polities of the Middle-East. It is equally applicable to, for example, the suppression and persecution of Catholics in England in the years after Elizabeth I took the throne. In such cases, one cannot retreat to the monasteries with the treasures of civilization, for the oppressors will come after them.[66] Nor can one try to organize a rebellion against the tyrant if, in taking that action, there is little hope of success, for the tyrant will

63. *Ibid* at 133.
64. See e.g. *The Eternal Jew*, 1940 (Deutsche Filmherstellungs- und Verwertungs- GmbH (DFG)). Note that this is a Nazi propaganda film; I recommend against watching it.
65. See e.g. Thomas Keneally, *Schindler's Ark* (Hodder & Stoughton, 1982).
66. This is inspired by Robert P George, "Morality and Neo-Gnosticism—Robert P. George at the Napa Institute 2016 Summer Conference" (30 September 2016), online (blog): www.robertpgeorge.com/multimedia/morality-and-neo-gnosticism/. I am not in sympathy with the rather polarizing tone of some of George's remarks.

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only 'increase in anger.'[67] Furthermore, as Simmonds elsewhere observes, repressive regimes can deploy measures in order to block recognition as between the regime's opponents within its borders.[68] The argument thus far has been supposing that a regime's implementation of a repressive legal order can be achieved without substantially damaging the community's rule of law. But for the reasons already stated, a repressive regime intent upon instilling in people some specific and comprehensive set of values, has no good reason to worry about departing from the standards which comprise the rule of law. This is the case with the example just discussed: of reducing the opportunity for dissidents to galvanize support for their cause. In fact the two go hand in hand: one can effectively reprogram citizens' moral values if the law's *invasion* of personal choice is accompanied by the *suppression* of choice. I am not claiming that there is no meaningful distinction to be drawn between the law's external morality and its internal morality: the present essay depends upon such a distinction. I am suggesting that each aspect of law—when compromised—dismantles civility in different ways.

What does it say about law that it can be used as an instrument of individual reprogramming but also (in doing so) be said to breach the rule of law? Perhaps we are dealing with differentiated senses of law that possess a merely semantic uniformity. Are legal doctrines and instruments which lay waste to the freedom of practical reason actually laws *at all*, or merely laws in a reduced and compromised sense? Natural law theorists are famed for asking the question, 'is unjust law properly law?'[69] But their answer is both subtle and complex. I do not propose to consider this here, but wish to observe that just as gross practices of injustice that occur through manipulations of the law's external morality are essentially *ultra vires*, so also serious depletion of the law's internal morality resembles more a government of will than a government of law. Fuller himself argued that a *complete* failure in any or all of his desiderata of legality would indicate a system of arbitrary rule, not law. But elsewhere he seems to recognize that judgments of legality lie on a sliding scale, and it would surely stand to reason that a low level of compliance with most or all of the desiderata would denote a system of arbitrary—and frequently military—rule.[70]

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67. See Thomas Aquinas, *De Regno* (I.IV.29) [Aquinas, *De Regno*] [translated by author].

68. See Simmonds, *supra* note 32 at 77. See also Aquinas: "Thus there can be no safety. Everything is uncertain when there is a departure from justice. Nobody will be able firmly to state: This thing is such and such, when it depends upon the will of another, not to say upon his caprice." Aquinas, *De Regno*, *supra* note 67 at I.IV.26.

69. Notice that Aquinas (and to my knowledge any other natural law theorist) does not add the words 'at all' (*omnia*) to the statement '*lex iniusta non est lex*' ('an unjust law is not a law') which seems to have been picked up by Hart from the Dominican Fathers translation of Aquinas's *Summa Theologiae*. *Cf* Hart, *supra* note 10 at ch IX; Aquinas, *ST supra* note 17 at I-II.95.2c. Revealing are Aquinas's further words: "A tyrannical law, through not being in accord with reason, is not a law *absolutely speaking*, but instead a perversion of law; and yet in so far as it has something of the nature of a law, it aims at the citizens' being good." *Ibid* at I-II.92.1 ad 4 [emphasis added].

70. "The 'totalitarian state' is a state in appearance only, and the movement no longer truly identifies itself even with the needs of the people." Arendt, *supra* note 32 at 266.

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The rule of law itself provides no easy way back from periods of tyranny. But the flame of civility—the treasures of civilization, I would like to suggest—lie in the law itself, no matter how compromised it has become. For civility consists of nothing other than organized rule, informed by reason, extending to every aspect of social life: *civilized* law and order. This thread, the possibility of civilized governance through law, is always there. As Aquinas observes, even evil and repressive regimes, perverted ideologies, resemble civilized rule through law in that they seek to make citizens good, not absolutely speaking, but relative to this or that regime's perverted ends.[71] Law is never completely evil: the very idea of law lies within a spectrum of good ends which inform our understanding of its point and purpose. Nothing other than law is capable of restoring reasonable and civil rule: it is not a mere instrument but the jewel in the crown of civilization. It is, in particular, the fruit of three thousand years of philosophizing begun with Ancient Greek poetry and drama.[72] Only through law itself can a community reinstate the essential limitations of the law's interference in private moral life. The law, in other words, is self-transcending: by no other means can we explain how the catastrophes of repression and evil contain within them the seeds of recovery. For as Simmonds observes, the nature of law is such that it is not reducible to a set of legislated diktats: "once enacted, the rules have an existence that is independent of that legislative will," and "rules are general requirements that can be complied with in a diversity of different ways."[73]

It is therefore perhaps impossible for a ruling power completely to obliterate the directivity of legal order. In thinking about the law's directiveness, it is tempting to restrict our focus only to the rational capacity of human persons to internalize and understand—and to conform their actions to—imposed general standards which, as Hart observed, they are capable of applying to themselves "without *further* direction."[74] But the dispositions and attitudes which sustain legal order are (to employ Hart's term) more 'widely diffused' than that image suggests. For in addition to the citizen's 'vertical' relationship to the state, much of law is concerned with so-called 'horizontal' relationships (though often in fact hierarchical) *between* citizens. Ordinary citizens are participants in legal order's directivity in the way they hold and administer their property, regard themselves as entitled by law to certain rights or freedoms, invoke their conception of such rights in dealings with others, shape their transactions according to prescribed forms, criticize or condemn infringements of what they understand to be the legal rules or duties then operative, and so on. Hart's term for these aspects of law is:

71. See Aquinas, *ST*, *supra* note 17 at I-II.92.1 ad 4.

72. I speak here of the idea of law as such, which is universally available even outside the boundaries of Euro-American legal systems.

73. Simmonds, "The Bondwoman's Son", *supra* note 16 at 123. One might contrast this situation with that of 'law' under the Third Reich, in which Hitler's very words were law, and anything contrary to the spirit of those words was de facto criminal: a complete erosion of spheres of autonomy and discretion.

74. Hart, *supra* note 10 at 124 [emphasis added].

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"the minimum content of Natural Law."[75] But his account of the matter is somewhat ambiguous, for it hovers between a conception of what is *presupposed* in "any [viable] social organization"[76] (even therefore of a pre-legal society) and what is "*in fact* . . . a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control."[77] Thus although even such elementary forms of social life may be withheld from some, perhaps many, persons in a state, the legal common goods (of clarity, stability, etc.) are never fully destroyed, but instead perverted; and the political goods of internal peace, order, etc., retain their identity as ends to be pursued, however narrowed or dearly bought. (It is always from such embers that processes of recovery are begun.)

These postures toward the law I call 'sustaining attitudes': attitudes which provide stability and directivity to law. I now turn to examine these attitudes, and their importance, more specifically.

IV. Sustaining Attitudes

In common with Augustine, the scholastic philosophers and jurists of the medieval period regarded evil as a privation of good; and hence by considering unjust law, we are considering a perversion or disordering of those sustaining attitudes which are necessary for law. The subject of sustaining attitudes was one already known to the classical writers on justice: Aristotle's *Politics*, for example, begins with the statement that "every *polis* is a kind of partnership . . . constituted with a view to some good"[78] and the human being himself a *homo politicus*:[79] one whose mature life, as the *Nicomachean Ethics* had explained, is not that of the youth or immature-minded person who is "without self-restraint," but one who in possessing and loving virtue is "a law to himself."[80] The idea is revisited by Aquinas, who can draw not only upon the Aristotelian texts but also the authority of Romans 2:14: "When Gentiles, not having the Law, still through their own innate sense behave as the Law commands, then, even though they have no Law, they are a law for themselves."[81] In consequence, he affirms again and again that human law should not attempt to repress all evils, lest it prove too burdensome and become a source of contempt.[82] It is proper for the lawgiver to

75. *Ibid* at 202 (i.e., the need for allocation of resources, a system of mutual forbearances, legal penalties, etc).
76. *Ibid* at 193. Compare: "indispensable features of municipal law" (*ibid* at 199).
77. *Ibid* at 193 [emphasis added]. Thus, Finnis writes of "a 'minimum content' of positive law, a content [Hart] called natural law." John Finnis, "Natural Law Theory: Its Past and Its Present" (2012) 57:1 Am J Juris 81 at 98.
78. Aristotle, *Politics*, *supra* note 40 at I.1.1252a1.
79. See *ibid* at I.1.1253a3; Aristotle, *Nicomachean Ethics*, *supra* note 28 at I.7.1097b.
80. *Ibid* at I.3.1095a, IV.8.1128a.
81. Romans 2:14.
82. See e.g. Aquinas, *ST, supra* note 17 at I-II.77.1 ad 1; I-II.93.3 ad 3; I-II.96.2c & ad2; I-II.96.3 ad 3.

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respect and reinforce the customary modes of life of the people, which are works of reason made manifest.[83]

In more modern times, it fell to Hart to reaffirm these truths against the narrow positivism of Austin: a positivism which had attempted to displace the importance of the citizen's deliberative assent to the law with the realities and/or threats of physical compulsion (for example, by arrest, or detention) as the ultimate guarantee of obedience. Yet as Austin himself seems to realize, the organization of government as a whole cannot be founded upon structures of physical constraint, but relies upon corporate action, a capacity for which is acquired only through the adoption of rules which prescribe modes and forms of common action: rules that are adopted and indeed *habitually obeyed* because and insofar as they are deemed to be right, or necessary, or both.[84] Thus, Austin is led back to the very notion from which his jurisprudence originally conceives an escape: the consideration of that which is right or just.[85]

Hart's own discussion has the merit of distinguishing sustaining attitudes which arise *ex officio* and those present in the general population as private citizens. He rightly maintains that a system of commanded stipulations, concerned only with prescribing limits to forms of human action, cannot represent a central case of rule through law. For (on the one hand) the complex forms and functions performed by legal rules, which Hart brings together under the term 'secondary rules', manifest an intention on the part of 'the state' (dispersed throughout all levels of officialdom) of curing what is defective in precisely such an order of 'primary' (duty-conferring, action-constraining) rules. And what are these defects, except defects of justice? Uncertainty over the interpretation and scope of the rules eliminates certainty as to the ground and extent of obligations and their corresponding rights, i.e., as to the method of determining what is *due* or *owed* as a matter of justice to each person. The absence of a mechanism for adapting rules to changing circumstances is a question of the law's (in)ability to respond in a timely and proportionate way to the human goods that it is the presumptive purpose of law to secure.[86] Enforcement through diffuse social pressure rather than a centralized bureaucracy, judiciary, and police force, results in a severe inconsistency and instability in the administration of justice (the application of law in particular cases), and thus a lack of that genuine independence of each person from the will of others which law secures.

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83. *Ibid* at I-II.96.2c; I-II.97.3 ad 3.

84. See John Austin, "Lecture IV" in *Lectures in Jurisprudence or The Philosophy of Positive Law—Vol 1*, 5th ed by Robert Campbell (John Murray, 1885) 140.

85. For a more incisive discussion (than Hart's) of Austin's shortcomings, see Lon L Fuller, "American Legal Philosophy at Mid-century" (1954) 6:4 J Leg Educ 457 at 460 [Fuller, "American Legal Philosophy"]. See also Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630 at 639.

86. That is, by failing to respond adequately to opportunities for enhancing and enriching those goods, or for breadth and depth of pursuit, as demanded by reasonable custodianship; or by offering inadequate or untimely responses to emergencies or long-foreseen threats to those goods, or remaining indifferent to depredations of them.

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This natural orientation of law away from any repressive view of human beings as mere clay to be moulded and 'acted upon' is evident if we turn (on the other hand) to the perspective of the private citizen. In the classical schema of the purposes of government, we accordingly find, alongside restraint of the wicked and the defence of the people, a third idea: the provision of assistance to good citizens in the fulfillment of their (good) intentions.[87] Each of these purposes directly fosters the common good of the community which is the special responsibility of the state government.[88] However, the discharge of this responsibility requires a collective effort, in which each person subject to the law takes steps to coordinate their acts with those of their fellow citizens by reference to the law's demands, so that to a significant extent the governed coordinate their acts amongst themselves.[89] Hence, as Aquinas observes, the fate of the common good of the community depends upon the imposition of laws upon rational beings who are allowed scope to exercise their reason: the law must (as Hart recognized)[90] be *internalized* by those subject to it, so that, as Aquinas says, "through legal pronouncement a kind of inward principle of action is impressed on people."[91] This quality of internalization is central to the very character of law, to the idea of subjecting people to *directive* principles.[92] Law is therefore distinguished as a form of social order precisely in its treatment of citizens as capable of responding to direction through the exercise of reason and agency. (What is Hart celebrating, when he celebrates the emergence of private powers through the operation of secondary rules of change, but respect for human agency?)[93]

The operation of these directive principles must keep in mind the (presumptive) intention of the lawmaker in fostering the common good. Thus obedience to the law should not stem from motives of fear (of punishment) or hope (of reward), and should not, by clinging to the letter of the law, lead us "to interpret in a harsh

87. See e.g. Aquinas, *ST, supra* note 17 at I-II.98.6. See also Aquinas's *Commentary on the Sentences of Peter Lombard* at II.44.1.3. ['*Est enim praelatio, ad dirigendum subditos in his quae agenda sunt*']. One need not, of course, jump to Hart's ridiculous and false conclusion that all natural law writers "assert that human beings are equally devoted to and united in their conception of aims . . . other than that of survival." Hart, *supra* note 2 at 623. See also Finnis, *supra* note 14 at 29-30.

88. See Aquinas, *ST, supra* note 17 at II-II.50.1. See also Aquinas: "it is the function of every lawmaker to determine by law those matters without which observation of the law is impossible" Thomas Aquinas, *Summa Contra Gentiles* at III.121.4 [translated by author].

89. See Aquinas, *ST*, *supra* note 17 at I-II.107.1. See also John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998) at chs II.4, III.4, VII.4, VIII.1-2 [Finnis, *Aquinas*].

90. The very existence of law *as law* "depends upon a widely diffused capacity to recognise particular acts, things, and circumstances as instances of the general classifications which the law makes." Hart, *supra* note 10 at 124

91. Aquinas, *ST*, *supra* note 17 at I-II.93.5.

92. See *ibid*. See also *ibid* at I-II.1.2; *ibid* at I-II.90.3 ad 1.

93. "[P]ossession of these legal powers" constitutes a "huge and distinctive amenity" without which the citizen becomes "a mere duty bearer." Hart, *supra* note 10 at 41. Also of relevance are Fuller's remarks in private correspondence that the very idea of being 'judged' loses all intelligibility in the absence of respect for human agency, where human persons are reduced to objects for manipulation. See Letter from Lon L Fuller to Dorothy Emmet (7 October 1966) in The Papers of Lon L Fuller, archived at Boston, Harvard Law School Library (Box 2, Folder 16).

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or oppressive manner those norms that have been beneficially [*salubriter*] enacted for the welfare of persons."[94] To exercise one's practical reason in this way is to understand that one's self-interests must sometimes give way to the common good of the community, and thus the law will, without injustice, impede or prevent one's efforts to secure otherwise perfectly legitimate elements of a flourishing life (for example, by collecting revenue through taxation, remuneration, damages, etc., which might otherwise have been spent in pursuit of, say, one's private appreciation of art). The widespread relativism of recent times has rendered more problematic the idea of a 'common good'. But even a little thought shows that neither it nor the conditions of 'pluralism' in modern societies can altogether obscure the timeless core values upon which all civilized societies depend. In thinking about them, it is convenient to distinguish between a society's legal common good and its political common good.

A society's legal common good (its *temporalis tranquillitas civitas*) consists in the observance by the state (again at all levels of officialdom) of those reasonable norms required to avoid the defects of justice characteristic of pre-legal methods of social ordering. But the range of legal forms and functions required to overcome these defects ('desiderata' in Lon Fuller's term, literally that which is needed or wanted),[95] both extend beyond the demands considered by Hart (which thus form less than a minimum for a working legal order), and involve the *integration* of those functions with one another to form a complex directive ideal ('the rule of law').[96] For the achievement of clarity (to take one example) demands not only a set of propositions that are consistent with one another, free of contradiction, authoritatively worded, and possible to understand, but also prospective (courts cannot liberally invent new interpretations), capable of being reconciled when similar cases come before different courts at different times (and thus stable), and applied in a way that is responsive toward and faithful to the principles which inform those reconciliations. But (for another example) the law can only adapt to circumstances if the rules (a) are announced, (b) have that same clarity, (c) remain free from contradiction, (d) are prospective in aim, (e) demand what is possible, (f) integrate with existing structures of rules without catastrophic disruption, (g) achieve sufficient precision *as* standards, and (h) enter into the actual deliberations of courts and tribunals. And diffusion of enforcement, perhaps the prime defect of a pre-legal order, is brought about when those deliberations lie no longer in the hands of a trained judiciary with the legal knowledge to apply the rules as intended, there being no set of officials to hold interpretations together so as to safeguard from contradiction, unclarity,

94. Aquinas, *ST, supra* note 17 at I-II.96.6.

95. See Fuller, *supra* note 15 at ch II. The desiderata are sometimes referred to as 'principles' (of legality), but this does not capture the specific sense in which a legal order is *wanting*/lacking if such conditions are substantially unfulfilled. They were noted by Aquinas, who gets them from Isidore of Seville in Books V & IX of the *Etymologiae* [c.600].

96. An ideal, but also a duty: see e.g. John Finnis, "Law as Idea, Ideal and Duty" (2010) 1:2 Jurisprudence 245 at 247.

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avoidance of novelty (i.e., retroactivity)—indeed the fundamental lack of *promulgation* of precedents, doctrines, decisions, etc.[97]

A society's political common good (on the contrary) embodies those *further* requirements, beyond the operational situation created by the maintenance of the legal common good, which must be met in order to fulfill even the most basic demands of justice: the peace and temporal tranquillity of the state, a reasonable level of prosperity and opportunity for all persons, adequate remuneration for labour undertaken, the enforcement of bargains, recompense for and restraint of criminality and negligent acts, and so forth.[98] But the distinction between these two forms of common good (i.e., between a concern with the form of legal administration and substantive demands of justice) is not a firm one; the characteristic qualities of law (its promulgation, clarity, etc.) reflect underpinning sustaining attitudes which are intrinsically directive and purposive. Directivity is diametrically opposed to sheer imposition: see Parts II and III, above. Thus the needs of self-constitution inevitably suggest areas of life that need to be brought under the governance of law (an additional desideratum that we might term 'comprehensiveness').[99] The greater the domain of the law's regulation of life, the more complete is its purpose of rescuing humanity "from the blind play of chance."[100] Law, at least in modern systems, extends to every area of life in this way, but not equally in relation to all of its aspects. Some areas of life (such as creating agreements) typically enjoy greater intervention than others (such as travel). Nor does the law seek comprehensiveness in the sense of encroaching upon the private realm of moral value. Instead, the political common good marks out the competence of the ruling authority to a high degree, though not completely: left and right wing governments may have different opinions about the extent of political intervention in private life, for example. Sometimes we feel overly burdened by state bureaucracy and law, but this is distinguishable from more extreme versions of such mundane politics, which signal a descent into

97. For Aquinas's treatment of the Isidore/Fuller desiderata, see e.g. Aquinas, *ST, supra* note 17 at I-II.90.4: "promulgation is necessary for the law to obtain its force"; *ibid* at I-II.95.3: fidelity in interpretation (proportionate determination of the law's ordained end(s) (*determinetur secundum proportionem ad finem*); *ibid* at I-II.96.1: appropriateness to human nature (*possibilis secundum naturam*), unclarity of expression an evil that must be excised; *ibid* at I-II.97.2: the law must take account of many situations (prospectively) over time, and lack of stability over time is prejudicial to the common good. See also *ibid* at I-II.97.4 on impartiality/congruence; *ibid* at I-II.105.1 on consistency/coherence; *ibid* at II-II.120.1 on impartiality/congruence. An example of 'secret laws' can be found in the bureaucracy of Cecil Rhodes: see Arendt, *supra* note 32 at 280.

98. See e.g. Hugo Grotius, *Prolegomena to the Law of War and Peace* §§8 & 44; see also Aquinas, *De Regno*, *supra* note 67 at I.3.17-20; Aquinas, *ST*, *supra* note 17 at I-II.96.3; I-II.98.1; *ibid* at II-II.77.4: the public good consists in peace [*temporalis tranquillitas civitas*], justice [*iustum*] and prosperity [*affluentia rerum*].

99. See Finnis, *supra* note 14 at 271. Indeed, one could also add, beyond the need for consistency between legal rules, the requirement of consistency in aim, a desideratum pertaining to the integral coherence of bodies of law, such as contract and tort: see Dworkin, *supra* note 20 at chs 6 & 7.

100. Fuller, *supra* note 15 at 9.

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oppression through law: the descent from socialism into communism for example.

There are clearly many ways in which a ruling authority may act against the common good in either of these senses, and from a variety of motives some of which may well be innocent (as when the executive organs of government enact a law which they believe will be beneficial but is in reality harmful in its effects), or well-intentioned (for instance, in causing a foreseen injustice in order to bring about a greater good, or avoid a greater harm the occurrence of which is otherwise probable or guaranteed). Of course, some derelictions will be less well-intentioned: the enactments of a fanatic bent upon imposed conformity to ideology, or the tyrant whose purpose is absolute power and control, or the corrupt ruler out for personal or partisan interest. In these cases, the very sustaining attitudes necessary for law are undermined: for the mode of rule which violates or otherwise operates outside the desiderata variously identified by Isidore, Aquinas, and Fuller (which are conclusions from those sustaining attitudes) is no longer orientated to establishing *directive* principles (promulgated, intelligible, consistent, etc.), but to the control and repression of self-chosen, self-directed forms of activity.

Finally, observe that the sustaining attitudes that make law possible are diminished the greater the incursion of law into the realm of private morality. Yet they never entirely disappear. Oppressed people do not wish for anarchy as an alternative to repression: that would be no better. Instead they keep alive the sense of what law *should be* and, in favourable circumstances, *can be*. An evil legal order is not *sui generis* but a *perversion* of law; it does not entirely blot out the idea of just law. As Hart famously admitted, ordinary social arrangements (including law) are not "those of a suicide club," to which he ought to have added: nor a mass murder organization.[101] Law instead tends to foster or favour minimum basic goods which have as their object human survival.[102] Such basic goods, derivable from 'truisms' regarding the human condition, are themselves held in place by sustaining attitudes, and are themselves never entirely erased in the dark times. The example of the Nazi tyranny displays what happens when a regime denies the existence of our common humanity and replaces it with a Darwinian existential struggle between different 'races'. Despite recruiting pseudo-science and military force to its aims, it cannot altogether deny the truth of the human being, even as it hollows out the sustaining attitudes by which social institutions foster and promote the flourishing of this being.

V. Legal Order, Justice, and Human Good

The contingencies which surround the law's relationship to justice and injustice are highly complex. But having examined what becomes of law in the face of

101. Hart, *supra* note 10 at 192.
102. See *ibid* at ch IX.2

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tyranny, what is to be said of legal order's proper orientation to justice? Saint Augustine was painfully aware of the vices which spring from too ready an identification of the imperfect justice of human arrangements with the perfect justice to which all human beings are called; but to this it should be added that too ready a willingness to denigrate human arrangements as doomed to imperfection can lead to a worse a set of vices, in which injustices are tolerated as inevitable, and aspirations are lowered. In this and the next section, I offer some exploratory consideration of the problem.

Very many of the benefits and necessities that Aristotle identifies as lying behind the existence of the *polis* can only be secured through law.[103] But the legal common good of a community (the existence of promulgated laws which are clear, stable over time, etc.) is not a mere formal requirement of justice, discontinuous with substantive proposals for the ordered pursuit of human goods. For the substantive ambitions that lie behind attributions of right—and by extension duty, prohibition, immunity, liberty, etc.—cannot be accurately and equivalently formulated in other terms without involving or mixing together motives and considerations that legal forms carefully distinguish. If we think of one of the key substantive ends of justice as bringing about the situation in which every person has what is due to them (i.e., has what is theirs by right, *suum ius*), then other, radically non-juridical measures for reward or distribution will amount to an interruption of this situation, bringing into play other (narrower) principles as a means of bringing goods and harms into some kind of balance.[104] Legal order, then, is not simply a vehicle for the realization of social goods, *but is part of the good that is being pursued*.

Law is the keeper of the flame of civility and common life; but insofar as our common life has the character of a moral enterprise, orientated to good and worthwhile modes of living and to shared commitments such as fairness and justice, we might wonder what this reveals about those values. That there are human goods which depend upon the institutional realities of human law, and moral demands which only those institutional realities can satisfy, may seem to indicate that human knowledge of morality is, like the law itself, a collaborative engagement between many human minds; that the identification and striving for human good(s) and of the proper ends of human living is something disclosed to us only through the collective effort of pursuing them. In Lon Fuller's eyes, this dependency on institutional realities is indicative of the necessary form of moral thinking itself: a kind of *phronesis* (the wisdom of practical deliberation) by which a focused exploration of the means available to a society to pursue its aims will simultaneously clarify the ends being pursued.[105] Indeed it may reveal that certain

103. See Aristotle, *Politics*, *supra* note 40 at I.1-2.1252a-b. See also Finnis, *supra* note 14 at 3; but *cf* NE Simmonds, "The Nature and Virtue of Law" (2010) 1:2 Jurisprudence 277 at 279-80.
104. See also Finnis, *Aquinas*, *supra* note 89 at 332n, (b), read in conjunction with the conclusivity of rights: see Finnis, *supra* note 14 at 198, 210-11.
105. See Fuller, "American Legal Philosophy", *supra* note 85.

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ends, regarded in the abstract as desirable, are in reality non-viable for lack of a social form which does not involve disproportionate costs of one kind or another.

But the tradition of practical philosophy inaugurated by Plato and Aristotle, and built upon by the scholastics, did not shy away from the assertion of timeless moral demands nor hesitate to identify precepts for the guidance of practical reason (*phronesis*, *prudentia*), and thus of human goods, that are independent of any particular institutional context: a fact evident from both the *Republic*'s and the *Politics*'s discussions of the *best* polity. To the Christian jurists and philosophers of the early Church, Plato's insistence that the reality of eternal forms [*eidos*] is far greater and more fundamental than the apparent realities of the worldly sphere bore testimony to the openness of even pagan minds to the distinction between the relative justice of the earthly city and the true justice of God's law. But Saint Augustine's account of the process through which the rightful demands of the *lex aeterna*, obscured above all by human pride [*superbia*], become a kind of inward principle [*internus aeternus*] in human beings requires a clear concept of the natural law, the *lex naturalis*, which Aquinas later formulates as the "participation of the eternal law in the rational creature."[106] The most fundamental of these natural law precepts can never be entirely obliterated from the human heart,[107] for they have their basis in a principle as foundational to practical judgment as is the principle of non-contradiction to the speculative intellect: that 'good' is that which should be pursued as an end, and that which is contrary to good is to be avoided.[108]

Now the practical intellect's identification of these goods, and its capacity of distinguishing authentic human goods from false goods, is not tied to any specific institutional form. This much is evident not only from Aquinas's own treatment of the subject, which regards as legitimate and compatible with human flourishing all but the rule of a tyrant, but also from the ethical teachings of the Gospels, which offer a template for a good life in society that does not imply any particular political doctrine or mode of government. But neither do any of these ethical teachings derive from broad assumptions concerning a shared 'human nature'. On the contrary, Aquinas insists that:

> The nature of a thing is principally the form from which it derives its species; and the human being derives his species from his rational soul. Consequently, whatever is contrary to the order of reason is contrary to the nature of the human being precisely *as* a human being; and whatever is in accord with reason is in accord with the

106. Aquinas, *ST*, *supra* note 17 at I-II.91.2c. Augustine approaches the concept on numerous occasions (particularly in the *Confessiones*), but the closest he comes to a recognition of natural law, to my knowledge, is in the *De Diversis Quaestionibus LXXXIII*, 53.2, where he refers to "a natural law [*naturalis lex*] figuratively inscribed upon the soul of a rational creature." Saint Augustine, *De Diversis Questionibus,* 53.2.

107. See Aquinas, *ST*, *supra* note 17 at I-II.94.6c & ad1; *ibid* at I-II.94.4c; *ibid* at I-II.77.2c. I say 'not *entirely* obliterated': the body of Aquinas's reply to Quaestio 94.6 distinguishes between knowledge of the most fundamental precepts *as* general principles, which is completely resistant to abolition, and the knowledge of what those general precepts require in specific cases, which may become obscured by sin.

108. See *ibid* at I-II.94.2c.

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> nature of the human being as a human being ... Thus human virtue, by which the human being and his works are made good, is in accord with human nature exactly to the extent that it is in accord with reason; whereas vice is contrary to human nature exactly to the extent that it is contrary to the order of reason.[109]

Nevertheless, these same works of reason find their expression within a particular context of language and a shared history of reflecting upon such problems: certain truths of ethics that are objectively self-evident [*secundum se*] are self-evident *to us* only insofar as they are manifested in the workings of language and thought.[110] The notions of human good which lie at the basis of our practical deliberations are thus not culturally specific, except in their expression. This pursuit of human good has as part of its objective the rendering to each person what is reasonably due to them in justice. Hence a legal and thus *specific* institutional form will be needed for the purposes of moving persons toward a just sharing in those goods *from* the present reality of things in which injustices abound. For practical reason can carry through this project only if it is channelled (necessarily but not exclusively) through juridical forms. For example: *A* signs a contract with *B* for the supply of materials, but later discovers the materials are available more cheaply elsewhere (perhaps *B* is charging above the normal market rate). *A* therefore breaches the contract, refusing to accept *B*'s materials. The question of what is due in justice to each person cannot be clearly determined without recourse to rights (or at least prescribed remedies and procedures): the fact that *B* has a *right* to performance, or else to be restored to his original condition. Now if *B* is aware that *A* is facing bankruptcy, and there is a real risk that *A*'s dependants (family and employees) will suffer severe loss if *A* is sued over the contract, *B* might be moved to waive his right. This act of compassion is an act of moral goodness, but the employment of legal forms allows us to see that it comes at a cost: *B* does not get what he is owed.[111]

Obviously, the conclusions established by the operation of our present legal rights may, and indeed do, permit or even introduce forms of *injustice* into the community. (*B*'s exercise of compassion is explicable as rational on exactly this basis.) The rights that are due to us according to law may themselves stem from historical injustices, leading to the complex problem of determining when it is just to disturb present property rights which themselves embody some specific structural tilt. The 'kinds' of justice that are typically discussed in relation to such problems are better understood as the complex parts of a single inquiry, involving no categorical distinctions.[112] Thus efforts to reform an existing situation can be

109. *Ibid* at I-II.71.2c [emphasis added].

110. See *ibid* at I-II.94.2c. This is also the basis for Aquinas's remark that some self-evident [*per se nota*] propositions are self-evident only to the learned [*saepientibus*], and remain out of the grasp of the unlearned [*rudibus*].

111. I am grateful to Tobias Schaffner for discussion of this point.

112. Finnis makes the point in relation to the distinction between commutative and distributive justice, which he regards as simply a matter of "analytical convenience" and "an aid to orderly consideration of problems." Finnis, *supra* note 14 at 179. But the distinctions explored in the text are also sometimes *inconvenient*, and can operate in a way that clouds thinking (as Finnis later came to believe: see Finnis, *Aquinas*, *supra* note 89 at 188).

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understood as applications of 'corrective justice' in both a wider and a narrower sense than is used by Aristotle.[113] Aquinas's preferred term, 'commutative justice', designates those issues of (in)justice arising from the actions of one person to another (such as a contract or act of libel) as distinct from those arising from questions of distribution. But doubt over the true legitimacy of one's property rights reveals the ambition of *corrective* justice to be also (potentially) redistributive. Indeed, both commutative and distributive decisions might flow from ambitions of justice that are primarily restorative (as in the recovery of stolen property) or retributive (payment of a fine), for example.

Aquinas's term for the great majority of these efforts to refine laws so as to bring them into greater alignment with demands of justice is '*determinatio*'.[114] These *determinationes* are directed at the common good, understood (it will be recalled) as centrally involving personal self-constitution and the free (directive) cooperation of subjects amongst themselves. But the collaborative forms of action that are required in order to secure and advance the common good, and which cannot be wholly coerced, take place in the unjust and sin-soaked realities of the present, amid all the recalcitrance, lack of foresightedness, and confusions that citizens display.[115] Advance toward the common good therefore demands not only the clarification of what is justly owed to each person, but also the untwisting (through the working of the concerns of justice outlined above) of the inverted and/or corrupted situation which we have inherited. The final form of these collaborative enterprises (the patterns of right, duty, prohibition, permission, disability, etc.) is not known; and its present shape is unknown except as it is clarified by the current state of the law, as a highly systematic attempt to establish just relations between persons.

VI. The Fragility of the Legal Common Good

Lon Fuller's treatment of what I am calling the legal common good, the *temporalis tranquillitas civitas*, makes insufficiently clear the nature of the relationship of its desiderata to the end of justice. He laments the neglect shown in legal philosophy to "the morality that makes law possible," a subject often dismissed "with a few remarks about 'legal justice,' this conception of justice being equated with a purely formal requirement that like cases be given like treatment."[116] But the problem of equal treatment "is only one aspect of a much larger problem, that of clarifying the directions of human effort essential to maintain any system of law, even one whose ultimate objectives may be regarded as mistaken or evil."[117] Is Fuller saying that the problem of justice is simply one aspect of a larger

113. See Aristotle, *Nicomachean Ethics*, *supra* note 28 at V.1-4.1129a-1132b.
114. For a general discussion, see John Finnis, "Foundations of Practical Reason Revisited" (2005) 50:1 Am J Juris 109 at 111ff.
115. See Finnis, *supra* note 14 at 144-45.
116. Fuller, *supra* note 15 at 4.
117. *Ibid*.

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problem that demands to be understood in other ways, and involving other values? Or must this larger problem be understood as itself a problem of justice?

In all probability, Fuller intended to say that the problem of justice is not restricted to the operation of legal rules, not only because those rules may advance measures that are inimical to justice, but because they transcend the law by indicating a way of dealing with the broader problem of "clarifying the directions of human effort." No principles of justice seem likely to provide a solution to that problem, hence the most we can expect is the maintenance of a predicament in which our efforts often misfire in unexpected ways, and in which the resolution of certain aspects of the problem bring about the resurgence of others. But Fuller possibly also meant, by referring to a broader question of justice, to draw attention to the law's transcendence of law: for the problem of justice lately discussed is wider than 'legal justice', *and yet* is intimately connected with law, for justice is the law's virtue. When we refer to that wider conception of justice, we refer to potential transformations of our existing legal principles by reference to concepts, doctrines, and ideas *that can already be found, inchoately, in those existing standards*.

Though present in the thought of major figures in the liberal tradition, including Hobbes and Mill, this possibility is recognized by all of the major natural law theorists. It is recognized in Aquinas, who situates his 'treatise' on law within a broader treatment of ethics; it is implied in Grotius's distinction between a *facultas* (legal right in the strict sense, to which a specific duty is enjoined) and an *aptitudo* (a less choate moral right to which no specific duty is enjoined).[118] It is also present in Hobbes's admission that the radical right to self-preservation survives the 'contract' with sovereign authority, the latter's enactments requiring to be *scrutinized* (not *interpreted*) against the background of the needs of the common good.[119] Yet the law has not the character of a system of rules in any straightforward sense: even statutory rules are implicitly loci for legal *decisions*; their meaning, scope, and applicability are refined, sometimes altered, over time as a body of jurisprudence grows around them. Decisions at law are just that: judicial remarks *justify* the outcome of the case, and do not merely *explain* it. This feature of law (as, roughly, a body of reasons for decision rather than a system of highly crystallized rules which, in Hart's phrase, "claim [their] own instances") makes recovery from tyranny more difficult, for it is not a matter of repealing a set of rules.[120] That comes into it, of course, but the longer and more complex task is that of purging legal thought of a perverted ideology. Furthermore, it includes the effort to rid the legal system—including its lawyers—of complicit personnel. The effort of reconstruction of the legal order is made more difficult still by the fact that there is not one, but many, ways in which such a programme of work may be undertaken, many different bases upon

118. See Grotius, *supra* note 43 at I.1.IV-VII.
119. See Christopher R Hallenbrook, "Leviathan No More: The Right of Nature and the Limits of Sovereignty in Hobbes" (2016) 78:2 Rev Politics 177 at 192ff.
120. Hart, *supra* note 10 at 126.

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which a legal order may be founded. Even if there is general agreement upon the value or set of values on which the rehabilitated legal order should be established, ('justice', for example), such agreement is unlikely to extend to the precise characteristics of such values, or even where to draw the interface between law and politics. Even if such a proposal commanded universal acceptance, it would (as Saint Augustine predicted) include within it strains of evil, making any effort divisive, slow, and stumbling.

What, then, can be concluded from this? I suggest four things. (1) The project of dismantling the achievements of civility through repression begins with the use of law to invade the arena of personal moral judgment and to conform personal values to those of the legal authority. (2) The very idea of law, as the subjection of citizens to civil, stable, and reasonable rule, provides the key to restoration of a polity after periods of darkness and repression. For the restoration of the law, the law's grandeur must be restored; in order to restore its grandeur trust in the law must be recovered, and trust demands the restoration of faith in the law's ordering capabilities. (3) Law transcends law: the project of justice is one that reaches down into legal concepts and principles, and cannot be fully understood without reference to those concepts and principles. But (4) it is naive to assume that legal order can be reestablished overnight: the de-Nazification of the German legal system took more than twenty years, and in that time meted out ridiculously lenient sentences to major Nazi war criminals.[121]

The human capacity to invent new evils is in all probability without end. The causes which precipitate a community into times of darkness and tyranny may not always become clear except in retrospect, and (where they are foreseen) are not always preventible by the legal mechanisms in existence. In all likelihood, the treasures of civility are constantly in need of being built upon and renewed. The law is one of the central institutions through which such treasures can be safeguarded. But above all it should be remembered that, like all human achievements, it too remains always fragile and corruptible.

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121. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press, 1964) at 14-15.

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