One of the grand topics of the 20th century legal philosophy was the relationship between law and morality: Are the two normative orders autonomously separate from each other, or is law an institutionalized moral order? Are overlapping connections between legal and moral norms logically contingent, or is there a logically necessary relationship between the two? Is the relationship between law and morality accidental or essential? These are only a few possible renderings of the problem at stake. The general tone of the debate was determined by those who denied an essential, or necessary, relationship. The proposed sources for such a denial were many, the oldest one being the voluntaristic tradition of legal positivism which always, ever since the ancient Romans, had claimed that it is nothing but the will of the lawgiver which makes valid law. Another source was the Weberian philosophy of the "modern" state which built on the idea that in a developed "modern" state the legal order had completely disentangled itself from the moral order and become an autonomous and self-sufficient normative system. Similar ideas appeared in Talcott Parson's notion of social development as a process of adaptive upgrading in which social subsystems gradually were specialized and differentiated from each other.
A further source was the Kelsenian “pure jurisprudence” which underlined the logical completeness of the norm hierarchy of legal rules.

The Anglosaxon school of analytical jurisprudence, headed by H.L.A. Hart, made a point of showing that there is no logical connection between the concepts of law and morality, so that the law may have any content quite regardless whether it meets any moral standard, and is still fully valid law. A background factor common to several versions of the denial was the logical positivism of the Vienna school, a latter day version of ontological nominalism for the greater glory of natural science: according to it traditional ethics was pointless because its statements could not be empirically verified. Consequently some sympathisers, like the Scandinavian realists, conceived of the law as a sheer social or psychological fact, which stripped it of moral undertones. Others, like Hart, came to look at morality primarily as a factual normative order, a positive morality, which in its own way marginalized whatever connection there might be between that which happens to be positively valid morality and that which happens to be positively valid law. “What happens to be valid law” is indeed a key expression in the present context: the worldwide upsurge of representative democracy during the 20th century was accompanied with a widely accepted political philosophy which maintained that one of the prerequisites for a functioning democracy is that the law may have any content as long as it represents the will of the legislative majority. Pre-positive moral constraints on the material content of law appeared in the eyes of many incompatible with democratic government¹.

¹. Note, though, that Carlos Santiago Nino makes an ingenious attempt at showing how democracy makes laws moral, providing thereby quite on the contrary a link between law and morality; see his Derecho, moral y política. Una revisión de la teoría general del Derecho, Ariel, Barcelona, 1994, p. 161 pp. In the context of this essay we cannot engage in a discussion on the morality of democracy; for a divergent view, see e.g. Alberto MONTORO
In a way the question concerning the relationship between law and morality was very close to another great dispute of the 20th century, namely the Is-Ought question between legal positivists and jusnaturalists: whether legal Ought is to be derived—or derivable—from some Is of natural morality or the like. It is therefore hardly surprising that many of the legal philosophers who challenged the mainstream dogma and supported an essential, or necessary, relationship between law and morality were—like Lon Fuller with his "internal morality of law", and the new Aristotelians and Thomists most notably exemplified by the "new school of jusnaturalism" headed by Germain Grisez and John Finnis—in one way or another sympathetic to jusnaturalistic views. Their contributions to the discussion show that the essential question as it was framed in the 20th century differed, deep down, very little from the one posed by Plato and Aristotle: whether the conceptual essence of law is to promote the common good, or whether it is nothing but an arbitrary order imposed by the strong on the weak, democratically or otherwise.

Below we shall first look at some of the common arguments proffered for holding that legal and moral norms are different from each other. Then we shall look more closely at H.L.A. Hart's argument for holding that even if there are connections and similarities between legal and moral norms, they still will not imply a necessary relationship between the two. Finally, we shall try to construe an intelligent reply to the analytical position in order to show that views like Hart's are crucially dependent on certain metaphysical presuppositions which no one is under an obligation to share, and that if one chooses a different worldview it is also natural to assume that there must be an essential relationship between law and morality. For this purpose we shall discuss Lon Fuller as an exemplary opponent to Hart, and also

BALLESTEROS, “Razones y límites de la legitimación democrática del Derecho”, in Anuario de Filosofía del Derecho XIX, pp. 119-182.
have a closer look at Carlos Santiago Nino's posthumous contribution to the debate.

1. LAW AND MORALITY AS DIFFERENT NORMATIVE ORDERS

It is obvious that law and morality are not identical: they are two different normative orders with different functions and characteristics. Our question is whether these differences justify the conclusion drawn by many philosophers that law and morality are conceptually and/or essentially independent from each other. To employ H.L.A. Hart's terminology, we ask ourselves whether morality in any way defines the very concept of law. In Aristotelian terms we might paraphrase the question as follows: is law essentially moral? Aristotle's answer according to which law is an essentially moral enterprise is the implicit starting-point of the whole discussion. Hart, again, reflected the mainstream of modernity when he wanted to deny a conceptual link between law and morality. We shall begin our quest by looking at the differences between the two normative orders pointed out by Hart in his highly influential "The Concept of Law". There, the fundamental difference is summarized in terms of "external" and "internal" behaviour: the law deals with the former, whereas morality concentrates on the latter. While Hart wants to dismiss the more simplistic formulations of this difference, he proceeds to show that there is "something of importance" hidden in them, summarizing it under four headings.

First, a closer analysis suggests to Hart that moral norms are usually considered of central importance for social life, whereas


3. HART, ibidem p. 168.
legal norms need not be important for the very survival of society. True, some legal norms deal with extremely important matters, but such norms form only a fraction of modern legislation, most of which is concerned with morally indifferent questions and formal details. Hart seems to think that this difference is essential. His conclusion can be challenged, though, by pointing out with Rudolf Stranzinger that differences between law and morality can be of various kinds: not every difference is specific (a property constitutes a species by being shared by all members of one kind and none of the other), but some of them are typical without being specific ("arthäufig": only members of one kind have a property, but not all of them), or characteristic without being specific (all members of one kind have a property, but also some members of the other kind), or inessential (a property is shared by some members of both kinds but not by all members of either kind). Where the difference in importance is concerned, one should realize that moral norms are usually more abstract than legal norms, wherefore it is only to be expected that when a person applies the law he will not usually have to think of the basic principles which perhaps underly the applied norms. Indeed a central purpose of lawmaking is to facilitate judgment by making it unnecessary to resort to the first principles every time. But this by no means implies that the first principles do not exist, or that they are not moral. Hence the difference seems to be just a matter of relative closeness to the first principles, and thereby inessential.

Secondly, moral norms are immune from deliberate change by human fiat, whereas it is in the very nature of law that legal norms can be changed at will by the lawmaker. Moral norms,

again, are not changed, but changes take place in them over time. In slightly different words, Heinrich Geddert identifies the difference in question as one stemming from the respective sources of law and morality: legal norms are deliberately legislated whereas moral norms are not. Also this difference seems essential to Hart. But he seems to look thereby at law as a merely formal notion: it is quite obvious that, in a formal sense, laws are passed and abolished in a way in which moral norms cannot. This shows that law and morality are different, but overlooks that laws can be looked at from other viewpoints, too: Authors like H.T. Klami have pointed out that law is not only a normative but also a factual, or normal, order. Given that, it is obvious that a change in the normative order by no means effects an immediate change in the normal order. Customary law is a case in point. Similarly, if one holds –like those who support a Realesque multidimensional view of law– that the law has an evaluative or moral aspect, too, it is equally clear that the basic structure of that aspect changes much more slowly than the formally legislated norms. The difference in question can be essential in a specific sense only if one defines law as nothing but a product of positive enactment. But quite clearly that would be begging the question. Otherwise the difference is typical without being specific, or even inessential if we take into account that sometimes people do deliberately change their moral habits, too.

9. On such doctrines, see e.g. Seppo LAAKSO, Über die Dreidimensionalität des Rechts und des juristischen Denkens. Überlegungen zu einer syntetisch-argumentativen Rechtswissenschaft, The University of Tampere, Tampere, 1980.
It is possible to refine the argument from the source of legal and moral norms by ceding that in a way both can be legislated, but at the same time pointing out that they have different legislators: where legal norms are heteronomously legislated by someone else for the agents who are their subjects, moral norms are autonomously legislated by the agents who are their subjects for themselves. But even in this form the difference fails to be specific, as it overlooks not only the modern notion of internalized legal norms but the entire Aristotelian tradition which holds that a government by law is fundamentally an autonomous self-government of the citizens. One might also question the autonomy of the moral agent by pointing out that it is quite unusual for a moral doctrine to hold that agents actually invent their own standards: moral norms are generally believed to be given to the agent, and his autonomy is reduced to the act of making them his own, i.e. of internalizing them. Besides, positive morality is as heteronomous as positive law can ever be. Hence the difference must be inessential even in this form. – But one can still reforge the argument at hand and claim that it is an essential difference between law and morality that the former is created by the state, whereas the latter was born and develops in a broader social context. Nevertheless it is obvious that the state is not everything the law requires in order to gain reality: e.g. customary law is not created by the state even in the first place. Internalization does not take place by the lawgiver’s fiat. On the other hand, the state can, and can hardly avoid to, promote certain moral standards. As long as we look at this version of the argument merely in terms of who or what is the lawgiver, it is

10. See GEDDERT, op. cit., p. 95 pp.
12. GEDDERT, ibidem.
really not much different from Isidorus of Seville's classification of ancient Roman laws according to the last name of the person who drafted the piece of legislation in question\textsuperscript{13}, and equally inessential. A more interesting way of putting the argument would depart from the Aristotelian notion of law being the required method of organizing precisely the state and no other kind of community. But as we shall see towards the end of this essay, no essential difference between law and morality can be maintained from that viewpoint, either, because it explicitly conceives of the state as an institution for an essentially moral purpose.

Thirdly, Hart argues that an aspect of the essential difference between law and morality is that the law can be broken by objectively illegal external acts without regard to whether the subjective internal intention of the agent is blameworthy, whereas an action can only be morally blameworthy only if it is accompanied by a blameworthy intention\textsuperscript{14}. Morally, a demonstrated good intention—as well as a demonstrated incapacity for having a blameworthy intention at all—\textit{always} removes blame, whereas in law it is not necessarily so, even if intentions usually play a rôle in criminal and torts law. Nevertheless, as even Hart points out, the difference between law and morality is not sharp on this point: it is not possible to draw from this the conclusion that morality is interested in intentions alone, while the law is interested in external actions alone. Both are concerned with both, but with different priorities in mind\textsuperscript{15}. An action as defined by law can indeed be unlawful in the abstract while an individual action which matches the universal description can at the same time be lawful, because it is either excusable or justified due to special circumstance, and moral reasoning works much in the same way. But Hart fails to

\textsuperscript{13} See Etymol. V, 15 (Patrologia latina 82, 201).

\textsuperscript{14} HART, \textit{op. cit.}, p. 173 pp.

\textsuperscript{15} See p. 174.
underline the fact that the reasons which sometimes can make an unlawful action excusable or justified are fundamentally moral, which points to an intimate connection rather than to a difference between law and morality. We should also add that different moral doctrines give a different weight to subjective intentions: for utilitarians, the consequences of the action are the most important factor, whereas for Aristotelians and Thomists the decisive factor is the objective intension of an action rather than the subjective intention of the agent. Only in a Kantian morality can everything turn on the agent’s intention. This insight highlights the point made by Stranzinger that a claim of difference between law and morality often is only a claim of difference between a certain conception of law and a certain conception of morality.\textsuperscript{16}

If we shift attention from the agent’s intentions to the lawgiver’s intentions, it is possible to make an analogous claim: it is the lawgiver’s intention to regulate external human action, while morality pays primary attention to internal actions and attitudes.\textsuperscript{17} This claim enjoys a certain plausibility, but it is obviously just a matter of degree: most laws are more interested in external behaviour than in internal motives, and many moral norms are more interested in internal motives than external behaviour, but quite obviously internal motives are far from irrelevant for many laws (just think of notions like “good faith” or “criminal intent”), and equally obviously external behaviour is morally relevant in many cases. It is worth noting that the classical tradition of moral philosophy even divides morality in

\textsuperscript{16} STRANZINGER, op. cit., p. 248 p.; cf. NINO, op. cit., pp.17-42, where the author goes so far as to claim that the whole question concerning a conceptual relationship between law and morality is pointless for this reason.

virtues with an internal mean of excellence, like temperance and fortitude, and those with an external mean, like justice\textsuperscript{18}.

This last notion brings us to an alternative version of the argument, presented by Kubeš: that law seeks to direct human relations, whereas morality seeks to direct humans in their individual capacity\textsuperscript{19}. In different words, law directs people in their rôle of citizens, whereas morality is relevant for their other rôles\textsuperscript{20}. Part of this claim is evidently true: laws are passed for the purpose of regulating human actions inasmuch as they are relevant for the common good of the entire society. For this reason laws mainly deal with civil relations, wherefore justice, with its external mean, is naturally the supreme moral consideration in the realm of law. Indeed the ancients included this very notion in the definition of law\textsuperscript{21}, regarding it a specific and essential property which makes law what it is, i.e. law. Even so, this will not imply that it is not part and parcel of morality to be concerned for the common good and for justice in human relations. True, classical morality can be characterized as agent-centred, i.e. concerned for the personal excellence of the agent\textsuperscript{22}. But even then this personal excellence is far from an individual matter: it is in an important manner defined by the justified expectations placed on a person according to the rôles he occupies in society. And if we look at modern moral theories, they tend to be explicitly patient-centred: even if it is the action of an individual which is evaluated by moral standards, the aspect which is usually considered morally relevant in an action is precisely that which has an impact on others. As a consequence,

\textsuperscript{18} See St. THOMAS, \textit{Summa theologiae} Ia IIæ 64,2.
\textsuperscript{19} KUBEŠ, \textit{ibidem}.
\textsuperscript{20} Cf. GEDDERT, \textit{op. cit.}, p. 145 pp.
\textsuperscript{21} See e.g. \textit{Summa theologiae} Ia IIæ 90,2 and 96,1; At the same time they made a point of assuring that even then the law was in principle concerned for all moral virtues, even those with an internal mean, inasmuch as they were in any way related to the common good, see \textit{Summa theologiae} Ia IIæ 96,3.
\textsuperscript{22} Or eudaimonistic, as this way of conceiving of morality is often called.
the present argument points to a characteristic difference between law and morality: it is necessary for laws to be concerned for what we do under the aspect of social interaction and community, whereas it is not necessary for moral norms but only some of them have a social concern. This clearly divides law and morality into different species—but fails to show that one is not the subspecies of the other, or that the two do not belong to the same genus.

A fourth aspect of the difference between law and morality according to Hart has to do with sanctions: pressure to moral conformity is internal, whereas pressure to legal compliance is external. In other words, the typical sanction for a moral transgression is a pang of the transgressor’s own conscience, whereas sanctions for legal offences are administered by external authorities. Hart does not deny that external sanctions sometimes apply to breaches of the moral code, too. But on the other hand he fails to appreciate the bad conscience one can get for breaking the law if one has internalized the law in the way suggested above. Geddert again proposes that we should distinguish between various claims: That laws are always sanctioned, or that moral norms are always unsanctioned, are patently false claims. Closer to the truth is that laws are generally sanctionable in that the law usually provides for sanctions for offences against the law, but it is a different matter altogether whether these sanctions will in fact be applied. Morality is clearly sanctionable, too, but moral sanctions are usually different from legal sanctions in that they are not backed up by formal institutions. Yet is is by no means unthinkable that a formal

23. HART, op. cit., p. 175 p.; cf. Stranzinger, op. cit., p. 254 p., where the argument is that laws are sanctioned, whereas moral norms lack sanctions.


authority is instituted for the purpose of administering moral sanctions. And Robert Alexy clearly argues in his Sonderfall-thesis that law is fundamentally a special kind of morality, institutionalized for the purpose of providing the society with a forceful method of overcoming some of the practical shortcomings of the moral discourse.

It all seems to boil down to the rather evident notion that the administration of law is formalized in a way in which morality is not. Similarly, the validity of law has formal criteria which do not apply to the validity of moral standards: laws can be valid in a formal, or constitutional, sense even when they lack factual validity, i.e. efficacy, and ideal validity, i.e. moral acceptability, or reasonableness. On the other hand, moral standards can only be valid if they are reasonable standards. We are back where we began: laws usually have a formal source which moral norms lack. But what is the source for the validity of the constitution? A Grundnorm perhaps? But why is the Grundnorm valid? Instead of showing that law and morality are hereby essentially or conceptually unrelated, this point should rather lead us to the insight that the legal institutions, if they are not to exist for their own sake and therefore to be pointless, have a moral raison d'être: they are needed because morality is unable to organize a society effectively on its own. As a consequence it would seem


28. Even KUBEŠ, who otherwise holds law and morality separate orders, thinks it is necessary for the validity of a legal order that it be validated by a moral order, see op. cit., p. 169 & 178.
that an important difference between law and morality resides in the former being always a means to further ends and never and end in itself whereas the latter can give expression for unconsequential considerations which are ends in themselves. But even if this were the case, it will not remove the possibility that the ends to which it is the essence of law to be a means are ultimately moral.

The discussion so far clearly points towards the rather trivial conclusion that while law and morality are different species, they share the function of directing human action, whereby they are related to each other. The answer to the question whether the relation is conceptual in the sense that the concept of law includes a moral definiens is inconclusive so far. It seems to depend a lot on how one chooses to define law or morality whether this can be the case or not. We should not be overly hasty in accepting the conclusion of Nino according to which the question is thereby uninteresting and even pointless. This is namely true only if we accept his high-handed denial of what he calls conceptual essentialism.

Instead of using the historically laden terms “nominalism” –or “conventionalism”– and “conceptualism” we choose to distinguish between those who define the concept of “concept” in an extensional manner, and those who define it in an intensional manner. The extensional approach, favoured by the analytical school, basically points out that this is a law and that is a law and that is a law, too; and this is a moral norm and that is a moral norm and that is a moral norm, too; and some of these laws do not match any moral norm, and some of these moral norms do not match any law; therefore the extensions of law and morality do not cover one another; therefore they are not conceptually related, either. But this is not a commonplace understanding of the

29. See NINO, op. cit., p. 41 p.
concept of "concept". Usually we hold that concepts are normative in that a thing must meet certain criteria in order to be accepted as a genuine representative of a given concept\(^31\). From this perspective concepts appear intensional: they are based on a piece of information which tells us what it is that makes a thing what it is, i.e. its intension, or point. If the law has a moral point, then those "laws" which fail to meet the requisite moral criteria fail to be law, too, in the proper sense of the word. Those who believe that it makes no sense to think that law lacks intension, and is thereby pointless, can hardly be expected to accept that the concept of law is a matter of convention, wherefore there is—and can be—no correct definition of law. Quite clearly Hart—and Nino for that matter—are equally unwilling to accept that law is pointless. Therefore, despite the fact that they both support the view that there is no necessary conceptual connection between law and morality, they proceed to discuss several connections between the conceptually separate normative orders which they acknowledge as important even if they maintain that they are not conceptually or essentially necessary\(^32\).

2. CONNECTIONS BETWEEN LAW AND MORALITY

Having denied the possibility of a conceptually necessary relationship between law and morality, Hart argues that they nevertheless have a close contingent relationship, based on the fundamental characteristics of human society which make the institution of a legal order practically necessary. This necessity, together with the social factors which cause it, Hart jocularly calls "the minimum content of Natural Law"\(^33\).

\(^33\) HART, op. cit., p. 189 pp.
The factors which make it practically necessary for any human society to found a normative order of law are five: (i) human beings are vulnerable and need protection in order to survive; (ii) human beings have approximately equal capacities, so that it is not possible for anyone to impose a permanent order on others by relying on his personal strength or cleverness alone; (iii) human beings tend to be selfish rather than altruistic in that they are often willing to take advantage of a favourable circumstance at the cost of their fellows; (iv) the resources available to any human society are limited, so that in the end the allocation of resources between individuals is a zero-sum game; and (v) human understanding is limited, and the human will is prone to weakness. The result of all this is that in the state of nature, as it were, human interaction tends to be competitive and individual life and property unsafe. Therefore, in order to make a peaceful and ordered life possible, social interaction must be *organized* by instituting a permanent order. Such an order, again, can best be instituted by the rule of law. Therefore, if human society is to be viable, it is practically necessary that it be organized with a coercive legal order which prevents—to use a Hobbesian notion—a war of everyone against everyone from breaking out.

That this rather Hobbesian notion is applicable to Hart's "minimum content" shows that his "Natural Law" is "natural" merely in the same sense as Hobbes' account of law can be called a theory of "natural law": it shows, given that his pessimistic view of mankind is true\(^{34}\), that a coercive legal order is necessary

34. Cf. John FINNIS, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980, p. 231 pp., where the author points out that it is not necessary to assume that it is in the nature of human beings to treat each other badly in order to come to the conclusion that they need a normative order in order to organize their many pursuits and callings into a manageable whole. Cf. etiam Steven LUKES, "Taking Morality Seriously", in *Morality and Objectivity. A Tribute to J. L. Mackie* (ed. Ted Honderich), Int'l Library of Philosophy, Routledge & Kegan Paul, London 1985 (pp. 98-109), p. 101 pp., where it is argued that a
for survival. If one accepts the value judgment that being coerced to survival is better for human beings than being at liberty to win or to lose in the battlefield, "the minimum content" may even justify that an order be instituted which is strong enough to maintain peace. But it can hardly have much to say about the substantive content of the order in question, as Gregorio Peces-Barba also points out. And Otfried Höfffe is in his right to say that we can hardly be satisfied with justifying the mere existence of a legal order: the actual content of every particular legal order cries for justification. And it is only natural to expect that such a justification be a moral one which distinguishes between a good and a bad order, or—in ancient terms—between state and tyranny.

Perhaps anticipating this objection, Hart brings up a number of aspects under which it has been claimed that morality is essential to law, with a view to showing why these claims fail to demonstrate a conceptually necessary relationship between law and morality, even if some of them rightly point at a significant, even if contingent, connection. The first topic Hart takes up is the obligatory authority of law: according to him a professed obligation to respect the authority of the law is not always based on moral considerations. More often than not, people make their decision to abide by the law on other than moral grounds: e.g. for prudential reasons, or out of fear. Therefore it is quite conception of limited altruism like Hart's presupposes a conflict of interests rather than creates it.

35. Gregorio PECES-BARBA, Introducción a la Filosofía del Derecho, Debate, Madrid, 1983, p. 315 p. Cf. HART, op. cit., p. 195, where unclear reference is made to "minimum forms of protection... which are ...indispensable features of municipal law".


enough for law that it oblige the subjects coercively, and it is in no way conceptually necessary for it to be morally internalized or internalizable by them. – An obvious reply to Hart would be that the psychological motives which legal subjects actually hold for their decisions can hardly have much relevance for the question whether it is in the essence of law that it ought to be based on moral premisses in order to be valid. It is also important to distinguish between obliging and obligatory 39: a piece of legislation can very well be formally valid and actually effective and thereby obliging, even if it were not valid in a moral sense which made it genuinely obligatory. The question concerning "iniquitous law" is a case in point 40: Hart thinks it is to the advantage of legal science to hold that laws are laws, and thereby included within the scope of its discipline, even if they are immoral. But this is a mere terminological trick: it makes little practical difference whether we call morally defective laws "laws" or something else.

On the contrary, the important question should be whether there is something in the very enterprise of organizing a society with law which makes the validity of laws depend on their relationship to moral standards. Thereby we should distinguish between several levels of inquiry: An individual law can clearly be legally valid in a non-moral sense even if it were not valid on its own merits in a strictly moral sense. The legal order as a whole, again, can hardly be legally valid in any way which were not constitutive of a vicious circle, and if it is to have a

39. Cf. *ibidem* p. 18 pp., where Hart discusses the difference between a gunman and a lawgiver. There he wants to make the distinction between obliging and obligatory without taking recourse to moral considerations. As I interpret it, his distinction depends on the notion that the law is institutionalized in a way which a gunman's orders are not. But to my mind this trick only moves the problem to a different level: if a legal order is institutionalized by a habituation which in turn is merely based on sheer force, does it really differ from a gunman in any essential respect?

40. See *ibidem* p. 203 pp.
meaningful validity at all, it must needs derive from some extra-
legal consideration, most likely a moral value. If a legal order as a
whole is morally valid, it can as a consequence constitute a
general reason for the subjects at large to hold the laws at large
within that order as *prima facie* legally valid in a sense which is
not merely obligieing but also morally obligatory. The immorality
of a particular piece of legislation may sometimes overturn this
assumption of legal validity in a moral sense, but even then, an
individual subject may, for strictly moral reasons, have a
particular duty to submit to the requirements of the morally
defective law in the particular situation at hand. In this way, if
we are to use a meaningful notion of legal obligation which
differs from being obliged by coercion, the fundamental
prerequisite for it will always be moral.

Hart admits that morality undoubtedly has a bearing on law in
that it influences the content of legislation: legal norms often
reflect prevalent moral norms. But they do not always do it,
which shows that this influence is conceptually contingent. It is
only factually indispensable for the law, if it is to to create a
stable order in society, that it meet the prevalent moral standards
to a degree which is sufficient in the present circumstances. But
here we should note how admirably Hart fits the category of those
who define “concept” extensionally, not intentionally. If one
accepts a purposive view of law, like Lon Fuller, one will tend
to read a purpose into the very concept of “law” and not merely
particular purposes to particular laws. Then it is not sufficient to
point out that not every particular law has a particular moral
purpose, for the law as a whole might still have one.

Hart admits that morality affects the interpretation of law, due
to its open texture, and to the requirements of justice on judicial

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41. As already Aquinas pointed out in Ia IIæ 96,4: Injustæ autem sunt.
Haven, CT 1965, p. 96.
procedure\textsuperscript{44}. Here his argument against a necessary relationship is sociological: he points out that even if moral considerations are important for judicial reasoning, they have historically been "honoured nearly as much in the breach as in the observance". In much the same way he disvalues the insight that morality can be used for a critical evaluation of law: it cannot constitute a necessary relationship because people in fact more often disagree than agree on how laws ought to be morally evaluated\textsuperscript{45}. But it is hardly the same thing to say that moral standards have in fact often been broken in the administration of the law, or that the evaluation of laws according to moral standards is more often than not subject to disagreement, as to say that moral standards do not constitute a necessary part of legal reasoning and interpretation, or that the proper standards for evaluating law are not necessarily based on moral considerations. Indeed, the modern philosophy of hermeneutics has quite clearly shown that there is no way of arriving at a practical legal interpretation without at least implicitly employing evaluative criteria\textsuperscript{46}. And clearly there is no point of even talking about evaluation, unless it takes place with reference to values. In order to maintain that such an evaluation can be performed without implicit and ultimate reference to moral values one must discard the very idea that the purpose of evaluation is to distinguish between that which is truly right and that which is truly wrong and embrace a pluralistic conception of value which denies the possibility that some, i.e. moral, values are more important than others\textsuperscript{47}.

\textsuperscript{44} Op. cit., p. 200 p.
In his discussion, Hart makes one seeming concession: perhaps there is a necessary connection between law and morality in that a certain minimum of justice is necessarily involved whenever laws are used for directing and controlling human behaviour. He refers to the Anglo-Saxon conception of "Natural Justice", which consists of principles related to the formal justice and impartiality which are considered essential for legal procedure, and says that if this is what is meant by the necessary connection between law and morality, he is ready to accept the claim. Nevertheless, it is "compatible with very great iniquity". In other words, it will not yield any wielding criteria which would allow us to place substantive limits for that which is acceptable or legitimate within the realm of law. All it undoubtedly yields is the formal principle of justice which is nothing but an application of the general principle of consistency: like are to be treated alike, and unlike are to be treated differently. And if we place this principle in context with law, it is quite possible even to claim that in a way no law can ever be at odds with it. For laws are by definition general rules which determine how certain kinds of people in certain kinds of situations ought to be treated, and if persons who match the relevant legal criteria are consistently treated in the way the law stipulates, they will by definition be treated alike, i.e. equally according to the law. Hence it is quite obvious that even a blatantly unjust or evil law can meet the requirements of the justice under scrutiny as long as it is a formally sound piece of legislation. At this point the discussion will necessarily (sic) take a turn to a famous episode of the 20th century discourse on legal philosophy in which Hart played a part, too: Lon Fuller's theory on law and morality.

3. THE INTERNAL MORALITY OF LAW?

The famous difference between Hart and Fuller had moralistic undertones which reflected their different scientific inclinations and the way they reacted to the equally (in)famous “perpetual recurrence” of Natural Law doctrine, once again recurring after World War II. Where Hart believed that the best way to prevent something like that from happening would be to deny that nature determines the boundaries of what can be the content of valid law\textsuperscript{50}, Fuller thought that it was imperative to find a way of showing how nature herself would put a stop to tyrannies if only she were given the appropriate authority which belongs to her\textsuperscript{51}. This basic attitude brought him to construe a theory of law with which he wanted to show that, contrary to being infertile that very connection between law and morality which even Hart admitted was necessary, viz. the one via the formal characteristics essential for law, constituted a basis for a morality which was not only “internal” to the law and thereby part of the very concept of law, but also a source for applications which would circumscribe the scope of the legitimate material content of the legal order.

Fuller introduces his problematic with a distinction between a morality of duty, and a morality of aspiration\textsuperscript{52}. He argues that a morality of aspiration which strives for perfection in legality is relevant for law\textsuperscript{53}. He is clearly inclined towards an intensional notion of “concept” when he holds that the concept “law” requires of real laws that they meet a certain standard of legal perfection, or an ideal norm of lawlikeness. He explains what he has in mind by telling a tale about an unhappy king named Rex who sets out to organize his realm with law. Thereby he makes a row of mistakes which teach him step by step what is the

\textsuperscript{50} See HART, \textit{op. cit.}, p. 203 pp.
\textsuperscript{51} See FULLER, \textit{op. cit.}, p. 152-186.
\textsuperscript{52} \textit{Op. cit.}, p. 3 pp.
\textsuperscript{53} \textit{Ibidem} p. 41 pp.
appropriate way in which laws are to be drafted, promulgated and administered. While he learns from his own mistakes, Rex comes to realize the importance of the following considerations: 1) Laws must be general\(^{54}\). 2) Laws must be promulgated\(^{55}\). 3) Laws must be prospective, not retroactive\(^{56}\). 4) Laws must be clear\(^{57}\). 5) Laws must be consistent and mutually compatible\(^{58}\). 6) Laws must not require the impossible\(^{59}\). 7) Laws must remain constant over time\(^{60}\). 8) The application of rules by officials must be congruent with the rules\(^{61}\). Fuller uses a Dickensian metaphor to make his point: if the legal order fails to meet one or several of these criteria of lawlikeness, it is to that extent not a legal order in the proper sense of the word, “except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract”\(^{62}\). The eight requirements constitute an “internal morality of law” which every law must respect in order to be law at all.

Now it may appear too much to say that a law which fails to meet one of the requirements is thereby no law at all. Clearly it is an imperfect law, but it may seem to make more sense to put it in the way John Finnis suggests: “law” has a focal meaning which includes a set of criteria which laws must meet in order to be laws properly speaking, while laws which fail to meet some criteria but still meet others are laws in some limited particular sense\(^{63}\).

\(^{54}\) P. 34 & p. 46 pp.
\(^{55}\) P. 35 & p. 49 pp.
\(^{56}\) P. 35 & p. 51 pp.
\(^{57}\) P. 36 & p. 63 pp.
\(^{58}\) P. 36 & p. 65 pp.
\(^{59}\) P. 36 p. & p. 70 pp.
\(^{60}\) P. 37 & p. 79 pp.
\(^{61}\) P. 38 & p. 81 pp.
\(^{62}\) P. 39.

\(^{63}\) FINNIS, op. supra cit, p. 277; This is a play with the Aristotelian distinction between “simply” and “in a sense”: “good simply” requires all and “evil simply” comes with one fault, but that which is “evil simply” can still be “good in a sense”. Thus there is no difference between Fuller and Finnis.
Whatever the case, Fuller's requirements seem on first sight designed to secure the effectivity of law: in order for the legal order to accomplish its task, it must abide by all these requirements, for which one may well adopt the shorthand expression "the rule of law". Efficiency is an undramatic requirement, and many others have demanded that laws must be efficient or efficacious in order to make good sense\(^64\). But if this is the case, it is difficult to see how Fuller's view is any different from Hart's, who—as we remember—also says that it is necessary for laws to meet the basic requirements of formal justice but claims that this is a meagre basis for a necessary connection between law and morality because it is compatible with very great iniquity. The difference, as Fuller sees it, lies in that there are certain substantive ends which it is impossible to promote with laws without compromising the "internal morality" which gives expression for an aspiration towards perfect lawlikeness\(^65\). His belief appears to be that a scrupulous respect for the "internal morality" will increase the likelihood of justice in the legal order\(^66\). This is at least what his appeal to historical evidence\(^67\) seems to suggest. And if we take Fuller's requirements as necessary prerequisites for making law at all, then they will obviously be necessary prerequisites for any reasonable lawmaking, too. But if they are to have significant material


\(^{67}\) P. 154.
applications where the substantive content of the laws is concerned, they have to be sought in the light of a dictum which Fuller pronounces when he says that his “inner morality” has an inbuilt view of man as “a responsible agent”\(^6\). This notion allows us to stake a step further: from the aspiration of law to perfect “lawlikeness” to the aspiration of law as an enterprise for human order to a perfect “humanness” or “humaneness”.

As a human order, the legal enterprise intends to regulate the behavior of human beings. In principle, one can attempt to do this in two philosophically divergent ways: One way is to manipulate the subjects without their rational co-operation, as if they were cattle and not responsible agents or autonomous rational persons with an ability to direct their own actions in a reasonable manner. This is like the Macchiavellian approach to government, or also that of a totalitarian tyranny, or of a modern “liberal” state which uses economic incentives to manipulate the citizens. The other way is to ask for the citizens' co-operation, assuming that they are responsible agents and autonomous persons with a mind to acting reasonably even on their own initiative. This is like the Aristotelian approach to government, or that of a state which trusts traditional legislation, or government by the rule of law, relying on the citizens to make up their minds that it is reasonable to abide by the requirements of the law for the common good of everyone. Now what Fuller appers to point at is that if a legal order directly violates the “internal morality”, it will at least in some cases be thereby repugnant to the “responsible agent” –view of man, and consequently inhuman.

Let us look at Fuller’s “internal morality” step by step: To begin with, he says laws must be general. This insight relates to the “responsible agent” argument in that it is a way of respecting the autonomy of the citizens not to direct their behaviour by individual and particular ad hoc orders or commands but by

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telling them in abstract terms what is expected of them as rational agents and relying on their good sense to adjust their actions to the general rules (given that they *are* reasonable). But this is nothing but a rendering of the original Aristotelian view according to which it was proper for slaves to be governed despotically, so that their actions will be not their own but those of their master, whereas free and equal citizens are to be governed by appealing to their reason and by letting them govern themselves\(^69\). Secondly, that laws must be promulgated is not merely a pragmatic point: it has a relationship with "*responsible agency*" in that it makes sense to manipulate people with secret regulations only if it does not matter whether they make up their own minds to act as required or not. In Aristotelian terms, it is possible to appeal to someone's reason only if one lets him know what is wanted of him. Where this not the case, the "legal order" would be Kafkaesque at best. Also the fourth and fifth requirements concerning clarity and consistency can be interpreted in the same way: that the valid rules are sufficiently clear and consistent for the citizens to understand in a univocal manner is an obvious prerequisite for their informed and autonomous self-government according to internalized rules. A similar point can be made about Fuller's third requirement, too: retroactive legislation is quite obviously not interested in "*responsible agency*" inasmuch as it imposes a rule on past actions rather than future ones. A lawgiver drafting a retroactive law is only interested in the measurable results —whatever they are— of the "legislation", and it makes no difference to him whether these results are a consequence of autonomous and informed civil obedience.

The way in which the sixth requirement, that laws are not to require the impossible, relates to "*responsible agency*" is evident. The seventh, that laws should remain constant over time, bears an

\(^69\). See Polit. I, 5-7.
equally obvious relation to it: in order for the citizens to be able to act according the law they have the right to expect that they can base their choices on a reasonably reliable knowledge about the foreseeable future. Otherwise their choices will not be genuinely informed. Moreover, it is to-day a widespread problem all over the enlightened West that laws are simply too many, new laws being passed all the time, and old ones being amended "whenever something occurs for the better"\textsuperscript{70}, so that it is practically impossible for ordinary citizens to follow the development at all. In such a political community, "responsible agency" under law is at best a beautiful fiction. The same can be said about such a political community, too, which violates Fuller's last requirement according to which it is imperative that both government and judiciary abide by the valid laws: if it is impossible for the citizens to know how officials will react to their choices, it is clearly not their "responsible" obedience which counts, but the opportunistic government -or its opportunistic officials- will utilize them for various purposes according to the demand of the situation. There is indeed an important difference in whether the government directs civil behaviour for the common good of everyone -or for the convenience of the government.

4. DISCOURSE AND DEMOCRACY

On the basis of what we have said above, the logical step to take would seem to lead us to an Aristotelian conception of law in the service of civil freedom. I trust that I have no need to explain the details of this conception to the readers of this journal. Let me only point out that it builds on a conception of man as a rational and a social creature with an internal entelechy which propels

\textsuperscript{70} See Summa theologæ Ia IIæ 97,2.
him towards perfection. This perfection consists in perfect rationality and perfect sociability, which can—if we look away from theoría, the most perfect perfection of rational activity which can only be achieved by the few—only actualize in a perfect community—the polis—which teaches the citizens to govern themselves and each other perfectly with the rule of their reason. If the political community is conceived of like this, that it is a means to perfecting human nature in individuals, then also the methods it employs for the purpose of “making men good”71 must be geared towards the same end. It follows, in the first place, that laws—which meet at least the criteria proposed by Fuller—are the only legitimate way of directing the citizen's choices because they are the only method which respects the status of the citizens as free and responsible, autonomous agents whose task is to govern themselves and one another. But quite clearly something must also be required from the material content of the laws if they are to promote the citizens' capacity for self-government: as a modern version of the Aristotelian theory puts it, laws must be compatible with the principle of subsidiarity which accords primary responsibility for the common good to the citizens themselves and only secondary responsibility to the government inasmuch as the citizens are not in a position to act properly on their own72.

Now for many moderns this way of looking at things is distasteful because it commits the sin of “essentialism”, i.e. conceives of the concept of “concept” in an intensional manner as it accords things a purpose based on their essential function within the universe of things. We have no space in this context to review the reasons which have led many to adopt a worldview which denies that things have a point and purpose which is part and parcel of their being the things they are. In the 20th century

71. See Eth. Nic. II,1 (1103b3) and Summa theologiae Ia IIae 92,1.
those reasons have appeared overwhelmingly compelling to many, even so much that one has felt no serious need to demonstrate why the essentialist view is wrong. Here we shall only take up one strategy which in the 20th century offered an increasingly popular promise that one could thereby avoid an outdated essentialism but at the same time maintain the view that there is a necessary connection between law and morality which goes far beyond the Hartian minimum, even much farther than Fuller perhaps envisaged when he wrote his own account. The source for this promise is the discursive theory of practical and legal reasoning, exemplified by names like Habermas, Alexy and Nino.

The fundamental idea on which the discursive school of the Habermasian fold is based is that society consists in communication between its members. The social institutions, including laws, are a result of this communication. In order to achieve good results, the communication should take place under given ideal circumstances which allow and ensure free participation under equal conditions for all members of society, and follow a given set of rules which reflect the requirements of rational and reasonable discourse. The discourse will arrive at morally justified conclusions if it meets the principle of universalizability which requires that every participant to the discourse should be freely willing to accept that the conclusion, e.g. a piece of new legislation, is in his own interest, too73. Robert Alexy, a disciple of Habermas, has applied the Habermasian notions on juridical reasoning, which he sees as a special case ("Sonderfall") for the general practical reasoning conducted on the political level of society74. In this way, if practical reasoning at large has a necessary connection to morality, then juridical reasoning must necessarily be moral, too, as it is nothing but a

73. For a discussion and slightly divergent view, see AARNIO, op. supra cit., p. 243 pp.
74. ALEYX, op. supra cit., p. 261 pp.
special kind of practical reasoning. This train of thought has been
developed in an original manner by Carlos Santiago Nino
precisely in order to show why, despite his belief that there is no
necessary conceptual connection between law and morality, they
are nevertheless necessarily related as different kinds of discourse
with a common fundament, or different instantiations of one and
the same metadiscourse, as it were\textsuperscript{75}.

Nino's starting point is that it is impossible for even an
external observer to understand a legal order without unders­
tanding the internal point of view of those who are subjects to
that legal order\textsuperscript{76}. In other words, understanding it presupposes
knowing why these subjects consider it a binding legal order.
And the foundation for this internal point of view, Nino claims, is
the practical discourse which has evolved and become the
principal mode of reproduction and intersubjective (re)for­
mulation of morality in the post-Renaissance West\textsuperscript{77}. Without
knowing this practical discourse one cannot know the law and
understand its evolution. And without the practical discourse
which underlies the internal point of view there cannot even be
law which an external observer could observe\textsuperscript{78}. The fact that in
order to identify the law one must identify the basis of its
authority shows that extralegal reference is necessary for that
purpose\textsuperscript{79}. For Nino, this authority is based on the law being
compatible with the interests of everyone, which in turn implies
that they must be a matter of critical discussion between all
members of society, including the lawgiver, the judiciary, and the
ordinary subjects. And this, according to Nino, is equivalent with

\textsuperscript{75} See NINO, \textit{op. cit.}, p. 43 pp.
\textsuperscript{76} P. 43 pp.
\textsuperscript{77} P. 49 p.
\textsuperscript{78} P. 47.
\textsuperscript{79} P. 50 pp.
their being a moral matter\textsuperscript{80}. Practical examples confirm\textsuperscript{81} that the law is not an isolated phenomenon: it is impossible to conduct a juridical discourse without taking recourse to a wider non-juridical discourse –which is a moral discourse concerning the justification of the authoritative premisses of the juridical discourse\textsuperscript{82}. In this way the juridical discourse seems to be a special case of the wider moral discourse pretty much in the same way as Alexy has suggested.

But morality is not merely necessary for justifying the law, it is necessary for interpreting it, too\textsuperscript{83}. Nino puts it rather nicely that laws –as the prescriptions they are– are overly crude and unbending to use as materials in a train of reasoning leading to their application: for use in practical reasoning they must be transformed into interpretative propositions about their relevance and content\textsuperscript{84}. Nino goes on to analyze different phases, steps or aspects of the process of interpretation, and finds in every case that it is impossible to carry out these steps without resorting to reasons which are moral in the sense defined above\textsuperscript{85}. But these reasons need not refer to any objective substantive moral content: that they refer to a discourse which can be characterized as moral suffices to make them moral reasons\textsuperscript{86}.

\textsuperscript{80} P. 59. Note that Nino conceives of “morality” explicitly in the predominant modern way of understanding morality as that aspect of practical reasoning which has to do with how individuals treat each other. For more details, see his discussion on prudential and moral reasoning, p. 80 p. His is nevertheless not the only way, and not necessarily the best way, in which morality can be conceived of, and it is therefore one of the weak points in Nino’s argument.

\textsuperscript{81} P. 60 pp.

\textsuperscript{82} P. 79 pp.

\textsuperscript{83} P. 84 pp.

\textsuperscript{84} P. 85.

\textsuperscript{85} P. 87 pp. As Nino points out, “scientifically” value-free legal dogmatics is often merely a misleading camouflage for underlying evaluations which one wants to hide; see p. 100 pp.

\textsuperscript{86} P. 128 p.
The fact that laws cannot be justified or interpreted without reference to morality appears to give reason to doubt the usefulness of law in the first place: If the law cannot justify itself, and if its interpretation to a great deal depends on moral reasons, why should we have law at all? Would not morality be enough for the purposes of society? Nino thinks this is not the case because legal actions and legal decisions are not isolated individual actions or decisions, but collective in that they are part and parcel of a process of social interaction in which all members of the society participate and which extends from the past via the present to the future. Law is not a matter for each citizen on his own, but for all citizens as a collective. This makes it possible for Nino to make a functional difference between justice in an individual case of applying the law and justice on the level of the entire collective practice of juridical discourse: it may be important to protect and maintain the collective practice even at the cost of justice in particular cases if it can be shown that keeping up the present juridical order is the most legitimate alternative for the society in question among the realistic options it has: a “second best” order may be worth maintaining if all the other realistic alternatives are even worse. With examples drawn from game theory Nino proceeds to argue that if the legal order depends on external sanctions and prudential adherence alone, it will not succeed well in its function to facilitate social

87. 130 pp.
88. P. 134 pp.; The notion of collective action is open to criticism because it is counterintuitive in the sense that what people generally expect from the law, when they actually are involved in a legal process, is personal justice and not some abstract collective good. It is true that e.g. the judiciary must in its activity take into account the possible prejudicial effect of its judgments, but this is never the whole story: the primary purpose of law is to lend justice to the parties if the case under litigation.
89. P. 140 pp.; Cf. St. Thomas’ notion according to which one may have to abide by a law which is unjust because disobedience would cause “scandal or disturbance”, mentioned in footnote 41 above.
cooperation. For success, sanctions must be coupled with a moral authority which makes the citizens accept the law, or to internalize it, not merely as a matter of prudence but also as a moral obligation. In this way Nino turns upside down Alexy’s idea according to which it is an aspect of a necessary relationship between law and morality that morality needs the support of legal sanctions in order to be able to organize society: on the contrary, it is the legal sanctions which for Nino require the support of morality in order to work properly.

Having concluded that moral legitimacy is a necessary prerequisite for the success of a legal order in performing its task of social organization, Nino finally turns to a discussion on what possibly may be the proper foundation for the legitimacy in question. His favourite moral theory is discursive morality, because it allows one to surpass the problems of moral subjectivism without stagnating the moral order: while an ongoing moral discourse which guarantees rational discussion lets one arrive at definite intersubjective solutions, it will at the same time remain open for new rounds of discussion which can yield different outcomes. An ideal discussion is impartial, universal and public, among other things, and Nino—not entirely unlike Fuller—believes that the requirements of ideal discourse, even if they are in themselves strictly formal, will establish a number of moral principles with material relevance, viz. the principles of respect for personal autonomy, inviolability, and dignity. But the problem still remains that it is not self-evident that a moral discourse ought to be like the one envisaged by

90. P. 148 pp.; Again the adoption of game theory as an unquestioned basis for argument is open to criticism from other worldviews which do not accept the rather selfish and calculative view of man on which game theory depends.
91. See above at footnote 26.
93. P. 166 pp.
94. P. 170 p.
Nino. Besides, it is still compatible with an individualistic moral elitism, which he finds distasteful and chooses a collectivist approach which holds that morality is not a matter for each as an individual but for all as a collectivity. As a collective process, an open and fair moral discourse is the nearest approximation to universal impartiality which can be reached in a society. As such, it promises a high probability of yielding right solutions. Thereby it has the advantage of at once allowing for the possibility that maybe the solutions it yields are not absolutely right, but still providing a good reason to accept them as if they were right, because all the odds are that there is no better way of finding out what precisely are the right solutions.

The obvious step to take now is to point out that democracy seems to be a way of actualizing a kind of fair and open discourse, or a “second best” substitute for it, which may meet at least some of the requirements of ideal discourse and thereby ensure a reasonable probability that its outcomes will on the whole be the best ones a society can reach by any realistic means. But not any conception of democracy will do: A necessary distinction must be made between the personal interests of each citizen and the impersonal interests of the citizens as a collective. Given the competitive nature of social interaction—illustrated by game theory—only a democracy which can in the eyes of the citizens justify a sufficient degree of transformation of personal interests into legitimate impersonal interests can be an effective democracy and fulfil the function of government in a satisfactory manner. A number of different approaches have looked at democracy from this viewpoint. Nino discards the theories based on the notion of popular sovereignty, and the ones based on a perfectionism which holds that the task of civil society is to grow civil virtue, in order to put forward his favourite

96. P. 177 pp.
alternative: a “deliberative conception” of democracy, based on his version of the theory of discourse. A democracy like this will allow everyone to participate and to know the standpoint of his fellows, participants do not merely seek to prevail by force or persuasion but to justify their standpoints publicly, their position will make it important for them to have sympathy for competing interests and to feel shame for promoting personal interests, an open debate will help to avoid errors, the majority principles makes participants seek wide support for their proposals, and thereby the probability that democratic decisions will be fair is high. If this is so, then the sheer fact that a decision has been made democratically is a reason against disobeying it even if one knew for sure that it is a wrong decision, given the fact that the democracy in question, despite all its shortcomings, still is the best available way of making decisions for the relevant society. This, for Nino, constitutes the ultimate moral foundation for law: in order for laws to be legitimate qua laws, they ought to be democratic, because democratic discourse, by being the fairest available method for politics, justifies the way in which personal interests are by the laws subjected to the impersonal interest of the collectivity. If democratic laws are disobeyed, the social order is in danger of disintegration. *Quod erat demonstrandum.*

5. TOWARDS A CONCLUSION

It remains to be asked whether Nino accomplishes with his ingenious argument a result which were essentially (sic) different from Hart's and Fuller's? I think not. For what Nino succeeds in doing is showing that it is impossible for the legal order to function without reference to morality. This, as we recall, was the
basic tenet of both Hart and Fuller, too. Towards the end of his exposition Nino merely makes the material corollaries of his formal requirements somewhat more explicit than his predecessors. Where Fuller was satisfied with pointing out that his "internal morality" would preclude some ways of violating the personal integrity of the citizens, Nino explains the mechanism in more detail and shows why even a deficient social practice of democratic political discourse will make the legal order meet a reasonable standard of moral legitimacy. In this respect Nino appears to follow Aristotle's famous dictum in which he points out that even if individual citizens are not very wise, it is quite possible that wisdom will accrue when the citizens join their forces in deliberating public issues\textsuperscript{100}. But all this leaves open the final question: what is the point of it all? Why is it important that personal autonomy, inviolability and dignity be respected? For Nino seems to hold that these considerations, which presumably would on the one hand justify the value of democracy as the best available source for legislation, follow on the other hand by definition from his requirements of ideal discourse. Clearly this is a \textit{petitio principii} if any.

What we need instead is a consideration which shows why it is a good idea to adopt a notion of ideal discourse which yields precisely those values. We need to know why democracy, or the law, is good for us. By far the most promising alternative which can provide such a justification both for democracy and for law is precisely the one Nino discards in one sentence: perfectionism. Only a perfectionistic theory which can show how it makes a difference for every citizen \textit{morally} to be subject to a democratic legal order can lend it an ultimate \textit{moral} point, sense and justification. Nino discards "essentialism" by pointing out that social institutions are conventions, whereby they cannot be

\textsuperscript{100} See Polit. III,11 (1281a39-b10).
instatiations of any essences given to us independently of our conventions. We should nevertheless notice that the fundamental strategy of “essentialism” is not to maintain that institutions, like the law, have an abstract moral essence which they ought to meet: the proper “essentialist” tenet is that the human being has a moral essence, and that the human institutions ought to meet the requirements of that human essence. A good example is the Aristotelian theory according to which the essence of man is to grow to a moral and political perfection which can only be attained in a political community. Given such a starting point, democracy has a meaningful purpose because it helps citizens to grow to that perfection, and the legal order makes sense because it is the only legitimate way in which the political community can be governed in order to facilitate the growth of the citizens to the perfection which is their essential end.

An important motive which has prompted authors like Nino and Hart to discard “essentialism” is their belief that if it is accepted that “law” has a moral essence, it will necessarily follow that the content of the legal order is somehow materially predetermined and thereby in principle unchangeable. But already Aquinas made it very clear that a theory of law which is based on an essentialistic conception of morality does not necessarily imply such a predetermination. If we step back from Aquinas to the original Aristotelian theory of natural morality, politics and law—which is the mother of all

101. Christoph GUSY, Legitimität im demokratischen Pluralismus, Franz Steiner Verlag, Stuttgart, 1987, is an exemplary representative of this attitude when he argues that if the legitimate material content of the law is morally limited, democratic legislation makes little sense, because lawmaking is not then a creative activity at all but a simple matter of finding out what natural morality prescribes and positivizing those prescriptions by translating them into the language of law; see in particular pp. 62-76. A very similar notion is apparently implicit in Nino’s argument, too, even though he does not take it up as a central theme in his exposition.

102. Ia IIæ 95, 2.
essentialisms in this respect— we can clearly see how it leads us to
a position according to which, yes, the purpose of the law is to
make men good, i.e. virtuous, but this civil virtue is in the last
analysis equivalent to a capacity for moral and political self-
control which is equivalent to moral and political freedom and
therefore in an important manner incompatible with every idea of
imposing a predetermined material morality on the citizens. The
task of the Aristotelian state and of its legal order is on the
contrary to help the citizens to reach an autonomous position of
mutual self-government. The crucial difference with moderns like
Nino is that the law is not for the purpose of serving interests\textsuperscript{103},
be they personal or impersonal, but for the \textit{good} of the citizens.
This difference brings us to the problem of moral motivation: In
that respect the Aristotelian essentialism is capable of showing
how the law can genuinely be for the common good of all even if
it may be against the interests of some: the good it seeks is moral,
and the interests it sacrifices are merely material, and there can be
no conflict between the good of one individual citizen and
another, as one's being a good citizen in no way diminishes the
chances of the other being a good citizen, too.

For Nino, again, there seems to be no good which is separate
from interests, and all he can show is why a more sophisticated
calculus of interests may motivate the citizens to sacrifice some
of their immediate personal interests for some more remote
general interest in which they have a share and by which they can
hope to win a greater interest satisfaction in the long run. I do not
see how such a step can genuinely remove the problem of
motivation for the citizens' allegiance to the outcoming legal
order: it will still continue to depend on a calculus of probable
interests-satisfaction —unless one can show why, ultimately, each
citizen plausibly has good reason to prefer his \textit{good} for his
\textit{interest}. And I do not see how else one could have such a good

\textsuperscript{103. See op. cit., p. 180 pp.}
reason, unless one realized that it made one a better person. Such a judgment, again, is feasible only on the assumption that we can tell what it consists in to be a good person. And that we can only do if we assume a human essence with a moral standard of excellence.

In just a few words, then, the law seems to be an essentially moral institution because of the very fact that it is a human institution: its very point is to make human life more excellent, otherwise there would be no point in instituting it in the first place. I do not think anyone can avoid making implicit reference to some conception of such excellence when one evaluates the meaning of law for human society. Such a conception surely underlies every non-"essentialist" theory, too. The trouble is only that a non-"essentialist" will not make his conception of human excellence an explicit issue, thanks to his adopted commitment precisely to non-"essentialism". Thereby he is bound to make the same mistake which Nino accuses those legal dogmatists for who –while there is no way in which they can really purge their activity from implicit reference to moral considerations– will explicitly deny any such reference as something "unscientific".