THE MINIMUM CONTENT OF NATURAL LAW

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"*"There is an unavoidable necessity of a minimum necessity of a minimum natural law."* –François Gény[1]

1. A Problematic Case

In two previous essays, I have attempted to demonstrate that relatively strong logical bonds indeed exist between the notions of legality and morality within legal positivism.* But even if these attempts were wholly successful, we are still quite some distance from demonstrating logically necessary substantive connections. To this point, I believe I have succeeded in showing that moral principles and moral commitment are devices or concepts to which appeal must be made to generate replete accounts for a modern legal theory encompassing adjudication and obligation; and these amendments suggest important movements for a Hartian positivistic legal position. Indeed, they bring it within the general vision of Rudolf Stammler's modern natural law position of a formalized "natural law with variable content."[2] Still, no argument has yet been advanced to show that our moral principles or particular legal rules must have certain content. That is, there has been no argument tying more robust notions of justice to our understanding the character of law as traditional natural law positions would promote.

In this third essay, our argument will be extended to attempt deriving substantive minimum content for a Hartian positivistic legal theory [PLT] on the basis of H.L.A. Hart's having recognized a minimum content of natural law. It will be shown that the position which can be established consistent with his sketch of "simple truisms ... disclos[ing] the core of good sense in the doctrine of Natural Law"[3] yields a connection between legality and morality which challenges Hart's designating such minimum content merely contingent. That is, it is not the case that these so-called truisms are a matter of natural necessity alone, given the nature of man in the world today. Rather, they can be seen to comprise a species of logically necessary connections which defeat the PLT separation thesis [*viz.* that there is no necessary or conceptual connection between

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law and morality] on substantive grounds. In terms of Jules Coleman's 'positive positivism' position, argument will demonstrate that no positivistic 'separability thesis' can survive our analysis since every conceivable legal system must have not only a legally-binding-moral-principles clause embedded in the relevant rule[s] of recognition,[4] but a substantive-moral-principles clause as well.

Before considering the details of that argument, let's turn to the problems presented by a specific legal case and its judicial resolution in order to highlight points for the position to be sketched. The case reviewed below is the celebrated *Regina v. Dudley and Stephens*.

1.1. Regina v. Dudley and Stephens

On the Monday afternoon tide of 19 May 1884, the sailing yacht *Mignonette* set out from the village of Itchen Ferry, Hampshire, England bound for Sydney, New South Wales, Australia. On board were Thomas Riley Dudley (age 31, the captain), Edwin Stephens (36, mate), Edmund James Brooks (38, seaman), and Richard Thomas Parker (17, boy). The ship was reasonably well provisioned for the anticipated 15,000 mile/4 month journey, at the end of which lay delivery of the yacht to a successful Sydney lawyer and politician, John Henry Want, who commissioned the voyage; and the start of new lives in a new country for the men taking her Down Under. But as seems wont during such lengthy ocean voyages, tragedy struck. Forty-eight days into their journey, after enduring the blows of a heavy storm for many hours, the ship was swamped and began breaking up in the late afternoon of 5 July. Only with great effort were the men able to launch her lifeboat and gather a few survival items before the *Mignonette* speedily sank some 1600 miles northwest of the Cape of Good Hope.

They had no fresh water in the boat, and very little food. During the first three days they subsisted on two 1lb. tins of turnips. Days 4-12 found some nourishment in the blood and meat of a small turtle captured as it swam by the boat; but then followed eight days without any food whatsoever, the last five being also without any fresh rain water so that they had begun to drink their own urine to keep themselves from perishing of dehydration.

On 23 or 24 July, Dudley spoke of the need to draw lots in order that one of them might die to nourish and so save the others.[5] Brooks vigorously dissented. Stephens reluctantly agreed, though it was suggested that they let one more night pass before they take such drastic measures. Parker, wasted from drinking large amounts of sea water and nearly comatose, lay in the bottom of the boat. The next day, no sails in sight, Brooks

still refusing to participate, Stephens agreed with Dudley that they had waited long enough . . . and that Parker –already so near death and without wife or children to support– should die so that they might survive. Praying to God for forgiveness, Dudley used his knife at Parker's throat, killing the lad quickly. Drinking what blood they could catch, eating some internal organs and chewing on fatty flesh, all three men survived four or five more days. Then, on 29 July, the *Moctezuma*, a German sailing vessel returning to Hamburg from South America, spotted their boat and picked up the three castaways, putting them ashore at Falmouth, Cornwall on 6 September.[6]

In keeping with maritime custom, Dudley recounted the entire episode –from wreck to rescue– with perfect candor for Captain P.H. Simonsen (of the *Moctezuma*), to local maritime officials in Falmouth, and in his official deposition to the Board of Trade (the government office in charge of merchant shipping and licensing of crew). Though contrary to almost universal opinion favoring the men at that time, warrants were grudgingly issued for their arrest on the charge of murder. Of signal interest was the surprised reaction of the men when taken into custody. As Simpson takes great pains to establish in his rehearsal of the story

> All three were quite astonished at being arrested, Tom Dudley in particular. There is no reason to doubt that this astonishment was entirely genuine. . . .
>
> > [Quoting from a contemporary news item in the *Standard*:] The most remarkable feature, in some respects, of the whole case is the extraordinary candour of the three men when they were landed in an English port. Without, apparently, the slightest misgivings as to the manner in which their tale would be received, or the faintest sense of having done anything the law could punish, they told their story, in all its revolting detail, to the Collector of Customs at Falmouth, and afterwards embodied it in statutory declarations.
>
> Clearly some fundamental barrier of incomprehension existed between the captain and crew of the *Mignonette*, men of the sea; and Sergeant James Laverty, the local representative of the common law of England.[7]

The custom of the sea finally had been beached on the sands of landlubber homicide.

That the government of the day wished the men quickly tried and convicted as examples to the seafaring community is clear. The Home Office in particular was anxious that the law not be seen to countenance such behavior in this or any future case, whether by way of justification or excuse, and that the severest sentence possible be passed to stem the tide of public –especially seaport– sentiment rising in favor of the defendants. Though Sir William Harcourt, home secretary at that time, did pity the

men (and so later supported the exercise of sovereign clemency on their behalf), he was bent on their conviction and the passing of capital sentences for murder. That the courts shared the government's concern to the extent that various judicial officers contrived to put the men on show even while contravening established rules of jurisdiction and procedure is more controversial, though not without substantial evidence.[8] In the event, a special verdict having been elicited with regards to the acts and intentions of Dudley and Stephens[9] after trial by jury before Baron Huddleston in Exeter on 7 November 1884, an expanded five-judge Assize court[10] met in London on 4 December to consider the verdict, rehear counsels' arguments and decide the case. On 9 December, Lord Coleridge delivered the judgment of the court: Dudley and Stephens were pronounced guilty of "wilful murder" and sentenced to death. This sentence was then commuted by the Crown on 12 December to six months' imprisonment, not at hard labor.

1.2. Survival & law

Though several of the political and legal moves in the case are worthy of attention, they pass beyond the purview of this essay. Of primary significance for our examination of the case here is the court's distinct rejection of the defense of necessity, known in early doctrinal writings as *se defendendo*,[11] to justify or excuse Parker's life being taken for the sake of the others. The judges would, in fact, brook no argument from Arthur Collins, Q.C., in his defense of Dudley and Stephens that any notion of necessity could overcome the charge of murder. After dismissing various objections put by Collins for the prisoners, the Court noted

> The contention that [the killing] could be anything [but murder] was, to the minds of us all, both new and strange, and we stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy.[12]

Collins does cite several authorities in his attempt to establish the defense under multiple formulations. At times he speaks of the 'pressure of necessity' ... 'compulsion by necessity' ... 'inevitable necessity' ... 'unavoidable necessity' ... or even 'extreme necessity' while he relates, for example, the "case often put by casuists" and found in Bacon reckoning the struggles of two shipwrecked men for use of a single plank floating in the waters which can support only one of them –the conclusion being that necessity excuses either man for forcing the other away to drown.[13] Collins likewise makes reference to Hale's PLEAS OF THE CROWN wherein "the position asserted by the casuists, and sanctioned, as he says, by Grotius and Puffendorf [sic], that in a case of extreme necessity, either of hunger or clothing; 'theft is not theft, or at least not punishable as

theft, as some even of our own lawyers have asserted the same'."[14] Interestingly, he also cites the American decision in *Holmes*[15] for support of the proposition that necessity can excuse throwing overboard excess weight, people specially, to maintain a craft's stability for the sake of other survivors. Collins here seems to have relied only upon J.F. Stephen's brief of *Holmes* found in the latter's DIGEST, for he never quotes from the opinion itself. That reliance is unfortunate, for though Lord Coleridge would just as likely still have dismissed such an authority as unsatisfactory for an English court,[16] language gleaned from the *Holmes* opinion might have helped Collins refine his argument and perhaps prevail over the prejudices of the judges and disentangle the confusions joined to the issues involved.

The facts of that case concern an entirely different sort of marine disaster than the situation faced by Dudley and his crew. There, an American ship, the *William Brown*, went down after striking an iceberg some 250 miles southeast of Newfoundland on a winter's journey from Liverpool to Philadelphia. Of 82 people on board (17 crew and 65 emigrant passengers), only 51 could be accommodated in the two life boats, leaving 31 passengers on board to go down with the ship. Only 10 persons (captain, second mate, 7 crew and 1 passenger) could be reasonably fit into the smaller jolly-boat. The remainder (first mate, 8 seaman and 32 passengers) filled, indeed overloaded, the long-boat. There was no danger of starvation for either group; each boat was stocked with sufficient food and water for one week adrift (longer if properly rationed). And, being inside the busy northern sea lanes, there was good chance that they eventually would be picked up, though too long exposure to the severe cold could present a very real survival problem of hypothermia. But the long-boat, due to its excess lading, was in continual danger of being swamped from its riding so low in the water, or of striking one of the many blocks of ice in the waters and so sink as did the ship.

The following evening, during a violent rainstorm, the long-boat's mate exclaimed, "This [bailing] work won't do. Help me, God. Men, go to work." When the crew ignored this order, the mate repeated a short while later, "Men, you must go to work, or we shall all perish." He then directed the crew "not to part man and wife, and not to throw over any women." Seaman Holmes and others of the crew then proceeded to throw overboard 14 male passengers.[17] Less than twelve hours later, the weather having cleared early next morning, the remaining crew and passengers were spotted and picked up by a passing ship.[18]

In defense of Holmes' actions at trial, the law of necessity was passionately pleaded as full justification:

> Counsel say that lots are the law of the ocean. Lots, in cases of famine, where means of subsistence are wanting for all the crew, is what the history of maritime disaster records; but who has ever told of casting lots at midnight, in a sinking boat, in the midst of darkness, of rain, of terrour [sic], and of confusion? ... The crew either were in their ordinary and original state of subordination to their officers, or they were in a state of nature. If in the former state, they are excusable in law, for having obeyed the order of the mate, –an order twice imperatively given. ... But if the whole company were reduced to a state of nature, then the sailors were bound to no duty, not mutual, to the passengers. The contract of the shipping articles had become dissolved by an unforeseen and overwhelming necessity. The sailor was no longer a sailor, but a drowning man. ... We do not seek authorities for such doctrine. The instinct of these men's hearts is our authority, –the best authority. Whoever opposes it must be wrong, for he opposes human nature. ... The parties, sailor and passenger, were in a new state. All persons on board the vessel became equal. All became their own lawgivers; for artificial distinctions cease to prevail when men are reduced to the equality of nature. Every man on board had a right to make law with his own right hand, and the law which did prevail on that awful night having been the law of necessity, and the law of nature too, it is the law which will be upheld by this court, to the liberation of this prisoner.[19]

In response to this stirring appeal by defense counsel, the judge made the following significant concession in his charge to the jury:

> It is one thing to give a favourable interpretation to evidence in order to mitigate an offence. It is a different thing, when we are asked, not to extenuate, but to justify, the act. ... Where, indeed, a case does arise, embraced by this "law of necessity," the penal laws pass over such a case in silence; for law is made to meet but the ordinary exigencies of life. ... And I again state that when this great "law of necessity" does apply, and is not improperly exercised, the taking of life is devested [sic] of unlawfulness.[20]

What is most striking about this language is the picture drawn of a situation or set of circumstances wherein municipal positive laws of theft and homicide do not apply.[21] And that they do not have any force or effect does not turn on an evaluation that necessity somehow overrides them, or that necessity creates a unique exception which common law judges may read into their application. Instead, the laws are not deemed applicable because the existence of laws presumes common society and societal institutions for the laws' administration, a defeasible presumption which in such extreme cases may in fact be voided.[22] In the words of Justice Baldwin quoted above, "Where, indeed, a case does arise, embraced by this 'law of necessity,' the penal laws pass over such a case in silence; for law is made to meet but the ordinary exigencies of life." In brief, the ordinary circumstances of life that make possible the existence of society and of a society's legal system ... the circumstances of justice ... are lacking; and because they are lacking, law is not possible:

> Laws exist to regulate social arrangements in normal conditions, not in wholly abnormal conditions when society breaks down.
>
> [I]n desperate conditions, such as those confronting Dudley and Stephens, men are reduced by circumstances to a state in which it is incongruous to think of laws applying at all. They are in a [*scil.* Hobbesian] state of nature, where there are no legal rights, duties, or crimes.[23]

If this analysis rings true, exactly which conditions are lacking in *Dudley and Stephens*? Put somewhat differently, what conditions might be specified as possible and necessary to generate society and legal system?[24] What conditions constitute the circumstances of justice? It is to the examination of these queries we now turn.

2. The Circumstances of Justice

2.1. Hume's criteria

For David Hume, justice is an artificial virtue "which arises from the circumstances and necessities of mankind."[25] That is to say, the virtue of justice does not in any direct sense spring from the natural passions composing man's nature; rather, it arises with the artifice of conventions established to stabilize the possession of material objects (thus also generating the notion of property). This is the first step in stabilizing society itself and so permitting the many personal and public advantages which living in society confers. Since variant circumstances and necessities will have a differential impact on man's skills, ingenuity and opportunities as a crafter of practices, "the rules of equity or justice depend entirely on the particular state and condition in which men are placed, and owe their origin and existence to that utility, which results to the public from their strict and regular observance."[26] These states and conditions are both internal and external in nature: they, respectively, have regard to human nature –the natural passions and affections comprising our "natural temper"; and the conditions of the world around us –the natural supply of material goods available to meet our needs and desires along with environmental factors such as climate comprising our "outward circumstances."[27]

Our particular states-and-conditions/circumstances-and-necessities identified by Hume are systematically set out in neither the TREATISE nor the ENQUIRY. Thus, we are never presented with anything like a comprehensive list for our review, but must glean from those pages the various contingencies to which Hume wishes to draw our attention. This leads to some quite interesting, if also quite divergent, lists in contemporary literature.[28] Without meaning to become embroiled in that debate, figure IV-1 furnishes a tally of those states and conditions mentioned by Hume collated from both sources.

Internal conditions:

1. numberless wants and necessities [TREATISE, at 484]

2. natural ties between the sexes and between parents and offspring [TREATISE, at 486; ENQUIRY, at 185]

3. selfishness/limited generosity [TREATISE, at 486-7 & 494; ENQUIRY, at 185]

External conditions:

4. three inconveniences due to slender means for relieving necessities: a)individual force too small to execute considerable work; b)individual becomes jack-of-all-trades but master of none; and c)the least failure leads to ruin and misery [TREATISE, at 485]

5. insecurity of possessing material objects to meet wants and necessities [TREATISE, at 488 & 494; ENQUIRY, at 191]

6. moderate scarcity: neither too abundant nor too limited supply of material objects to meet wants and necessities [TREATISE, at 488 & 494; ENQUIRY, at 183-4 & 186]

Uncategorized condition:

7. rough equality in strength of mind and body between men [ENQUIRY, at 190: not an explicit condition, but eisegetically reasonable in context]

Figure 2-1: Hume's Conditions

Condition (1) is introduced by Hume to open section III.ii.2 of the TREATISE, showing man's state to be more miserable than that of other animals whose needs and capacities are better aligned, but the point never reappears in his argument. Likewise, condition (2) is noted as "the first and original principle of human society" in the TREATISE; yet, saving its invocation in both works as a standard instance of generosity in order to overcome the widely-received too-pessimistic picture of man being a wholly selfish brute, it also drops from view. Condition (4) makes a short-lived explicit appearance alongside condition (1) for the sake of exhibiting society as a remedy for each inconvenience. Although it could ostensibly serve, especially in the ENQUIRY, as implicit ground for the regular assertion that notions of property and justice serve utility, such reference is

murky at best. Condition (7) presents a bit of a problem, not only because it makes a single appearance in his later work, but because the textual fragment in which it is embedded requires a substantial gloss. In this portion of the ENQUIRY, Hume puts the case of a species of rational creatures living amongst men that are

> of such inferior strength, both of mind and body, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the effects of their resentment; ... Our intercourse with them could not be called society, which supposes a degree of equality; but absolute command on the one side, and servile obedience on the other.

We are hereby led to suppose that Hume's supposition of a rough equality in strength of mind and body between men does describe man in society. Just what that rough equality entails is nowhere explained. A typical modern gloss makes the following points: no individual is invulnerable in his person or possessions; no one's activities can dominate all others' plans; no one can securely supply his needs and desires without cooperative effort. Other extended interpolations read more like quotations from Hobbes' mid-seventeenth century LEVIATHAN:

> the difference between man, and man, is not so considerable .... For as to strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself. And as to the faculties of the mind ... I find yet a greater equality amongst men, than that of strength. For prudence, is but experience; which equal time, equally bestows on all men, in those things they equally apply themselves unto. ... From this equality of ability, ariseth equality of hope in the attaining of our ends.[29]

For all that, whatever echo of Hobbes' formulation might rightly be attributed to Hume's thinking one century later, he makes no further mention of the point in his derivation of the virtue of justice.

What Hume in fact consistently stresses is the conjunction of conditions (3), (5) and (6) as representative of our actual circumstances of justice:

> I have already observ'd, that justice takes its rise from human conventions; and that these are intended as a remedy to some inconveniences, which proceed from the concurrence of certain *qualities* of the human mind with the *situation* of external objects. The qualities of the mind are *selfishness* and *limited generosity*: And the situation of external objects is their *easy change*, join'd to their *scarcity* in comparison of the wants and desires of men [TREATISE, at 494 (original emphasis)].

> Here then is a proposition, which, I think, may be regarded as certain, *that*

> *'tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin* [TREATISE, at 495 (original emphasis)].

It is the peculiar matrix of these conditions which generates both the necessity for and possibility of cooperative efforts and the stabilization of society for personal and public good. Comparing this particular conjunction with other possible states of affairs, he goes on to conclude that a significant change in any one of these conditions renders the notion of justice useless. Whether the changes are for the good, as when one compares the present state of the world with the poets' golden age of Saturn –external objects available in such abundance that every want and desire can be fulfilled without depriving any other and/or the generosity of man is unlimited; or whether the changes be for the worse, as when one compares the present state with a fall into a pessimistic philosopher's state of nature –conditions wherein there is such scarcity of necessaries the majority can but perish and/or selfishness is complete; the result is the same: "any considerable alteration of temper and circumstances destroys equally justice and injustice" [TREATISE, at 496]. And again: "Reverse, in any considerable circumstance, the condition of men: Produce extreme abundance or extreme necessity: Implant in the human breast perfect moderation and humanity, or perfect rapaciousness and malice: By rendering justice totally *useless*, you thereby totally destroy its essence, and suspend its obligation upon mankind" [ENQUIRY, at 188 (original emphasis)].

This destruction of justice becomes the expected, indeed infallible, consequence upon altering our natural background conditions, again irrespective of the conditions being bettered or worsened: "Where mutual regards and forbearance serve no manner of purpose, they would never direct the conduct of any reasonable man" [ENQUIRY, at 191]. We would then also have to expect that no institutions of justice for fixing or guiding patterns of behavior could develop, there being no preliminary conventions arising out of man's attempts to stabilize society. And where there exists no social rule-governed activities, whether due to such activities being otiose or infeasible, there can be neither social rule-guided nor rule-created actions or obligations.[30] In short, there could be no legal system. Society would either be impossible to sustain, or would naturally take root without artifice props or glues.[31] Thus, Hume draws a picture of a set of contingent conditions which logically undergird the concepts and institutions of justice and law. Alter the former and you necessarily eliminate the latter.[32]

At this juncture, a scant holdover worry from the close of our first section may come to the fore. A concern may exist over linking notions of circumstances of *justice*, even in a restricted Humean sense, with the concepts of *law* and *legal system*. The connection may

be clear in Hume, but ought we follow him? More importantly for our project, may it not act as a hidden premise in subsequent argument when linking natural law notions of substantive justice to a Hartian legal theory? That concern is understandable, though I think misplaced. As to the former query, it is both fair and proper to follow Hume's usage without misgiving in this context. His naturalistic formulation of justice in terms of utility fits quite comfortably with the Hartian position heretofore developed. Furthermore, Stammler's doctrine of "natural law with variable content" can easily embrace Hume's explanation that "Tho' the rules of justice be *artificial*, they are not *arbitrary*. Nor is the expression improper to call them *Laws of Nature*; if by natural we understand what is common to any species" [TREATISE, at 484], without connoting more traditional substantive content. Thus, we make no claim to any connection not already established.

As for the latter 'smuggling' question, the short answer is 'closely read the rest of this chapter to see whether any sleight of hand *is* attempted.' (There isn't.) A somewhat longer and perhaps more satisfying response for the time being might take the following form. Hart utilizes Hume's discussion of the circumstances of justice to advance his own case for the "core of good sense" which might rightly be attributed to traditional natural law doctrines. In the course of that argument, Hart too marks the easy, plausible link between background conditions and the rise of rules of obligation and legal institutions. Recalling that Hart sees his work in part "as an essay in descriptive sociology" [CL, at v], this linkage should not be surprising or worrisome. Thus, it does not become a means for surreptitiously slipping our conclusion amongst the premises of the argument developed below. It is a means of calling attention to the fact that the terms are connected at least in the senses determined in the previous two chapters of this essay, and that further investigation may prove fruitful. To fill out and fortify this brief response, let's turn in the next subsection to consideration of Hart's own position in greater detail.

2.2. Hart's adaptation of Hume

Unlike Hume, Hart does furnish an inventory of specific conditions, or "simple truisms" concerning human nature and our world, for our perusal. And unlike some other compilations, a share of the credit for surveying these conditions is explicitly accorded to Hobbes as well as Hume.[33] A summary is set out in figure IV-2, below.

The first condition recalls the obvious Hobbesian point that every man is susceptible to bodily attack by his fellow man. Nor is anyone invulnerable to the injury or death which can thus result. Having stated that truism, however, Hart goes on to make a much stronger point about the contingent nature of that vulnerability:

Conditions and Corresponding Rules:

1. human vulnerability → rules restricting use of violence [CL, at 190]

2. approximate equality → rules of mutual forbearance and compromise [CL, at 190-191]

3. limited altruism → rules of mutual forbearance and control of aggression [CL, at 191-192]

4. limited resources → rules instituting property, division of labor and cooperation [CL, at 192-193]

5. limited understanding and strength of will → rules stipulating sanctions for breach of other rules [CL, at 193-194]

Figure 2-2: Hart's Simple Truisms[34]

> Yet though this is a truism it is not a necessary truth; for things might have been, and might one day be, otherwise. There are species of animals whose physical structure (including exoskeletons or a carapace) renders them virtually immune from attack by other members of their species and animals who have no organs enabling them to attack. If men were to lose their vulnerability to each other there would vanish one obvious reason for the most characteristic provision of law and morals: *Thou shalt not kill.*[35]

Thus, any rules concerning tolerable and intolerable levels of violent behavior are intimately linked to, while being only contingently required by our actual, physical vulnerability. The second condition, likewise recalling principally Hobbes' observation that differences between persons both in body and mind are not so great as to permit any individual to dominate all others, "is a fact of quite major importance for the understanding of different forms of law and morality .... This fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation" [CL, at 190-191]. Limited altruism, the third condition for both Hart and Hume (reading Hart's phrase as analogous to Hume's limited generosity), supplements this notion of the necessity of legal and moral rules and also calls attention to the condition's establishing their very possibility. For if humans were "devils prepared to destroy, reckless of the cost to themselves" such rules would not be possible; conversely, if all were angels, restrictions would be unnecessary [CL, at 192]. Thus, that man is not angelic makes some

sort of rules necessary for social stability; that man is not wholly devilish permits a set of such rules to be promulgated and successful.

The fourth condition, reading akin to Hume's condition (6), naturally gives rise to some form of property relations and devices (such as promising) for supporting cooperation. Again, like Hume, Hart suggests that an institution of property incorporating static rules of division and minimal forbearances along with more dynamic rules covering transfer and exchange relations would not develop under conditions of limitless abundance [CL, at 192]. Unfortunately he never indicates whether sufficient scarcity can exist so as to defeat *ab initio* any rules arising. It is not clear that he would disagree with that proposition, though one might reasonably hesitate to commit him to Hume's majority rule. That is, while Hume can be read to suggest that scarcity must be so extreme as to put the survival of a majority in jeopardy before conventions are to be deemed useless or impossible, that is neither the only reading nor the only reasonable intuition possible concerning resource levels. So while there is surely some minima which must be adopted on Hart's account if any rules devised are to play a role in guiding social behavior, we are not yet in a position to determine an appropriate threshold. [We shall return to this point in the next section.] The fifth and final Hartian truism mixes insights from Hume and Hobbes concerning a)man's propensity to overestimate the value of fulfilling short-term interests and thereby be willing to sacrifice long-term benefits, along with b)the temptation to engage in free-riding,[36] to derive the need for rules to create sanctions as a guarantee for general voluntary submission to all the other rules of the society [CL, at 193].

Hart observes at each turn that "it might have been otherwise": homo sapiens could be invulnerable; some individuals could be exceptionally well-equipped in mind and/or body and so capable of complete domination of others; man could dispositionally be devilish or angelic; resources could be unbounded; and sanctions might prove impossible to implement. Each of the truisms outlined happen to hold in this world, but it needn't have been the case; they merely describe contingent features of the world man does engage. Thus, it is proper to speak of the "natural necessity" [CL, at 195] of sanctions, rules governing property, etc. As such "they disclose the core of good sense in the doctrine of Natural Law. ... and explain why the definition of the basic forms of these in purely formal terms, without reference to any specific content or social needs, has proved so inadequate" [CL, at 194], albeit they lack any logically necessary status. They constitute then an empirical or sociological conception of natural law.[37] Now, I don't wish to dispute the assertion that conditions might have been different.[38] I concede that there seems no logical necessity in their holding true in all possible worlds.[39] But the

conceptual necessity which we are investigating is not that of the world's conditions. Our legal theoretic dispute concerning conceptual linkages between legality and morality turns in part upon the scope of logical necessity for law and legal system under the conditions which do obtain in the world which we inhabit. To put the point in somewhat different terms, to deal with this problem of scope we need antecedently to determine *how* (i.e. under what specifications) law and legal system are possible. That it *is* possible is a given datum of this world, and assessment of that datum has in part been provided by Hume and Hart as set out above. Yet, to query 'how' also indicates that we need to determine whether law is also possible if such conditions were substantially altered. If law is not a logical possibility under significantly divergent conditions, as Hume seems to have concluded, we then shall have to hand the makings of Hartian substantive natural law rules which necessarily flow out from a set of conditions defining the scope of the possibility for law –a set representative of those actual conditions of man and the world he inhabits.[40] In short, we will have derived a set of reasons for establishing an orthodox natural law position.

3. Conditions for Law

The notion of reasons just introduced is a pivotal feature of subsequent discussion. Our argument should not be seen to turn on a description of any actual causal chain such that a legal theorist can map, say the sociological evolution of, any contents of a particular legal or moral code in a society which did or does exist. Instead, following Hart, we mean to insist on the justificatory nature of conditions which ground systems of legality and morality:

> It is important to stress the distinctively rational connexion between natural facts and the content of legal and moral rules in this approach, because it is both possible and important to inquire into quite different forms of connexion between natural facts and legal or moral rules. ... e.g. unless young children are fed and nurtured in certain ways within the family, no system of laws or code of morals can be established .... Connexions of this sort between natural conditions and systems of rules are not mediated by *reasons*; for they do not relate the existence of certain rules to the conscious aims or purpose of those whose rules they are. Being fed in infancy in a certain way may well be shown to be a necessary condition or even a *cause* [in sociological or psychological terms] of a population developing or maintaining a moral or legal code, but it is not a *reason* for doing so [CL, at 189-190].

John Eatman fairly captures this notion of contingent truisms acting as reasons in a hypothetical case:

> Imagine that a law against theft is challenged by a given individual. "Why

> should I desire that such a law, with attendant sanctions, exist?," he might ask. In reply, we could point out to him that he himself is vulnerable to attack (truism 1) and that, on occasion, another person or group of persons may be willing (truisms 3 and 4) and able (truism 2) to take his property, in which case his ability to survive may be in jeopardy (truism 4). The existence of effective sanctions provides a motive for obedience likely to override any particular benefit one might obtain through violation of the rule [truism 5], and thus provides some quarantee that his adherence to the rule will be reciprocated.
>
> It could be, of course, that human nature and/or environmental demands will change, in which case one or more of these reasons may not be operative. ... Yet, so long as these contingent facts do hold, this "minimum content of natural law" is always justifiable to every member of a society.[41]

Employing this sense of reasons, then, let us turn to an analysis of the conditions identified by Hart and the rules which are said to follow from their holding in this world.

3.1. Vulnerability & violence

Is vulnerability a necessary condition for the development of law? Would we lose all reasons for rules restricting interpersonal violence if man were a species not liable physically to suffer from external attacks by others of his kind? Hart does not directly answer either of these questions, but he does give this contingent characteristic high profile in his discussion of natural necessities. For if man were invulnerable *ceteris constantis*, he argues, in addition to the loss of [at least some] reasons for rules restricting violent behavior the need for sanctions outlined by the fifth condition (limited understanding and strength of will) could not be satisfied. The result is that one standard or core feature of law (*viz.* sanctions) and one elemental purpose (*scil.* providing some guarantee for rules' observance by others) could not arise.

As previously noted, Hume makes little room for, and provides but nil discussion of, this condition of vulnerability in his outline of the circumstances of justice. While Hart does hedge his counterexamples of invulnerability by concluding there is a loss of only one obvious reason for rules restricting use of violence, perhaps Hume was correct simply to assume the condition of physical vulnerability without making explicit argument for institutions of justice which turns on its presence. As Lucas remarks with regards to a broader understanding which is required for notions such as vulnerability,

> To have a set of values –that is, to care for something– is, for any being not totally omnipotent, to be *vulnerable*. And therefore anyone who ever wants to *do* anything in a public external world, as well as anyone who ever wants the co-operation of anybody else ... is vulnerable. Even tortoises [footnote here to the CL passage reproduced in our text at page 38, above] are vulnerable in this

> way, and could be subject to a form of coercion. Although a recalcitrant tortoise could not be killed or made to suffer pain by other tortoises, it could be prevented from doing anything. Anything it did, a group of other tortoises could undo: or they might stand in a circle round it, and in effect imprison it. This is not a contingent fact about tortoise life, but a necessary consequence of there being a common, public, external world in which individuals can do things.[42]

Thus, while physical invulnerability may preclude the necessity of rules restricting violence tending to bodily harm or death, it in no way diminishes the social requirement for rules restricting the use of coercive force which would otherwise inhibit an agent's activities. What is then seen as importantly vulnerable is one's *interests*, not one's body per se. So physical invulnerability of itself will not defeat the realization of sanctions in order to sustain the general purpose of adherence to rules as Hart supposed; nor even need it eliminate the need to control through social norms violent interferences, although notions of physical harm or death obviously would not appear in their construction.

Could law or conventions of justice develop amongst a group of individuals holding invulnerable interests? Presumably not. Such a world could not be inhabited by two or more totally omnipotent beings in Lucas' sense –that is a logical impossibility. So such a world would have to contain two or more less-than-omnipotent beings whose interests could never clash. This would seem to dictate that their interest invulnerability results either because a)distances between these beings' spheres of operation keeps them and/or their interests' fulfillment sufficiently spatially separated, or b)though spatially near their interests do not engage a common external forum. These alternatives exhaust the possibilities whether these beings are mortal or immortal.[43] So in neither world is there *reason* for law. Interest vulnerability remains one of the prerequisites for social rules to arise and develop.

3.2. Equality & forbearance

Is approximate equality a necessary condition for the development of law? Would we lose all reasons for rules of mutual forbearance and compromise if some individuals were so exceptionally well-equipped in mind and/or body as to be able to dominate without fear of reprisal? Hart does declare that the natural fact of approximate equality "makes obvious the necessity" for law [CL, at 191]. But does that natural fact merely make the necessity *obvious*, or does that fact also render a system of forbearances necessary *in rerum natura*?

Hume presumably would answer both queries in the affirmative, for the notion of relative equality is essential to his conception of society. This interpretation permits the

proper stress to be laid upon his hypothetical of an inferior species living amongst men in a condition of "servile obedience,"[44] while forestalling debates concerning actual versus putative inferiority. Hart, too, appears to follow Hume's position when he assumes that significant dissimilarities *ceteris constantis* invites the exceptional being's dominance. That is to say, such an individual has good reason to exercise whatever advantage is available, and no reason to do otherwise. One need not here imagine Biblical Nephilim alongside ordinary mortals[45] or a Swiftian Gulliver amongst Lilliputians[46] to recognize the point. As Hart suggests, we can look to collectives such as modern nation-states in the international political system for examples of extreme inequalities in powers which readily translate into significant disparities in relations.

Nonetheless, the point is a slippery one. On the one hand, substantial inequalities in body and mind implicate some sort of physical invulnerability (the clearer reading of the point both in Hart and Hume). On the other hand, they might translate into some form of interest invulnerability (a possible but less clear reading in either account). But either reduction perforce returns us to our discussion of vulnerability in the previous subsection. If the fundamental point is a physical one in nature, then such inequality does not in fact preclude a system of forbearances and compromise arising since physical invulnerability does not of itself safeguard one's interests. Indeed, we find Hart conceding that, for all the significant inequalities existing between nation-states in the contemporary world, international law remains possible –even if marked by some differences in structure [CL, at 191 & 208-231]. If the alternative point is adopted, that the agent's interests are invulnerable, then we do find a world without law or the possibility of its developing: as noted in discussion above, agents in that world would lack reason for establishing any system of rules for guiding behavior. Thus, under either interpretation what remains essential to law development is interest vulnerability. To that extent, the truism of approximate equality adds nothing new to our tally circumscribing the possibility of social order in any world where law is possible.

3.3. Altruism & aggression

Is limited altruism a necessary condition for the development of law? Would we lose all reasons for rules of mutual forbearance and control of aggression if individuals exhibited either utter selfishness or unlimited generosity? Once more, Hart's analysis echoes that earlier provided by Hume. Further, each agrees that both queries deserve positive replies.

> Men are not devils dominated by a wish to exterminate each other .... But if men are not devils, neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual

> forbearances both necessary and possible. With angels, never tempted to harm others, rules requiring forbearances would not be necessary. With devils prepared to destroy, reckless of the cost to themselves, they would be impossible. As things are, human altruism is limited in range and intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled.[47]

While it appears obvious enough that the "perfect rapaciousness and malice" of a demonic humanity would foreclose the development of any rules moderating aggression (reasons for moderation or forbearance would simply find no foothold in that world of unchecked passions), it is not similarly clear that an angelic humanity's unlimited altruistic dispositions; or a bit weaker, simply being oblivious to temptations to harm or take advantage of another, prejudices the possibility or necessity of norms regarding mutual forbearances for circumscribing social behavior. Recalling that the condition of limited understanding and strength of will is being held constant here, the notion that irrespective of the best of intentions an act may result in harm, whether to bodies or interests, due to negligence or misjudgment of the facts would still find conceptual work to perform.[48] Thus, we should expect even this society to establish some social codes for guiding interactions and providing for remedies, e.g. a universal tax-supported insurance scheme for compensation, when harm ensues. Yet again, the fact that interests are vulnerable supplies a reason for social controls under conditions of all but complete devilish inclinations.

3.4. Resources & property

Are limited resources a necessary condition for the development of social rules? Would we lose all reasons for a system of rules instituting property, some division of labor, and cooperation if material resources were either extremely scarce or unlimited? Hume was clearly of the opinion that substantial changes in resources, whether for the better or the worse, results in the destruction of justice: a set of social norms either will not arise or, if some set of rules are for some time in place, will disappear with the transformation in circumstances [TREATISE, at 496; ENQUIRY, at 188]. In like vein, Hart carefully notes that "It is merely a contingent fact that human beings need food, clothes, and shelter; that these do not exist at hand in limitless abundance; but are scarce, have to be grown or won from nature, or have to be constructed by human toil" [CL, at 192]. Thus the need for an institution of property, promising, etc. Additionally, he observes that if there were unlimited resources these institutions would not evolve. In this too he follows Hume. But, as previously outlined, he never directly addresses the issue of extreme scarcity. How might we expect his argument to develop in response to that possible world?

Six years prior to the release of his THE CONCEPT OF LAW, Hart published a provocative essay concerning moral and natural rights. He argued there that "if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free."[49] In a footnote explaining the terms to be used for understanding the notion of freedom, he draws several important distinctions and makes an interesting observation:

> *Coercion* includes, besides preventing a person from doing what he chooses, making his choice less eligible by threats; *restraint* includes any action designed to make the exercise of choice impossible and so includes killing or enslaving a person. But neither coercion nor restraint includes *competition*. ... all men may have, consistently with the obligation to forbear from coercion, the *liberty* to satisfy if they can such at least of their desires as are not designed to coerce or injure others, even though in fact, owing to scarcity, one man's satisfaction causes another's frustration. In conditions of extreme scarcity this distinction between competition and coercion will not be worth drawing; natural rights are only of importance "where peace is possible" (Locke).[50]

Attend to that last sentence. On a reasonable reading, the concluding proposition on offer is that under conditions of extreme scarcity coercion becomes assimilated to competition –significantly, not vice versa– so as to extinguish any natural right not be be coerced.[51] While it may not be entirely fair to attribute to Hart adherence to a proposition dropped in a note some years past –and that in an essay he has since repudiated[52]– it does cohere with the form and substance of the argument so far explicitly put by him on resource availability; and is certainly consistent with Hume's conclusion of the matter, a not unimportant tracking given their other like positions.

But are these observations correct? Could law or conventions of justice develop amongst a group of individuals with access to unbounded primary material goods? or conversely, with access only to such deficient supplies that basic needs cannot all be satisfied? With regards to a possible world containing unlimited resources, it might be helpful to evaluate the proposition that law would there be unnecessary in light of our introduction of the notion of interest vulnerability. To thereby rephrase the point at issue, would the natural fact of unbounded primary material goods turn vulnerable interests into invulnerable ones? Asking the question in that way helps make clearer its rhetorical force, for under conditions *ceteris constantis* there is little reason to suppose that the mere presence of some additional quantum of goods over and above the levels with which we are familiar would suffice to render interests unassailable. This is not to say that some limited, though important, interests would not receive substantial protection. Wide access to good food and clean water, for example, unhindered by any lack in supply and the 'curse' of work to obtain them could easily engender the

elimination of norms from any set of rules dealing with distribution of these basic resources. But would this abundance necessarily eliminate the notions of property and theft ... of mine and thine? of the need for conventions of promising? and of division of labor? Proper answers to such questions would be in the affirmative only if by setting the level of resources we mean to decide the concomitant nonexistence of industry ... the absence of any mixing of an individual's creative manipulation of the natural resources so readily available. Only under that additional corollary does abundance destroy justice.[53] Else, an individual's interests in relation to some particular product of nature, especially if that good has become more valuable relative to that individual just because it has been picked out and/or creatively handled, are no less vulnerable, however many other such primary goods are available for appropriation, than under a condition of moderate scarcity. Accordingly, social conventions would be required to manage appropriation, manipulation, exchange, etc. of even ever-abundant resources.

Turning to conditions of extreme lack of primary material goods, one could find it more tempting to deny the possibility of law. The notion that individuals in this possible world do not find themselves engaging any problem of constructing social order is an appealing one when basic survival for one might only be won at the expense of another's. We can uncover the ground of such intuitive appeals by asking whether there could be rules regarding resource allocations[54] which these beings have reason to construct and conform to. The simple reply seems to be, "No, there is no reason here; only survival. And that means no holds barred in the struggle to live." Perhaps so. Certainly the common examples customarily trotted out at this juncture in the argument –life-and-death stories based on horrendous conditions visited upon a land and its people during or immediately after a ravaging war, recurring famine in drought-stricken lands like Ethiopia, and disasters faced by seamen such as Dudley & Stephens and Holmes– causes one to pause and reflect. The intuition that under such extreme scarcity social ordering is at least insensible if not impossible ... that rules can play no role here ... that conventions can serve no function is a powerful one.

Yet, the difficulty one might have with such scenarios is that they involve individuals who had been living under conditions of social order, who now face exigent circumstances, but who carry with them the already developed notions of fairness and equity. Consequently, their question is not whether those notions can be developed *tout d'un coup*, but whether it makes sense to apply them in some fashion or other to their circumstances (e.g. whether the drawing of lots is rightly required before arranging that someone sacrifices for others' benefit). It is then difficult to see why the proper response is so obviously a negative one. On the other hand, while it could be the case that beings

finding themselves in this short-supplied world *ab initio* would never in fact develop conventions or institutions of justice, there seems no logical barrier to the possibility of their developing. What is crucial in any of these accounts is what is to count as the ground for reason; what factors go into the determination of which interests are deemed to belong in the calculations of social order. This is no longer a matter only of what goods are to be found in the external realm; it now includes an internal viewpoint factor of purpose. [We return to this point of purpose for fuller development in subsection IV.4.1, below.]

3.5. Understanding & sanctions

Are limited understanding and strength of will necessary for the institutional development of law? Would we lose all reason for voluntary submission to a system of rules if sanctions were impossible or superfluous? These questions are, of course, rather different in nature from the queries in preceding subsections. We do not focus here on the possibility of law without sanctions. That debate, surrounding the adequacy of the early Benthamite/Austinian positivistic concept of law being the sanction-backed command of the sovereign, was addressed and settled in the negative by Hart in chapters II-IV of CL. The conclusion there, as may be recalled, is that sanctions are not required for there to be law; instead, law must independently exist for there to be sanctions properly so called.[55] Thus, the existence of rules for sanctions must be seen to serve some broader purpose than law's initial development. And so it is, in the guise of a 'guarantee' for grounding obedience.

> The [natural facts already discussed] that make rules respecting persons, property, and promises necessary in social life are simple and their mutual benefits are obvious. Most men are capable of seeing them and of sacrificing the immediate short-term interests which conformity to such rules demands. ... On the other hand, neither understanding of long-term interest, nor the strength or goodness of will ... are shared by all men alike. All are tempted at times to prefer their own immediate interests and, in the absence of a special organization for their detection and punishment, many succumb to the temptation. ... 'Sanctions' are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not [CL, at 193 (original emphasis)].

Notice that the natural fact of limited understanding plays an extremely limited role here. Those unable to perceive and reason from such simple facts, necessary rules and obvious benefits to motivate adherence must be few indeed. The core of the problem as Hart sees it resides in the essential weakness or incorrigibility of the human will.[56] The role of sanctions as a guarantee is then double-edged: on the one hand, the knowledge

that a sanction will be applied for [attempting] disobedience or free-riding gives one a direct, self-interested reason to obey, whatever additional motivations one may have; on the other hand, the knowledge that others are aware their disobedient or free-riding actions will be sanctioned and that they have direct, self-interested reason to submit likewise gives one a reason voluntarily to incur the cost of obedience to gain the long-term benefits that devolve from more-likely-than-not general cooperation. Thus, institutionalization of the set of social rules made effective through sanctions becomes possible.

What if individuals possessed wills which were incorrigible in the now obsolete sense of that term, *viz.* so strong and good as to be beyond improvement?[57] Could this possible natural fact, combined with sufficient education so as to assure that self-evident benefits of cooperation were universally apprehended, defeat the institutional development of law since formulating sanctions to guarantee obedience by all would be unnecessary? Once again, to phrase the question in this manner helps uncover the obvious response, "Of course not." In fact, it is not clear that sanctions would even here operate entirely without purpose. They may not need to be instituted to guarantee good faith adherence; yet, as suggested in our discussion of altruism in subsection IV.3.3 above, even the best intentioned actors can err. Only omniscience as a corollary here would suffice to overcome negligent or unintended harms.[58] Thus, sanctions could act to forewarn agents of problematic activities and to ground establishment of a scheme for reparations should interests ever be harmed. Law and its institutional development accordingly is assured.

What of individuals wholly devoid of understanding or strength of will to resist temptation? what becomes of law in that possible world? Interestingly enough, this query poses a challenge to the first arising of social order, not merely its institutional development. On the one hand, creatures who were incapable of evaluating any cooperative enterprise as mutually beneficial could never know they have reason to develop any conventions at all. In short, law would not be possible for them, however advantageous or reasonable the enterprise. On the other hand, creatures who were quite fully aware of the value in conventional behavior, but who also could never resist free-riding or breaching the conventions initially adduced, may have reason to desire law although be forever unable to attain it.

Could sanctions work here to save these beings from their overly weak dispositions? The answer depends in part on how one understands their weakness of will. If like a demonic humanity they dispositionally could not project future gains to offset short-term interests, the conception of sanctions to salvage cooperative behavior would be beyond

them. For like possible future gains which become losses in the breach, future losses from sanctions could not be adduced to remedy current motivation to disobedience. In this case, law itself seems beyond the pale of realization. If weakness of will is not of this last variety, but partakes of the more familiar problem of powerful motivation to maximize short-term pay-offs (whether because calculations balancing short- against long-term interests are so very corrigible, or due to the determination that optimal strategies of the 'rational' maximizer are usually to 'defect' in each play of the game), then this possible world portrays an ungarnished Hobbesian one. There is reason for law; this reason is known; the reason is widely shared. Law becomes possible once agreement is reached that sanctions will be centralied under a ruling authority and to whom all will submit. In short, law is possible just because institutionalized, never before.

3.6. Summary survey

Our review and analysis of Hume's and Hart's conditions and their accompanying rules is now complete. Where have we arrived? Let's put the results in some better order.

(1) Vulnerability & violence – What makes law both possible and necessary is interest vulnerability, not susceptibility to physical harm *simpliciter*. It provides grounds for reason for social rules to arise and develop.

(2) Equality & forbearance – Though approximate equality is a natural fact describing this world's human inhabitants, it is not a feature which of itself renders law either possible or necessary. On one reading the notion reduces to point (1), above; on the other reading it renders law impossible.

(3) Altruism & aggression – Law is impossible only were humanity to exhibit "perfect rapaciousness and malice." No reasons would get a foothold there. But law becomes both possible and necessary whenever a concern for others' welfare rises above this hellish level, and extends unto the most extensive benevolent disposition possible. This latter point holds good as long as interest vulnerability holds as well.

(4) Resources & property – Law is both possible and necessary under any level of resource distribution and allocation. Though conceding that in a possible world of extreme necessity law might not in fact develop, the core notion of reason for law must here implicate the concept of interests to determine whether even those beings can have reason to develop conventions of justice.

(5) Understanding & sanctions – These conditions do not directly address the issue of the possibility of law, but its institutionalization. Law is institutionally impossible only

in a world where the condition of low-level understanding or weakness of will makes law itself impossible. Law is institutionally possible wherever these thresholds are exceeded.

In sum, the conditions for law converge on beings who (a)share interest vulnerability, (b)exhibit minimal concern for others, and (c)exercise minimal cognitive and conative capacities. In whatever possible world individuals so constituted co-exist, law is both possible and necessary. Tamper with any single condition here, and law becomes impossible.

Corresponding rules could be expected to cover the same range as outlined by Hart: restrictions on interpersonal violence/aggression; institution of reciprocal forbearances, property relations, and promising; and [evolutionary] institutionalization of those conventions. In fact, the results would closely resemble Roscoe Pound's seldom-cited "jural postulates" of civilized society. Though those statements are embedded in his conception of social interests operating as guides to adjudicative engineering and utilize an undefined notion of civilized society,[59] they do capture several of the main themes in this section's discussion. The five postulates (plus one corollary) are reproduced below for review.[60]

Jural Postulate I. In civilized society men must be able to assume that others will commit no intentional aggressions upon them.

Corollary of Jural Postulate I. One who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1)justify his act under some social or public interest, or (2)assert a privilege because of a countervailing individual interest of his own which there is a social or public interest in securing.

Jural Postulate II. In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated for their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.

Jural Postulate III. In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith, and hence (a)will make good reasonable expectations which their promises or other conduct reasonably create; (b)will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto; (c)will restore specifically or by equivalent what comes to them by mistake or unanticipated situation whereby they receive, at another's expense, what they could not reasonably have expected to receive under the actual circumstances.

Jural Postulate IV. In civilized society men must be able to assume that others will act reasonably and prudently so as not, by want of due care under the circumstances, to impose upon them an unreasonable risk of injury.

Jural Postulate V. In civilized society men must be able to assume that others who maintain things or employ agencies, harmless in the sphere of their use but harmful in their normal action elsewhere, and having a natural tendency to cross the boundaries of their proper use, will restrain them or keep them within their proper bounds. Hence one is liable in tort for I.Intentional aggression upon the personality or substance of another.... II.Negligent interference with person or property.... III.Unintended non-negligent interference with the person or property of another....

Of these postulates, special regard should be given I, II, and III(a). Were one to substitute 'In any social order' for 'In civilized society,' these formulations would comport well with the main points raised in our discussion above concerning the possibility and necessity of rules to cover aggressive behaviors, resource allocations, and promising due to interest vulnerability. In addition, V(II) and V(III) raise the issues of negligence and unintended harm canvassed in our discussion of unlimited altruism. Although the remaining formulae are meant to reach more complex legal systems, the motivations behind good faith, reparations, and moral expectations touch the sorts of individual and social interests which might define in part some of the vulnerable interests identified as conditions for law. To this problem of sorting through interests underlying law and their possible content we now turn.

4. Contents of Natural Law

4.1. Interests & survival

The results reached in our analysis so far are intriguing. Not only are the conditions for law ultimately identified simpler in detail and comprise a more compact list than initially offered by Hume and Hart, but they call to our attention the central role of interests in an account of law. Our attention is also drawn to the singular content of interests or aims actually recognized in Hart's account of contingent truisms and leads us to look more closely at what he takes to be the settled "simple contingent fact that most men most of the time wish to continue in existence" [CL, at 187]. Succinctly, Hart makes the explicit assumption that we are committed to survival, and deploys this interest to perform all the analytical work in generating reasons for law.

> For it is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but that this is reflected in whole structures of our thought and language, in terms of which we describe the world and each other. ... We are committed to it as something presupposed by the terms of the discussion; for our concern is with social arrangements for continued existence, not with those of a suicide club [CL, at 188].

Just as important, though left undeveloped in this recital, is Hart's appeal to the aim of survival as the only interest universally identifiable; that is, not only can survival do all the motivational work required, it is the only draught horse uncontentiously available.[61]

Now, that the notion of survival operates as a prominent reason in the development of law was recognized in the formulation of traditional natural law accounts. In reply to a question regarding the number of precepts contained in natural law, Aquinas comments that man shares with all substances "an appetite to preserve [his] own natural being. Natural law here plays a corresponding part, and is engaged at this stage to maintain and defend the elementary requirements of human life."[62] To this extent, the commitment to survival is deeply shared. But is the presumption of singularity a fair one? Hart has garnered a good deal of criticism for making this claim. Some critiques go astray because of their failure to pay attention to the role of reasons in Hart's account: thus, noticing that Freudian psychological theories identify several universal –if typically unconscious– aims beyond survival is neither denied by Hart nor is it problematic for his analysis. Such 'aims' may operate as causes in some scientific account of man's behavior, but they are not reasons in the sense previously discussed and here required. But besides these sorts of responses, alongside the polemical chafing at his invocation of *we* who are so committed, the substantive rejoinder concerns whether survival has a "simple and undifferentiated character. Whose survival is meant –the individual's or society's?"[63] If only the individual is in view, then these truisms may betray a narrow political philosophic individualism –a contestable position– and are therefore suspect. Even permitting them to be read as composing a simpler methodological individualism, "One does not need to indulge in Hegelian metaphysics to suggest that the forms of social organization in which individuals find themselves cannot simply be jettisoned or ignored either by their members or their observers. In this sense, one must account for what is required for *societies* to survive," not individuals alone.[64] As Hume specifically mentions, and Hart would surely acknowledge though it goes unremarked, an individualistic focus is an artificial one just in that man universally discovers himself in society, even if the range of that social order does not exceed a primitive form of extended family. It is the recognition of this natural fact concerning man's social nature which provides the focus for another natural law stage of precept development. Passing from what man shares with all substances to what is held in common with other animals, Aquinas continues his discussion by summoning universal animal inclinations: "correspondingly those matters are said to be of natural law which nature teaches all animals, for instance the coupling of male and female, the bringing up of the young, and so forth."[65] For self-conscious beings, of course, the implications here are understood to be more profound than mere satisfaction of a sociobiological drive, however adequate the

psychophysiological function may be deemed as an explanation on some neo-Darwinian model of species evolution.

In relation to this last point and its implications for social order, consider the role of social conventions circumscribing intimate relations, e.g. marriage delineations and incest taboos. Though differing to some extent from one society to another, no society exists without them. Given the natural facts of limited altruism and the desire for forging intimate relationships, it should be no surprise that there is reason for some development of family law as integral to societal order as those restricting interpersonal aggression. Likewise, given the natural facts of limited understanding and strength of will along with the natural desire to sustain personal and/or group values as means enhancing stability of intimate and social relationships, it should also be no surprise that there will be reason for some elaboration of customary norms and rites (e.g. institution of rituals or formal education) to ensure continuity between generations and survival of a society therein grounded. As Grotius explains, this maintenance of the social order, being consonant with man's nature and intelligence, is the source of law properly so called.[66]

Now, the examples given above and the project accepted here are not designed to determine and work through those interests which might only timorously be deemed universal in fact. As Hart concedes, even the keen interest in or aim of survival for an individual is not universal in any necessary sense, logical or natural. Perhaps "most men most of the time" do desire to survive, but such desires by no means hold sway or reign supreme for all persons in any society, and are often individually and socially deemed inappropriate in many important circumstances. Consequently, to claim that survival always operates as more than a hypothetical judgment in an argument for generating a reason to act under practical judgment is patently false. More correctly, *commitment* to survival is the key to translating the hypothetical judgment 'If I wish to survive then I (instrumentally) have reason to x' into the practical imperative 'Since I do desire to survive, I ought to x.' As Hart recognized in his 1958 essay on *Positivism and the Separation of Law and Morals*, "in asking what content a legal system must have we take this question to be worth asking only if we who consider it cherish the humble aim of survival in close proximity to our fellows" [Separation, at 80]. A more fruitful approach, then, that we might draw out of Hart's CL discussion would be to ascertain those interests which are "reflected in whole structures of our thought and language, in terms of which we describe the world and each other"; those interests we are committed to "as something presupposed by the terms of the discussion." Those are the interests grounding practical judgments concerning reasons for law. An heuristic device for teasing out interests such as these is not best located in a priori argument regarding human

nature. Let us not ask, 'what aims are universal?' Rather, let me suggest an alternative approach. Let us ask, 'what *questions* seem universally reflected in thought and language?' One can then surely follow both Hart and Aquinas in saying that the question 'what should I/we do to survive?' indeed reflects a basic interest. Embedded in every code extant is a group or set of basic rules governing, e.g. interpersonal aggressive, behaviors which come under social control for the sake of individual and/or group survival. Such conventions are reflective of (and may later come to constitute in part) whole structures of thought and language for grounding practical judgments and actions.

But is this question and the interest it reveals the only pair discernible? I think not. There is at least one other question universally asked and reflected in human thought and language, a question whose answer is reflected in some form or other in every social, moral and legal code known: 'Am I my brother's keeper?'[67] alternatively, 'For which persons and to what extent am I to be caring?'[68] Answered in various ways, but always asked, this sort of query leads to a group or set of basic rules delimiting conventions of commitment reflective of (and likewise may come to constitute in part) other seminal structures of thought and language for grounding practical judgments and actions, as well. This query brings us face-to-face with interests such as those noted above in intimate relationships, social stability, and so forth. In brief, we confront reciprocity interests between individuals-in-society.[69] There may well be other identifiable questions and interests beyond these two. If so, the picture would become progressively complex, and so would those interests' associated social conventions as they reflect that social complexity. But let it be stressed once again, the feature of which special note should be taken is that any such interests require an internal viewpoint commitment actually to generate reasons for law when mixed with appropriate natural facts. On this account, there is a threshold (alternatively, there are boundaries) as to what can count as reason for law and what can thus count as law itself.

4.2. Interests & norms

The concluding position that an internalized commitment is required to generate reasons is strikingly similar to Kelsen's pure theory concerning the necessity of presupposing a basic norm to create objective validity for a legal system. His position has often been misunderstood to require a *grundnorm* presupposition for there to be a *legal* system,[70] but it is one of the [perhaps few] points upon which Kelsen is reasonably clear:

> The function of the basic norm is not to make it possible to consider a coercive order which is by and large effective as law, for –according to the definition presented by the Pure Theory of Law– a *legal* order is a coercive

> order by and large effective; the function of the basic norm is to make it possible to consider this coercive order an an *objectively* valid order.[71]

The interesting question for us here is, 'make it possible for whom?'

At times, the basic norm seems to be the presupposition of a nation's citizenry. That is to say, irrespective of whether they are actually conscious of that norm, that their acts are considered by them as legal acts presupposes a hierarchy of norms, for which there must be a basic norm:

> Hence it is not the *science* of law which presupposes the basic norm. The science of law ... only ascertains the fact: that if men consider a coercive order established by acts of will of human beings and by and large effective as an objectively valid order, *they*, in their juristic thinking, *presuppose* the basic norm as the meaning of an act of will.[72]

In another essay, Kelsen speaks directly in the first-person plural, but from the point of view of an agent internal to the normative order as well as a positivist jurist engaged in externalized description. In differentiating the objective validity of a command by a tax official from the mere subjective validity of a command by a robber, he states that

> *we* do not consider the subjective meaning of the command of the gangster –as *we* consider the subjective meaning of the legal command of a revenue officer– as its objective meaning because *we* do not presuppose in the former case –as *we* presuppose in the latter case– a basic norm. A Communist may, indeed, not admit that there is an essential difference between an organization of gangsters and a capitalistic legal order which *he* considers as the means of ruthless exploitation. For *he* does not presuppose –*as do those* who interpret the coercive order in question as an objectively valid normative order– the basic norm.[73]

Thus, Kelsen's jurist can only proceed theoretically by making space for the internalized commitments of a legal system's participants. Without this theoretical notion of commitment, the legal scientist is at a loss to distinguish a robber band's commands from a State's legal commands –both would otherwise simply be seen to be more-or-less effective coercive orders. If those orders are to be distinguished, there must be theoretical recognition of the normative nature of the one and the lack of any corresponding normative character in the other.

True, it seems the theorist need not evaluate the commitments as right or wrong, good or bad. That citizens are so committed suffices to supply the necessary element for deriving objective validity of the legal order. But this picture quickly becomes more complicated. For at other times the basic norm seems to be the presupposition of the

legal scientist himself –a tool created so as best to understand the behavior of a nation's citizenry; thus its hypothetical character: "To make manifest this presupposition is an essential function of legal science. This presupposition is the ultimate (but in its character conditional and therefore hypothetical) reason for the validity of the legal order"[Pure TL, at 46]. A bit more clearly, the presupposition is said to be a "juristic hypothesis," and the "utlimate hypothesis of positivism."[74] Kelsen likewise places this presupposition at the foundation of sociological theory: "Commands 'in the name of the State' are such as are issued in accordance with an order whose validity the sociologist must presuppose when he distinguishes between commands which are acts of State and commands which do not have this character. ... Even the sociologist recognizes the difference between a State and a robber gang" [GTLS, at 186-187]. The scientist is not thereby thought necessarily to be committed to the norm he posits to explain others' behavior as conforming to some objective validity; it is possible to remain morally uncommitted:

> True, legal norms, as prescriptions of what ought to be, constitute values; yet the function of the science of law is not the evaluation of its subject but its value-free description. The legal scientist does not identify himself with any value, not even with the legal value he describes [Pure TL, at 68].

Thus, positing a social order's basic norm does not require the legal scientist to internalize the norm in order to speak of objective validity. But for all that, the presupposition of a basic norm to achieve descriptive objective validity does require an internalized commitment to normative order. As Kelsen himself has conceded,

> With the postulate of a meaningful, that is, non-contradictory order, juridical science oversteps the boundary of pure positivism. ... The basic norm has here been described as the essential presupposition of any positivistic legal cognition. If one wishes to regard it as an element of a natural-law doctrine ... very little objection can be raised; just as little, in fact, as against calling the categories of Kant's transcendental philosophy metaphysics because they are not data of experience, but conditions of experience. What is involved is simply the minimum, there of metaphysics, here of natural law, without which neither a cognition of nature nor of law is possible [GTLS, at 437].

In short, the positivist jurist must be committed to order to recognize order: if the jurist has not this morality, positing a basic norm for deriving objective validity (what natural lawyers and positivists alike know as the binding or obligatory nature of law) is impossible; legality being the mere generally-effective coercive order of the gunman. This recognition of commitment to interests shared hence includes commitment to establishment and maintenance of normative order. That latter commitment will then operate as the driving force of law. Like Lon Fuller's notion of law being a purposive

activity,[75] we must understand the contents of law to arise out of this recognition of humanity's shared interests and corresponding purposes. In Hartian-cum-Kelsenian positivist terms,[76] then, a system's rules' contents which derogate from this overarching purpose and do not reflect, arise out of, or serve shared interests and purposes fails to constitute a normative order for which citizens or jurists can presuppose a *grundnorm* for deriving objective validity. Consequently, bindingness fails to evolve and social order is threatened. In particular, individuals or groups regularly experiencing harm, e.g. being denied basic reciprocity rights in relation to their vulnerable interests, can, like Kelsen's Communist outsider, only recognize an otherwise effective coercive order. And on Hartian terms alone, the latter order is not for them even a *legal* order. To recite the catch-phrase, which is now seen to pack a substantive punch, unjust law is thus no law at all.

In consequence of this analysis, we discover our Hartian legal theory has ultimately unfolded in accord with an orthodox natural law account of law and legal system. We find here all the components necessary for developing various substantive-moral-principles clauses in any Hartian rule(s) of recognition. Nor is it any sufficient rejoinder that these clauses may vary from time to time and place to place (being the sorts of variations easily and explicitly accommodated in, for example, Aquinas' natural law theory). The point is that for there to be law and legal system, there must exist just this type of clause within any *grundnorm* or rule of recognition. Although we will not presently engage in the more extended project of proposing and developing specific clauses for contemporary society, our initial goal has been attained: the Hartian positivistic separation thesis is now entirely vitiated. Saving adherence to theistic revelation (a claim to knowledge which both Grotius and Aquinas acknowledged as unnecessary to their systems), there is no longer any chasm to be bridged between traditional natural law accounts as provided by medieval theorists such as Grotius and Aquinas, their modern expositions such as those provided by A.P. D'Entrèves and John Finnis,[77] and a Hartian theory of law. For Hartian law *is* natural law.

[1]This dictum is attributed to Gény by S.N. Dhyani in his monograph, LAW-MORALITY AND JUSTICE: INDIAN DEVELOPMENTS 11 (1984). I have not been able to trace its specific source, but the sentiment expressed jells well with the arguments advanced in his two major works. *See* F. Gény, 2 SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF: NOUVELLE CONTRIBUTION À LA CRITIQUE DE LA MÉTHODE JURIDIQUE (1921) [bearing the epigraph – "irreducible natural law"]; and his MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE (2nd ed. 1932), *esp.* §§160-163.

[2]*See* R. Stammler, THE THEORY OF JUSTICE *passim* (1902; I. Husik trans. 1925). For short argument that Stammler's theory is not in fact a relativist position, *see* A. Brecht, POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY POLITICAL THOUGHT 205-206 (1959).

[3]H.L.A. Hart, THE CONCEPT OF LAW 194 (1961) [hereafter cited as CL].

[4]*See* J. Coleman, *Negative and Positive Positivism*, 11 JOURNAL OF LEGAL STUDIES 139, 149 (1982).

[5]A brief aside may be appropriate here. The drawing of lots and sacrificing one (or a few) for the many were widely accepted principles for survival on the high seas. Though bloody details were often only elliptically or euphemistically embodied in their contemporary nautical ballads, 19th century European and American seamen understood well that drastic measures, including cannibalism, might be required to meet common peril. As noted by Justice Baldwin in an earlier American decision: dissent apparently existed concerning proper principles to apply when a craft is overloaded and in danger of foundering, but "There is, however, one condition of extremity for which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of the others, the selection is by lot." *United States v. Holmes*, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383). Thus, Dudley's proposal should not be interpreted as the raving of a man beaten by the elements, but the reflective determination of a sailor acquainted with the norms of his profession.

[6]The tale as related above is drawn from the official reports of the case in *The Queen v. Dudley and Stephens*, [1884] 14 Q.B.D. 273; and the excruciatingly detailed reconstruction of this (and other incidents of) survival cannibalism in A.W.B. Simpson, CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE *Mignonette* AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE (1984).

[7]Simpson, footnote 6, *supra*, at 10-11; *see also id.* at 70-72, where reference is made to several draft letters of "explanation, not confessions" composed by Dudley while on board the *Moctezuma*.

[8]The staged resort to a special verdict at the initial trial, the belated doctoring of the wording of that verdict for the second hearing, and the unprecedented structuring of the second tribunal are but three of the legal shenanigans which guaranteed murder convictions. These and other irregularities at bar are noted in Simpson's close study of the case.

[9]Though Brooks also survived by drinking some of Parker's blood and eating of the body, he became the chief prosecution witness against the other two men. Eyewitness testimony from a non-defendant was necessary for successful prosecution, but Brooks' exemption from the murder charge was also quite reasonable based upon his uncontested refusal to assent to the boy's being killed. As for Stephens, it remained unclear whether he ever did anything other than consent to Dudley's action. While nothing more is noticed in the special verdict, apparently there was testimony that Stephens actively participated by holding Parker's legs at the time of death. Thus, as an accomplice to murder, Stephens becomes vicariously liable for Dudley's act.

[10]The enlarged bench would now feature Lord Coleridge, C.J.; Grove and Denman, JJ.; and Pollock and Huddleston, BB.

[11]For discussion that this doctrine of excuse frequently has been, though ought not to be, identified with self-defense justifications, *see* G. Fletcher, RETHINKING CRIMINAL LAW 237, 352f., and 866ff. (1978).

[12][1884] 14 Q.B.D. at 281 (Coleridge, L.C.J.).

[13]*Id.* at 277.

[14]*Id.* at 283; *see also id.* at 278. Supporting material can be found in H. Grotius, THE LAW OF WAR AND PEACE, II.ii.6-9 [*De Jure Belli Ac Pacis Libri Tres* (1646)] ("if a man under stress of such necessity takes from the property of another what is necessary to preserve his own life, he does not commit theft." II.ii.6(4). F.W. Kelsey trans. 1925); and S. Pufendorf, ON THE LAW OF NATURE AND NATIONS, II.vi [*De Jure Naturae Et Gentium Libri Octo* (1688)] ("I should not feel, therefore, that a man has made himself guilty of the crime of theft if when he has ... fallen into extreme want of food necessary to maintain life, or of clothing to protect his body from the bite of cold ... he should make

away with them by violence or by stealth...." II.vi.5. C.H. & W.A. Oldfather trans. 1933). Discussion of the 'plank struggle' case can also be found at II.vi.4, and in S. Pufendorf, THE ELEMENTS OF UNIVERSAL JURISPRUDENCE, II.iv.6 [*Elementorum Jurisprudentiae Universalis Libri Duo* (1672)]. As regards this latter case, Pufendorf approves of the conclusion in our text in both works noted here. *But cf.* Grotius, who denies that there is any right of necessity in one man if the other, under an equal necessity, is already in possession of the plank. He then quotes Lactantius for support: "He is not foolish who has not, even for his own safety, pushed a shipwrecked man from his plank ...; for he has kept himself from the inflicting of an injury, which would be a sin; and to avoid such a sin is wisdom" (at II.ii.8).

[15]*United States v. Holmes*, footnote 5, *supra.*

[16][1884] 14 Q.B.D. at 285.

[17]*United States v. Holmes*, footnote 5, *supra*, at 361. That the mate meant and the crew understood the command as one requiring the sacrifice of some for safety of the rest was never in question. Even before the two boats parted, the mate bluntly told the captain that it would probably be necessary to cast lots for throwing over some of his load. The captain responded, "I know what you'll have to do. Don't speak of that now. Let it be the last resort." *Id.*

[18]Though some argument was presented to the jury that the act was *post hoc* clearly unnecessary and therefore murderous, the standard to which Holmes was actually held involved his duty at the time of his act according to the beliefs a reasonable man would hold under the circumstances. Thus, unable to know of their imminent rescue, he was not to be judged according to any absolute duty (i.e. what he should have done as evaluated retrospectively), but on the basis of whether his act was putatively right (i.e. proper according to the information he did have and/or could be held responsible to consider) at the time.

[19]26 F. Cas. at 365-366 (Attorney Armstrong for the defendant).

[20]*Id.* at 366 (Justice Baldwin). Stating that the casting of lots would have been an entirely acceptable expedient under the circumstances had the "supernumerary sailors" (i.e. those whose skill and experience were not needed to man the boat) been included in the draw, Justice Baldwin goes on to note, "When the selection has been made by lots, the victim yields of course to his fate, or, if he resist, force may be employed to coerce submission." *Id.* at 367. *Cf.* the case put by Pufendorf in his *Elementorum* (1672):

> If, however, in shipwreck, for example, more persons should leap into a boat than it can carry, in such wise, that, if the rest wish to be saved, one or more must necessarily be thrown out; assuming that all enjoy equal right here, those who are thrown out will have to be chosen by lot, and if any one refuses to have the lot cast, he can be thrown overboard without further delay as one who is seeking the ruin of all.

S. Pufendorf, footnote 14, *supra*, at II.iv.6 [W.A. Oldfather trans. 1931]. *But see* his later *De Jure Naturae* (1688) chapter on necessity, where these straightforward propositions become tentative questions: "..., shall not lots be cast to decide who shall be ejected? and may a person who refuses to abide by the lot be thrown overboard ...? But we reserve our decision for the time being on such highly unusual examples." S. Pufendorf, footnote 14, *supra*, at II.vi.3 [C.H. & W.A. Oldfather trans. 1933].

[21]Notwithstanding this important concession, the jury ultimately found the defendant guilty of manslaughter, presumably because the judge also charged them to consider in their deliberations the general transport or common carrier rule that owners and employees (here, captain and crew) remain under special obligation to passengers, even to giving their lives for the safety of passengers in emergencies. In a not-so-veiled reference to the 'plank struggle' case of the casuists mentioned in our text and note at footnote 14, *supra*, Justice Baldwin opined: "while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even 'the law of necessity' justifies not the sailor who takes it from him." 26 F. Cas. at 367. The court then sentenced Holmes to six months' solitary confinement at hard labor. *Id.* at 369. The original sentence also included a fine of $20 (?) which was later remitted. A pardon was sought, but refused because the court did not join the application which went to President Tyler.

[22]*Cf.* the similar strain of thought running through Pufendorf's *De Jure Naturae* (1688):

> And so necessity does not cause a law here and now to be violated directly ... but it is presumed from the benevolent mind of the legislator, and from the consideration of human nature, that a case of necessity is not included under a law which has been conceived with a general scope. ... But it should be observed, in connexion with those laws which cover the mutual duties of men, that there are certain precepts of natural law which presuppose some human deed or institution, that, as any one clearly recognizes upon a consideration of its end, should not be extended to a case of necessity; and therefore the same exception also is in the law.

S. Pufendorf, footnote 14, *supra*, at II.vi.2 [C.H. & W.A. Oldfather trans. 1933]. In the

case of the non-applicability of theft laws, Grotius adduces as the reason "a benign reservation in favour of the primitive right" to use common property, a right which "revives" in limited form even after distribution of property to individuals when necessary for self-preservation. H. Grotius, footnote 14, *supra*, at II.ii.6(2 & 4) [F.W. Kelsey trans. 1925].

[23]Simpson, footnote 6, *supra*, at 231. For the suitability of this Hobbesian gloss, *see* T. Hobbes, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL (1651), *esp.* chapter XIII: "To this war of every man, against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice" [at 83 in M. Oakeshott ed. 1946].

[24]Notions of possibility and necessity are grounded in the following intuitions: (1)Law is possible just in case a specified set of conditions holds in that world; (2)If law is necessary [in the sense that law is required to achieve some purpose such as social order] then law must be possible, i.e. of the specified set of conditions making law possible, a minimal subset necessarily holds in that world [a variant of the Kantian stipulation/intuition that 'ought' implies 'can']; (3)It is not the case both that law can be necessary and a minimal subset of possibility conditions are not possible in that world. I believe these are sufficiently weak to satisfy. Formalization and modal proofs will not be offered here; they are possible, but not necessary.

[25]D. Hume, A TREATISE OF HUMAN NATURE, III.ii.1 (1740) [at 477 in L.A. Selby-Bigge ed., 2d ed. 1978] (hereafter cited as TREATISE, with pagination to 1978 edition).

[26]D. Hume, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS §III.1 (1777) [at 188 in L.A. Selby-Bigge ed., 3d ed. 1975] (hereafter cited as ENQUIRY, with pagination to 1975 edition).

[27]The quoted phrases (originally italicized) first appear in the TREATISE, at 486. In his adaptation of Hume's writings, Rawls divides these states and conditions into 'subjective' and 'objective' circumstances. *See* J. Rawls, A THEORY OF JUSTICE 126-127 (1971). *Cf.* J.R. Lucas' analysis of human nature and the formation of political communities in his THE PRINCIPLES OF POLITICS 1-10 and 371 (1966; 1985). There, no explicit mention of external/objective conditions enters the discussion; he is concerned only with internal/subjective conditions and what tinkering with them portends for the philosophic generation of ideal communities.

[28]Rawls, for example, describes a set of six (perhaps eight, depending how one counts) circumstances, not all of which are traceable to Hume, but which "summary adds nothing essential to [Hume's] much fuller discussion." Rawls, footnote 27, *supra*, at 127-128. Hubin discovers four conditions in Hume, again alas not all with clear textual support, and notes, "Whether he is aware of it or not, Rawls adds to Hume's list." *See* D.C. Hubin, *The Scope of Justice*, 9 PHILOSOPHY & PUBLIC AFFAIRS 3, 20 (1979). Hubin arguably has done so, as well.

[29]T. Hobbes, footnote 23, *supra*, chapter XIII [at 80-81 in M. Oakeshott ed. 1946]. *Cf.* these formulations: "individuals are roughly similar in physical and mental powers; or at any rate, their capacities are comparable in that no one can dominate the rest. They are vulnerable to attack, and all are subject to having their plans blocked by the united force of others" from Rawls, footnote 27, *supra*, at 126-127; and "Even the most powerful is not invulnerable to attacks by the weakest; or, if the weakest alone cannot threaten the strongest, he can at least do so in association with others" in Hubin, footnote 28, *supra*, at 7.

[30]For interesting development of the distinction between rule-governed and rule-guided activities in a different context and to different purpose, *see* A. Gardner, AN ARTIFICIAL INTELLIGENCE APPROACH TO LEGAL REASONING (1987) [development of an expert computer system for contract law].

[31]*Cf.* Rawls' observation in a slightly different context: "In an association of saints agreeing on a common ideal, if such a community could exist, disputes about justice would not occur." Rawls, footnote 27, *supra*, at 129. This is not to say that coordination rules or conventions may not be required. For safety and convenience, even saints need to agree on which side of the road to travel. But such rules operate in wholly different fashion from determinations of rights and obligations when interests conflict.

[32]This thesis represents the 'logical presuppositional interpretaion' of Hume in Hubin's terminology. *See* Hubin, footnote 28, *supra*, at 8-10. He also floats four other possible interpretations of Hume and argues that all five fail properly to capture the scope of justice. The difficulty in following Hubin's strategy is its too strong reliance on swapping intuitions to construct justice's acceptable scope and thereby defeat Hume's thesis. Appeals grounded on what "seems to be" or "but surely ..." or "I, at least, ..." fail to carry the argument forward in satisfactory manner. *Id.* at 4 & 10. The upshot is that Hume survives Hubin's attack, particularly on this first very plausible reading of logical necessity.

[33]In his notes, Hart remarks that his "empirical version of natural law is based on" both men's works [CL, at 254]. Specific reference is then given to Hobbes' LEVIATHAN, chapters XIV & XV; and Hume's TREATISE, III.ii.2 & 4-7. Somewhat oddly, no mention is made of what I take to be an important chapter in Hobbes for the purpose of constructing such a list of conditions and from which we have had occasion to quote, *viz.* chapter XIII. Less important, though still curious, is Hart's exclusion of Hume's ENQUIRY.

[34]Several of these points are adumbrated in Hart's earlier reply to Jonathan Cohen's discussion and criticism of his inaugural lecture, *Definition and Theory in Jurisprudence*. In response to Cohen's putting three necessary criteria for a rule to be a legal rule, Hart supplies a list of eleven non-necessary standard or normal case criteria incorporating Cohen's three points and to which he appends the following footnote:

> There are, of course, several additions to this list that could plausibly be made, *e.g.*, it may be said that the criminal laws of a legal system must contain certain minimum vetoes against the use of personal violence and that either the criminal or civil laws or both must provide for a minimum form of property or possession in the sense of a right to exclude others from material objects at certain times for certain purposes.

He likewise adds a brief discussion on notions of approximate equality and limited altruism in subsequent text. Both essays can be found in *Symposium: Theory and Definition in Jurisprudence*, 29 [SUPP.] ARISTOTELIAN SOCIETY: PROBLEMS IN PSYCHOTHERAPY AND JURISPRUDENCE (1955). Cohen's piece begins at 213; Hart's reply begins at 239, with passages noted at 252-253. Similar allusions to points 1 and 4 appear in section V of Hart's essay, Separation, at 78-82.

[35]CL, at 190 (original emphasis). *See also* Hart's earlier characterization of this point: "suppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace ...." in *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593, 623 (1958); *reprinted* in his ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49, 80 (1983) [hereafter cited as Separation with page references to reprint only.]

[36]For an intriguing analysis of and some solutions to the free-rider problem in game theoretic terms, *see* P. Pettit, *Free Riding and Foul Dealing*, 83 JOURNAL OF PHILOSOPHY 361 (1986).

[37]The term 'empirical' is invoked by Hart in CL, at 187 & 254; the term 'sociological'

is suggested by J.W. Harris in his LEGAL PHILOSOPHIES 21 (1980). Yet, even this formulation echoes Grotian natural law argumentation:

> Grotius's practice of what he calls his *a priori* method shows it to be not an "abstract deduction ... taking as initially given only the nature of man". Rather, for Grotius and his successors, an essential role is played by their assumptions about history. Their method consists in showing that the acknowledged facts of human history are not arbitrary or accidental, but necessary. ... Grotius's *a priori* method characteristically proceeds by showing how the facts of human nature, concretely realized in specific social situations (most commonly drawn from ancient history), so drastically constrain possible solutions to given problems that the particular outcome or outcomes can be seen to be inevitable. He could be said to hold the view that human history reveals the logic of the distinctively human situation. For this reason, I suggest, we can understand why it is that –especially in his earlier published work, *Mare Liberum*– Grotius treats the law of nature as both innate and historical.

From S. Buckle, THE NATURAL HISTORY OF PROPERTY: NATURAL LAW THEORIES FROM GROTIUS TO HUME 5 (PhD Dissertation, Australian National University, 1987) [footnotes omitted].

[38]Still, it is not always clear just what it means to suggest, "Imagine a world wherein everything remains the same except ...." and then go on to describe some alteration in man's nature or environment. [*Cf.* the philosopher's incantation, *ceteris paribus*; and the law professor's imperspicuous Socratic hypotheticals.] Perhaps I simply lack sufficient powers of imagination necessary to play the game, but it often strikes me as akin to conceiving a square circle. That is, I rarely in fact am able to imagine even minimal alterations in the matrix of core conditions because I can't imagine changing one such factor without also reflecting upon its likely interactive effects upon at least one other core condition, which may subsequently have its own flow-on effects, and so proceed through the entire set. The resulting world is thus quite far from the proposed state of affairs which we were initially asked to consider. For philosophic analyses of possible world semantics and the problems they pose, *see* R. Bradley & N. Swartz, POSSIBLE WORLDS: AN INTRODUCTION TO LOGIC AND ITS PHILOSOPHY (1979), *esp.* chapters 1 & 6; D.K. Lewis, ON THE PLURALITY OF WORLDS (1986); *and* M.J. Loux (Ed.), THE POSSIBLE AND THE ACTUAL: READINGS IN THE METAPHYSICS OF MODALITY (1979).

[39]Nonetheless, the problem posed here is not simply one of modal logic and the criteria for differentiating 'merely conceivable' from 'actually possible' worlds as might have been suggested in the previous footnote. Physicists and philosophers of cosmology have begun painting a quantum mechanical picture of a finely-tuned universe in which the four

elementary forces (strong and weak nuclear forces, gravitation, and electromagnetism) and certain evolutionary processes must take on an extremely narrow range of coordinate values for there to be a cosmos to observe at all, and for that universe to produce intelligent creatures who can observe it. Accordingly, claims that some strange worlds are 'possible' may be in error, as they may in fact be logically-physically impossible. For survey of these points, *see* G.V. Coyne and M. Heller (Eds.), NEWTON AND THE NEW DIRECTION IN SCIENCE *passim* (forthcoming, 1988), with particular reference to the essay contributed by J. Leslie, *The Prerequisites of Life in Our Universe.* Be that as it may, for the sake of subsequent argument I shall set to one side any unease and pass over the problems in depicting these alternative worlds, however odd they may appear.

[40]The strategy followed in the remainder of this essay is similar to the argument proffered by Beyleveld and Brownsword in their stimulating article, *Law as a Moral Judgment vs. Law as the Rules of the Powerful*, 28 AMERICAN JOURNAL OF JURISPRUDENCE 79 (1983). The major difference is that they claim to have sketched a "real definition" of law and legal enterprise as a transcendental conception of morally legitimate power; no such transcendental deduction is attempted below. In fact, the label 'transcendental' may not be appropriate for the task. While sympathetic to their position that "The legal enterprise can only be explained in terms of a particular model which defines it. The model is a constellation of conditions and interests which we may refer to as 'the human social conditions under a problem of social order'" [*Id.* at 98]; Kantian a priori conceptual schemes which ground the possibility of experience play no role there. They do attempt a quasi-transcendental argument *in form* by attempting to demonstrate that any practical discourse presupposes a moral point of view by adapting Alan Gewirth's derivation of objective moral principles to the project of law [*cf.* A. Gewirth, REASON AND MORALITY (1978)]. But this is not in the end a transcendental argument concerning the possibility of experience or legitimacy of claims to knowledge. *See* A.C. Grayling, THE REFUTATION OF SCEPTICISM (1985), *esp.* chapter 4, for general discussion of transcendental arguments in philosophic argument. For an earlier attempt to grapple with the problem of a real definition of law, *see* B.B. King, *The Basic Concept of Professor Hart's Jurisprudence: The Norm Out of the Bottle*, [1963] CAMBRIDGE LAW JOURNAL 270.

[41]J. Eatman, LAW AND LEGAL OBLIGATION: A STUDY IN THE LEGAL THEORIES OF H.L.A. HART, JOSEPH RAZ, AND RONALD DWORKIN 69-70 (PhD Dissertation, Tulane University; 1981) [parenthetical identification of truisms 1-4 in original; bracketed notation to truism 5 supplied].

[42]J.R. Lucas, footnote 27, *supra*, at 4 (original emphasis).

[43]Recall that the possible worlds in view are defined by conditions of interest invulnerability *ceteris constantis*, i.e. all other conditions remain the same. Thus, excluded worlds are those wherein interests don't clash because the beings are so physically different that all their interests, e.g. in resources, are non-competitive; that such abundance exists so as easily to meet a Lockean proviso of 'enough and as good' remaining to potential competitors; etc. In the case of benign beings, akin to Rawls' community of saints, one might be able to conjure a few coordination conventions —though in that world it would appear that one is smuggling in the cardinal notion of interest convergence to diffuse possible conflicts along with some subtle tinkering as regards the condition of limited generosity.

[44]ENQUIRY, at 190. Noticed in our text at page 9, *supra*.

[45]*See* e.g. *Genesis* 6:4; and *Numbers* 13:33 —giants of violence.

[46]*See* the first part of Jonathan Swift, GULLIVER'S TRAVELS [originally published as TRAVELS INTO SEVERAL REMOTE NATIONS OF THE WORLD: IN FOUR PARTS —By *Lemuel Gulliver*, 1726; 2d ed. 1727].

[47]CL, at 191-192. *Cf.* Hume's comment on reversing this condition: "Implant in the human breast perfect moderation and humanity, or perfect rapaciousness and malice: By rendering justice totally *useless*, you thereby totally destroy its essence ..." [ENQUIRY, at 188 (original emphasis)]. In neither account should selfishness/devilishness be confused with simple egoism, the latter being a normative account which prescribes that one ought to pursue [rational] maximization only of one's self-interest. To reassert a traditional distinction here, beings with the former dispositions ought to be understood as ego*tists*, rather than egoists. Consider, for example, the power of the charge 'hypocrite' as applied either to a Kantian ethicist who acts egotistically or the egoist who is sacrificially beneficent when beyond the confines of his university office. For valuable contemporary discussion wherein the word 'wickedness' is supplied for traditional egotism, *see* S.I. Benn, *Wickedness*, 95 ETHICS 795 (1985).

[48]For associated argument that a motivational assumption of perfect altruism does not, indeed cannot, resolve the prisoners' dilemma in game theory, *see* P. Pettit, *The Prisoner's Dilemma and Social Theory: An Overview of Some Issues*, 20 POLITICS 1, 2-3 (May 1985).

[49]H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHILOSOPHICAL REVIEW 175 (1955).

[50]*Id.* at 175 n.2 (original emphasis).

[51]Unfortunately, it is not easy to discern whether 'restraint' should be understood to have been reduced to a form of coercion, and consequently also be taken up into competition *in extremis*, since that term is never analytically employed again in the essay. Not only does the notion of restraint introduced in the quotation appear to operate as a category within the broader conception of coercion provided, but further talk of freedom is always described in terms of the absence of coercion, alone. Thus, while argument can be advanced that the natural right to be free from restraint survives extreme scarcity, a fair reading could also be made that all such distinctions wither away where peace is not possible.

[52]*See* Hart's introductory comments to the collection of seventeen articles appearing in his ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (1983): "I have not included [this essay on natural rights] here, since its main argument seems to me to be mistaken and my errors not sufficiently illuminating to justify re-printing now" (at 17).

[53]This seems to be the purport of Hume's possible world wherein clothing and ornamentations will neither be required nor desired, raw foods wholly suffice, and "Music, poetry, and contemplation form [man's] sole business: conversation, mirth, and friendship his sole amusement" [ENQUIRY, at 183]. Yet, however conceivable this world, it is not the level of resources alone which has changed; Hume here imports several significant alterations in man's physical and psychological make-up, as well.

[54]The term is here used broadly to cover conventions establishing rules for exercising powers of appropriation, gift giving, promising, exchange, and so forth. It is not meant to denote centralized decision-making with regards to distribution.

[55]This resolution is in turn utilized to criticize any Kelsenian emphasis on law simply being a directive to officials to apply sanctions. *See* CL, at 35-36.

[56]Known as the problem of *akrasia* in contemporary philosophical literature (the term being a transliteration of Ionic Greek for 'incontinence' as found in the works of Plato and Aristotle). For an overview of the recent debate on how akrasia is possible and a proposal for fitting incontinent action and belief into a quasi-Aristotelian theory of human conduct, *see* A.R. Mele, IRRATIONALITY: AN ESSAY ON AKRASIA, SELF-DECEPTION, AND SELF-CONTROL (1987).

[57]*See* definition number three in the OXFORD ENGLISH DICTIONARY (1971) for an example of this rare, early seventeenth century usage. Parallel use is attached to the term in the phrase 'incorrigible sense statements' –being statements of which one may be certain, or alternatively about which one cannot be in error. *See* C.D. Rollins' entry on *Certainty*, 2 ENCYCLOPEDIA OF PHILOSOPHY 67, 69 (1967). But I am not aware that there is any knowing etymological link here.

[58]It is interesting to observe that limited knowledge is not one of the natural facts to which Hart appeals as a truism at the core of natural law's good sense, though it does have a place in his discussion of whether legislation can ever be 'unambigiuous' [CL, at 125]. It could surely serve as a corollary reason to obey, given limited understanding, when long-term benefits are not the obvious result of adherence to the rules. In other words, when one acknowledges one's own limited understanding, others' general obedience in the light of their understanding of long-term mutual good may here serve as a reason for motivating one's adherence to reap what one may not immediately see. *Cf.* the discussion of fallible judgment and imperfect information provided in Lucas, footnote 27, *supra*, at 6-10 and 123-133.

[59]More likely an allusion to contemporary English-speaking or Western European countries than an invocation of technical usage borrowed from international legal doctrine, e.g. by calling up the notion of jus cogens as understood and developed by the Permanent Court of International Justice under the League of Nations. For review of the evolution of this technical usage and how it might usefully be so read in this context, *see* G.W. Gong, THE STANDARD OF 'CIVILIZATION' IN INTERNTIONAL SOCIETY (1984).

[60]*See* R. Pound, OUTLINES OF LECTURES ON JURISPRUDENCE 168-185 (5th ed. 1943). Postulates I and II arise in Pound's outline under proprietary rights; III comes under duties of performance and of restitution; the corollary to I, along with postulates IV and V, arise under duties of reparation. Martin Golding notes that Pound's work "merits comparison with that of recent writers: the jural postulates, for instance, compare very favorably with H.L.A. Hart's 'minimum content of natural law' and lend themselves to richer treatment." *See* M.P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America –Major Themes and Developments*, 36 JOURNAL OF LEGAL EDUCATION 441, 452 (1986) (footnote omitted).

[61]*Cf.* Hart's remark from an earlier essay:

> Of course we must be careful not to exaggerate the differences among human beings, but it seems to me that above this minimum [content owing to natural

> necessity for survival] the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is 'necessary' in this sense [Separation, at 81].

Just such extension is, of course, the purpose of our argument in this section.

[62]SUMMA THEOLOGIAE, 1a2ae.94, 2. [T. Gilby trans. 1966]. This represents the first of three stages assigned to precepts of natural law.

[63]J.T. Noonan, Jr., *The Concept of Law* (Book Review), 7 NATURAL LAW FORUM 169, 175 (1962). Noonan is also one of those taking umbrage at Hart's use of the first-person plural pronoun at this point in CL's discussion of survival.

[64]M. Krygier, THE CONCEPT OF LAW *and Social Theory*, 2 OXFORD JOURNAL OF LEGAL STUDIES 155, 180 (1982) (original emphasis). Related criticism is also offered by Rolf Sartorius: "Hart's notion of natural necessity is presented in terms of what there are good reasons for *given survival as an aim*. But surely room must be made for loftier human pursuits than mere survival (of either the individual or the species)." R. Sartorius, *Positivism and the Foundations of Legal Authority*, in R. Gavison (Ed.), ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 43, 61 (1987) (original emphasis).

[65]SUMMA THEOLOGIAE, 1a2ae.96, 2. [T. Gilby trans. 1966]. This represents the second of three stages concerning the precepts of natural law.

[66]H. Grotius, footnote 14, *supra*, at Prol.8 and 12. *See also* K. Olivecrona, LAW AS FACT 13-15 (2nd ed. 1971).

[67]From *Genesis* 4:9.

[68]Somewhat more expansively, the question has also been put as 'who is my neighbor?' in *Luke* 10:29. *Cf.* the work reflected in the essays from E. Kamenka and A.E.S. Tay (Eds.), LAW AND SOCIAL CONTROL (1980), particularly the two essays contributed by the editors which take up and develop the notions of *gemeinschaft* (social control questions common to communal/organic societies) and *gesellschaft* (social control questions common to more individualistic societies, especially when based upon exchange relationships) and their overlap in social development.

[69]That such reciprocity interests in accountability for actions and mutual concern for

others exist forms the core of the 'transcendental' argument proposed by Beyleveld and Brownsword in the essay cited in footnote 40, *supra*. For theoretical development of similar reciprocity interests in international society; e.g. interests resulting in conventions encompassing *pacta sunt servanda*, equality, collective responsibility, and self-determination, *see* D.W. Skubik, *Two Models for a Rawlsian Theory of International Law and Justice*, 14 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 231, 244-248 & 258-263 (1986). For actual reflection of such interests and corresponding conventions in contemporary international law, *cf.* the modern development of jus cogens –being those rules widely agreed as fundamental to or necessary for international relations. In the words of the Vienna Convention, jus cogens norms are "peremptory" and "from which no derogation is permitted." Vienna Convention on the Law of Treaties, 23 May 1969 [in force 27 Jan 1980], art.53, 1155 UNITED NATIONS TREATY SERIES 331, 344 (1980) [I-18232]. They can be expressed in treaty or received in custom as necessary to protect the public interest of the society of States or to maintain the standards of public morality recognized by them. *See generally* I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-515 (3d ed. 1979) and the works therein cited.

[70]This seems to be the (mis)interpretation advanced by Julius Stone in several of his writings, principally in chapter 3 of his LEGAL SYSTEM AND LAWYERS' REASONINGS 98-136 (1964), where he handles in rather rough manner Kelsen's pure theory of law. For a vigorous response, *see* Kelsen's *Reply to Professor Stone*, 17 STANFORD LAW REVIEW 1128 (1965).

[71]H. Kelsen, footnote 70, *supra*, at 1144 (original emphasis). There is a passage in Kelsen's PURE THEORY OF LAW (2d ed. M. Knight trans. 1967) [hereafter cited as Pure TL] which could be misleading. In speaking of the interpretation of acts as legal acts, he indicates that conforming behavior being guided by the subjective meaning of the act must be recognized as its objective meaning (at 47). But this is not a reference to the validity or objective character of the legal order and its constitution.

[72]H. Kelsen, *On the Pure Theory of Law*, 1 ISRAEL LAW REVIEW 1, 6 (1966) (original emphasis). Philip Pettit quotes from this same passage to establish a definite reading for the attribution of the basic norm's presupposition in Kelsen's work *contra* criticisms raised by Jes Bjarup. *See* J. Bjarup, *Kelsen's Theory of Law and Philosophy of Justice*; *and* P. Pettit, *Kelsen on Justice: A Charitable Reading*, in R. Tur and W. Twining (Eds.), ESSAYS ON KELSEN 273 & 305 (1986). *Pace* Pettit, his reading is perhaps too charitable. Kelsen can be read as fixed on this point with consistency only at the cost of jettisoning large tracts of other work. Even within this 1966 essay, it can be argued that

Kelsen is worrying the distinction between the philosophy of law (dealing with the politics of justice) and the science of law (covering the positing of law and the coercive order's validity), the latter bearing the form and concern of his general theory of purity. If this interpretation is accurate, we are still left with a Kelsenian jurist presupposing the presupposition of a *grundnorm* to establish objective validity. More on this point, *infra*.

[73]H. Kelsen, footnote 70, *supra*, at 1144 (emphasis supplied). Similar language appears in the same context in an earlier work:

> The act whose meaning is the constitution has not only the subjective but also the objective meaning of "ought," that is to say, the character of a binding norm, if –in case it is the historically first constitution– *we* presuppose in our juristic thinking that we ought to behave as the constitution prescribes" [Pure TL, at 8 (emphasis supplied)].

[74]H. Kelsen, GENERAL THEORY OF LAW AND STATE xv & 116 (A. Wedberg trans. 1949) [hereafter cited GTLS].

[75]For Fuller, "law is the enterprise of subjecting human conduct to the governance of rules." L.L. Fuller, THE MORALITY OF LAW 106 (Rev. ed. 1969). Further, a legal system is "the product of a sustained purposive effort." *Id. Cf.* Aquinas' noting that "Law is a kind of direction or measure for human activity through which a person is led to do something or held back." SUMMA THEOLOGIAE, 1a2ae.90, 1 [T. Gilby trans. 1966].

[76]Hart acknowledges that Kelsen's basic norm is functionally equivalent to his rule of recognition in CL, at 228. Likewise, that Kelsen's notion of validity is to be understood as the problem of bindingness can be seen in CL, at 230.

[77]*See* e.g. D'Entrèves' short treatise entitled NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY (1951); and J. Finnis, NATURAL LAW AND NATURAL RIGHTS (1980).