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# FACT, VALUE, AND HUMAN PURPOSE

*Ernest Nagel*

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THERE IS, IN GENERAL, little intellectual nourishment to be found in rebuttals to rejoinders to replies. Nevertheless, even if rational debate accomplishes nothing else, it often succeeds in locating sources of misunderstanding; and it is with this minimal objective in mind that I am continuing my exchange with Professor Fuller.<sup>1</sup> In offering the following comments on his *Rejoinder* to my *Reply* I am impelled by the hope, not indeed of convincing him that his views on the issues under discussion are mistaken, but of persuading him that if, as he repeatedly complains, I have not grasped his thought, at least part of the reason for this may be unclarities in his own presentation and defense of his doctrines.

By way of preface, let me assure him that if I really have misrepresented him in my *Reply*, as he claims, I have done so unwittingly, and that if I have misunderstood him it has not been for lack of trying to comprehend his contentions. In preparing my *Reply*, I not only devoted much careful thought to his paper, but in the attempt to understand it I made myself familiar with his previous publications on the issues raised by him.<sup>2</sup> Moreover, I discov-

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1. Lon L. Fuller, *Human Purpose and Natural Law*; Ernest Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*; Lon L. Fuller, *A Rejoinder to Professor Nagel* — all in 3 *NATURAL LAW FORUM* (1958). All page references in the text are to this source.

In the same volume of *NATURAL LAW FORUM*, Professor Joseph P. Witherspoon contributes an extended comment on the exchange between Professor Fuller and myself, under the title, *The Relation of Philosophy to Jurisprudence*. Professor Witherspoon's essay is in considerable measure a sermon addressed to me on how to read a text, and in particular Professor Fuller's texts, since according to him I have failed to grasp the plain meaning of Professor Fuller's words. How reliable an interpreter of those words Professor Witherspoon is, I will not venture to say. However, the substance of his position, insofar as it is relevant to my discussion with Professor Fuller, is contained in his remark: "What law *is* cannot be separated from what it is *for*, and what it is *for* cannot be separated from what it *ought to be*." (p. 108) Now in my *Reply* I made unmistakably clear that I believed the law is subject to moral evaluation, so that on my view also existing law is not to be *separated* from considerations of what the law ought to be. On the other hand, I argued that an evaluation of the law is not intelligible, unless we *distinguish* what the law *is* and what it *ought to be*. But in the light of my brief quotation from him, Professor Witherspoon accepts this distinction, and therefore appears to agree with me and to disagree with Professor Fuller, who does not countenance the distinction. I must therefore leave Professor Witherspoon's contribution to "the cause of intellectual community" for assessment by Professor Fuller himself.

2. For the sake of the record, I add the following information. My *Reply* was my contribution, as an invited ten-minute commentator on Professor Fuller's paper in a symposium on natural law, held at the 1956 annual meeting of the American Philosophical Association,

ered that other students of the subject, whose competence to deal with the questions under discussion I regard as indisputable, found difficulties analogous to those I encountered in Professor Fuller's views. It seems to me not unreasonable to suggest, therefore, that it is not entirely the fault of his critics if, as he maintains, they have failed to understand him.

## I

Professor Fuller's central thesis, as formulated in his first paper, is that "in any interpretation of events which treats what is observed as purposive, fact and value merge." (p. 69) Although he rejects as "quite unresponsive" (p. 86) my argument that in making this claim he is at best asserting a tautology, to my regret he does not come to grips with my difficulty, and I have found nothing in his *Rejoinder* which requires me to retract my criticism as pointless. I have nevertheless profited from the restatement of his major thesis, and in consequence I believe I am able to present more clearly my continuing difficulties with his central claim. There are in fact three sorts of defects I find in his arguments for it: a confounding of several disparate senses of the word "evaluation" (and, correspondingly, of the word "value"); a failure to distinguish between a term as *evaluative* and a term as *vague*; and a confusion of the question whether or not men actually use a term without explicitly recognizing the distinction between fact and value, with the quite different question whether or not it is possible and important in such cases to make that distinction. It will not be convenient, however, to discuss each of these defects separately.

1. Professor Fuller fully agrees that the mind may have a "descriptive" as distinct from an "evaluative posture" toward reality, although in his view these postures merge when we are dealing with purposive events. He reformulates the issue as stated in his original essay in two related questions: "(1) Is it always possible to give an adequate non-evaluative account of any object that is itself the subject of an evaluation? (2) If so, does evaluation become legitimate (or 'competent') only when its object is first identified in such a non-evaluative account?" (p. 87) He maintains that the answer in each case is negative, basing his conclusion on a number of illustrative examples. However, the first question seems to me unclear as it stands, and requires some discussion of what is to be understood by "adequate" and "evaluation."

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Eastern Division. Professor Fuller was one of the two main speakers in this symposium. My mandate was to comment on his paper, not to write an independent essay expounding my own views. Professor Fuller's repeated complaint that my *Reply* contains no affirmations of my own moral and legal philosophy therefore seems to me unreasonable.

a) Professor Fuller nowhere explains what is the force of the adjective "adequate." It is manifestly a value term, and involves at least tacit reference to some purpose or objective for the sake of which an account is undertaken. Thus, when a physicist offers a non-evaluative account of a given system of pulleys (i.e., when he assumes a "descriptive posture" toward his subject matter), if his aim is simply to discover what is the mechanical advantage of the system, his account is *not* inadequate because he fails to note the weight of the pulleys, the length and tensile strength of the cord, or the purchase price of the machine. On the other hand, a builder assessing the physical and economic suitability of the pulley system for lifting construction materials used in his business, *would* be giving an inadequate account were he to ignore these items. In brief, *every* account of things and processes, whether it is descriptive or evaluative, is instituted for the sake of some objective; and the adequacy of an account can be judged only by reference to the purpose for which it has been instituted. But although this point is obvious, it is also important. For it calls attention to the circumstance that an account may be entirely adequate (relative to a given purpose), even when the account is an admittedly non-evaluative one, despite the fact that it does not provide an "exhaustively" detailed and "absolutely" precise description of the subjects under discussion.

Nevertheless, Professor Fuller appears to ignore this obvious point when, in reverting to his original molluscolidal example, he claims that even if our concern in giving an account of the boy's behavior with the clam were "in the 'pure fact' of the occurrences there related — say, in the directions and dimensions of the boy's physical movements — we could envisage that 'pure fact' more accurately if we knew what the boy was trying to do." (p. 88) If our intent is to characterize the boy's behavior with a view to relating his activities to his purpose (assuming that he has one), we will undoubtedly attend to different things in his total behavior than if our intent were something else; and even if our interest is to evaluate the boy's behavior as a means for achieving his aims, we will doubtless note varyingly different features in his actions should we modify our conceptions (or hypotheses) concerning the boy's objective. Professor Fuller is very perceptive when he calls attention to "the effect of a disclosure of the boy's purpose in bringing about a sudden enlargement of perspective." But I can find no warrant for his assertion that when we realize what the boy is trying to do, we are able to give a more accurate account of the boy's physical movements. For the accuracy of an account, like its adequacy, can be judged only in reference to the purpose for which the account is instituted. However, since an account undertaken for assessing the boy's behavior as a means for realizing his ostensible objective

has a different purpose than an account undertaken for describing the directions and the dimensions of his physical movements (perhaps for the sake of determining whether the boy has recovered from a crippling illness), the adequacy or the accuracy of the latter account follows from the former one neither in strict logic nor in normal fact. This is not the only example in which Professor Fuller has apparently forgotten that the adequacy of an account is relative to the purpose controlling that account. I shall try to show that his claim concerning the merging of fact and value is in part the consequence of his not remembering this point.

b) The primary, though I think not exclusive, sense in which Professor Fuller employs the term "evaluation" is for judgments in which the worth of some action, process, or object is assessed as a means for achieving some end, however tacitly or vaguely the end may be entertained, and whether or not the judgment is explicitly formulated. At any rate, this seems to be the sense required in his discussion of the original molluscoidal example, as well as of several others he advances in his *Rejoinder* in support of his central thesis. Some of these latter examples are especially helpful to me in stating my difficulties; and since I would be repeating myself were I to comment on each of Professor Fuller's illustrations, I will examine only two of them in the present context.

i) Professor Fuller raises the question whether the "existence" of a "legal order" in some society can be decided without evaluations being involved in the process. However, he declares that "the *ideal* of a legal order is never attained perfectly," so that "the 'existence' of a legal order is always a matter of degree and cannot be measured in 'non-evaluative' terms." How, then, he asks, "in determining whether a legal order 'exists' do we distinguish between the 'existent thing' and its 'value'?" (p. 91, my italics) Moreover, he suggests it would be absurd to maintain that we must first describe in neutral, non-evaluative terms "every existent thing embraced by such a judgment [i.e., a judgment as to whether a legal order exists] before the judgment itself can be 'competent.'" (p. 92)

I have several comments to make on this example of an alleged merging of fact and value. Professor Fuller is perhaps calling our attention to the familiar difficulty of formulating a "suitable" general definition of "legal order" (although I am sure he intends more than this) precise enough to enable us to decide in a uniform manner whether a given social system (e.g., Hitler's Germany) is an instance belonging to the extension of that term. But in any event the term "legal order," like many other terms in common use, has no precise definition, certainly not one that is acceptable to all who employ it. Although there may be a considerable measure of uniformity in the way men

apply it in many instances, it is also clear that many individuals differ in the criteria they associate with the term for its correct application. Accordingly, two individuals who disagree on whether a given society possesses a legal order, may disagree not because they base their predications on different descriptive (or non-evaluative) accounts of the society, but simply because they operate with different standards for the correct application of the label. In an analogous way, a bat may be characterized as a bird by one person and denied that characterization by another, because the connotations of the term "bird" are for them not the same, even though they agree in all other respects in their accounts of the object both have observed.

Now although Professor Fuller is not proposing a fully developed definition of "legal order," he does suggest what for him must be a component in any acceptable definition of the term. If I do not misread him, he is saying that no system of politically enforced regulations can properly be called a "legal order," unless the system approximates to an "ideal" order, and so embodies patterns of human behavior which both conforms to certain minimal moral standards and contributes to the realization of a progressively unfolding series of moral ends. Accordingly, so I understand him to maintain, it is not possible to decide whether, for example, a legal order did exist in Nazi Germany without characterizing the operations of Hitler's society in evaluative terms. I will not dispute here the suitability of a definition of "legal order" along the lines Professor Fuller suggests (despite my doubts about the desirability of a definition of the term which would require us to refuse this title to a "thoroughly bad" system of politically instituted and enforced regulations), since the precise form which a definition of the term ought to take is not pertinent to the issue under discussion. I gladly admit that if the term is to have any connotation, there must be *some* minimal conditions for its correct application; and I also freely grant that a definition such as the one Professor Fuller appears to have in mind is entirely possible. Nor do I deny that on his and similar conceptions of what is a legal order, any decision as to whether or not a legal order exists in a given society involves the use of evaluative terms. For if such conceptions are adopted, it is trivially or tautologically true that evaluative terms must be employed. What does puzzle me, however, and leads me to wonder whether I do understand him, is why Professor Fuller thinks he is not asserting the tautology to which I tried to call his attention in my *Reply*.

It is barely possible that Professor Fuller finds my criticism "unresponsive," because I have not made sufficiently clear that when anything is characterized in what I propose to call "functional" terms, the use of such terms *necessarily* requires evaluative judgments. Let me therefore try to make my point with

a biological example. A certain organ in the human body can be identified as a kidney by way of its gross anatomy, so that in the anatomical sense of the word we can give an account of some particular kidney (or of kidneys in general) in what are commonly regarded as non-evaluative terms. However, we have discovered that one of the normal functions of kidneys so identified is to maintain the blood in a certain chemical state. We may in consequence (and indeed frequently do) include this capacity of the organ in our conception of what it is to be a kidney. We may in fact make it part of our notion that to be a kidney an organ must maintain the blood in an "ideal" chemical balance, even if we should discover that actual organs vary in their capacity to do so; and we may in consequence come to regard it "a matter of degree" whether a given organ is really a kidney. On either of these two suppositions, however, the term "kidney" in its functional sense is an evaluative term, since we can determine whether a given organ is a kidney only by assessing its performance as a means for achieving a certain end.<sup>3</sup>

Similarly, in the sense associated with it by Professor Fuller, the functional term "legal order" is *necessarily* an evaluative one, because in that sense no system of human activities is a legal order if it is not conducive to the maintenance and the realization of certain moral objectives. Accordingly, though we may all agree in all our non-evaluative accounts of the Hitler regime, if there is room for doubt whether the decrees and enactments issued under the Nazis, together with the mechanisms of enforcement, were means for attaining those objectives, there is ground for doubt whether a legal order existed under Hitler. But if my statement of Professor Fuller's view is reasonably accurate, is he not after all asserting a tautology when he claims that this example illustrates a merging of fact and value?

But in any event, he heaps scorn on the notion that for an evaluative account to be legitimate, its object must first be identified in non-evaluative terms. He declares that to urge this notion is

like saying that unless we can trace the precise trajectory of a marksman's bullet we have no right to assert that it missed the target. Surely we can say that a legal system is missing its target without having to report the precise angle of divergence of every human action that contributes to that missing. We can also say of something that calls itself a legal order that it is missing that target so woefully that it cannot in any meaningful sense

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3. To avoid misunderstanding, I want to emphasize that on my view it is a *discovery* that kidneys identified by way of anatomical features do in general have this capacity, and not the result of any decision concerning the connotation to be assigned to the word "kidney." However, if in the light of that discovery we decide to modify the initial sense of the word, it is a consequence of this *decision* that to be a kidney (in the new, functional connotation of the word) necessarily implies the possession of the indicated capacity.

be termed a system of law. It has, if you will, so little "value" that it has ceased to "exist." (p. 92)

Ridicule and exaggeration, however, though they doubtless have their use, do not really turn the point of an argument. Professor Fuller is battling with straw men if he supposes those whom he calls "positivists" to maintain that a necessary condition for a competent evaluation is an absurdly minute and photographically precise non-evaluative description of the object evaluated. It has apparently not occurred to him that the sole alternative to an evaluative account is not an impossibly detailed non-evaluative one. And he seems to have forgotten in this instance, as he did in the example I discussed earlier, that every account is unavoidably selective, and that the adequacy of a non-evaluative account has to be measured, not against an ideal of "absolute" precision, but in relation to the particular purpose that instituted it. Accordingly, since a non-evaluative account that is not exhaustive of its subject may nevertheless be adequate to the purpose of the account, and since the judgment that an account is adequate involves an evaluation, I can explain Professor Fuller's tacit assumption that a non-exhaustive but adequate account of its subject must somehow be evaluative, only on the hypothesis that he mistakenly thinks the evaluative character of a *judgment of adequacy* of an account entails that the account is itself evaluative.

However this may be, I do not understand how anyone is able to evaluate anything responsibly, unless he can identify that thing in non-evaluative terms. If he is unable to do so, even though in a relatively sketchy and imprecise way only, I find it a puzzle to know *what* is being evaluated. I am, of course, *not* maintaining that such non-evaluative descriptions are in all instances explicitly formulated, and are invariably distinguished from evaluative judgments. Thus, the builder in my example above may not formally assert such statements as "The cord in this pulley is 200 feet long" and "This pulley is capable of doing the kind of jobs I need done in my business more effectively and economically than any other machine now on the market." Nor may the builder be aware in making such judgments (whether or not he states them explicitly) that one of them is descriptive while the other is evaluative. I *am* maintaining that the builder can be evaluating something only if he identifies that thing (perhaps only by way of unformulated perceptions) in non-evaluative terms. Moreover, I believe that when some evaluation of ours (such as my builder's) is challenged, we can meet the challenge responsibly only if we first articulate our descriptive characterizations, distinguish as carefully as we can our tacit evaluations from our factual claims, and perhaps (in order to make our evaluations more reliable) increase the detail and the

precision of our descriptive accounts. Professor Fuller questions the utility of such descriptive accounts, at any rate in his discussion of the "existence" of a legal order, on the ground that "the only significant thing [we] can say about [a] social complex is that it *does* fall short of the ideal of a legal order." (p. 92) But their utility seems to me obvious, if we are at all concerned with diagnosing a social complex, with the objective of changing what is actual in the direction of a better approximation to some ideal. Does Professor Fuller have a better alternative to the general policy of determining what is the actual state of affairs (with a degree of precision depending on the problem), as a condition for competent prognosis and therapy?

ii) Consider next Professor Fuller's example of the dancing couple who bring suit for improper discharge from employment, where the point at issue is whether or not the couple really did perform a tango. He notes that in such cases the judge must decide what form the testimony of witnesses may take; and he suggests that witnesses might not be required to describe the dance they saw performed "in terms of physical motions," and would be permitted to testify somewhat in the fashion: "Whatever they were doing, it was not a tango." (p. 93) Professor Fuller therefore concludes that an adequate account of the action in dispute in this case would not be presented in non-evaluative terms, so that in this instance, at any rate, ostensibly factual description and evaluation coalesce.

My comments on this example will be brief. I have already argued that it is a blunder to suppose that the sole way of characterizing anything in non-evaluative terms (in this instance a dance) is to describe it "in terms of physical motions" — where such a description will count as an adequate one only if it states every detail in the pattern of motions embodied in the performance. Moreover, were this standard for a non-evaluative description adopted, most, if not all, of the accounts of things we are accustomed to regard as non-evaluative would then have to be rebaptized as evaluative ones. Accordingly, by doing violence to the accepted distinction between judgments of fact and judgments of value (i.e., to the sense of the distinction in terms of which the issue raised by Professor Fuller is formulated), the question under discussion would be settled in Professor Fuller's favor — but only by redefining the terms used in stating the issue, and so reducing the latter to triviality. Thus, when we characterize a certain occurrence as the flight of a barn swallow, few of us are capable of rendering in explicit language the detailed patterns of the bird's shape, coloring, or motion. Nevertheless, most of us would probably deny that in describing that occurrence in the stated manner we are engaged in an evaluation. Whatever it is that we are doing when we declare that a certain occurrence is the flight of a swallow (or that a certain performance is

not a tango), we are *not* making an evaluation in the sense of assessing the worth of a thing as a means for realizing some objective.

But what is it that we are doing in such cases? It will be helpful to note that the terms ordinarily employed in identifying and describing things connote more or less extensive (and more or less precisely delimited) classes of attributes. Accordingly, no term is correctly predicated of a given object, unless the latter does in fact possess all the connoted attributes. On the other hand, we rarely make sure (sometimes because we are not in the position to do so) when we predicate some term of an object that the latter actually possesses each of the connoted attributes; and in consequence, the available observational evidence on the basis of which a term is applied to an object is usually (if not invariably) logically insufficient to guarantee with demonstrable certainty the correctness of the predication. For example, the connotation of the term "oak tree" includes the attributes of having leaves with a characteristic shape, a bark with a distinctive texture and color, a trunk and limbs with a certain grain and degree of hardness, a capacity for producing acorns, and so on. But when judging a tree to be an oak we do not normally first establish that the object really does have all these traits, and we base our judgment on noting the presence of a relatively small number of them.

Nevertheless, though in cases of this sort the observational evidence for a predicative judgment may be logically incomplete, the incompleteness may vary. In some instances the evidence may be so extensive that the judgment is accepted as beyond reasonable doubt. In other cases the evidence is far less compelling, and the judgment is felt to be only probable in some degree. In short, predicative judgments are commonly asserted on the basis of incomplete evidence, which must be "estimated." This estimation is sometimes a conscious and deliberate weighing of the evidence. At other times, especially in routine situations of life, there may be no explicit consideration of the observational data; in such cases a deliberative estimation is replaced by habit, so that predicative judgments are asserted — with varying degrees of confidence on the basis of the observed data — almost automatically. But to estimate the weight of evidence, in whatever way such an estimate may be made, is to engage in an activity that is not improperly characterized as an "evaluation" — though in a sense of the word distinct from the senses thus far discussed. Certainly the witnesses in the dancing couple example, who testify whether or not the couple were performing a tango, are *not* offering an evaluative account of the performance, in the sense that they are assessing an action as a means for realizing some purpose. They *are* offering an evaluative account, in the sense that their predicative judgments are ostensibly based on estimates of the evidential weight of their observed data. Accordingly, I

concur entirely in Professor Fuller's view that "there is an element of responsible decision in all intellectual activities" (p. 93), if this means that the decision in question involves an evaluation in the sense just indicated. However, unless different meanings of "evaluation" are confounded, the occurrence in the dancing couple example of evaluations in the present sense does not support his claim that the example illustrates the merging of fact and value.

2. Professor Fuller thinks that the administration of the law presents special difficulties for the view that "in any actual process of human decision [there is] a rigid separation of fact and value." (p. 92) I have already discussed the case of the dancing couple, one of the several examples he employs in this connection to support his thesis. I want to examine another example in this group, in order to exhibit another facet in my difficulties.

Professor Fuller cites the rule that if one party to an oral contract was negligent in interpreting the terms of the agreement while the other party was not, the court will enforce the contract in accordance with the understanding of the prudent party. He appends the comment that "the term 'negligence' is plainly a term of evaluation, but there is generally in the law no 'non-evaluative' colligation of the things or instances to which this term should be applied." (p. 94) I need hardly say that on questions of law I am happy to be Professor Fuller's pupil. However, when he declares that "negligence" is "plainly a term of evaluation," he does not seem to me to be making a judgment simply in his capacity as a distinguished legal scholar. To be sure, the term "negligence" contains an evaluative component, as does the biological term "kidney"; for an action is characterized as negligent with reference to the likely consequences to which, in the light of our general experience, actions of that type are believed to lead. It is also undoubtedly the case that there is in general no descriptively characterized and precisely demarcated set of things to which the term is applied in the law. Nevertheless, as innumerable writers on legal subjects have noted (and I hope I do not appear to be presumptuous in venturing to remind Professor Fuller of this), the law of torts recognizes standards of nonnegligent action — even if those standards are determined in part by uncodified custom, are elastic, and are subject to alteration as society itself changes. Accordingly, the term "negligence" is not *merely* evaluative (any more than is the term "kidney"), so that in a large number of instances its application is controlled by rules referring to paradigmatic situations that are identifiable in non-evaluative language.

On the other hand, the term "negligence" is notoriously a highly vague one. It is vague in the sense that the term "bald" is also quite vague, while for all practical purposes the term "kidney" is not — in the sense, namely, that there is a large class of actions for which habits of usage are indetermi-

nate as to whether or not the term applies to them. In consequence, when borderline cases become subjects of litigation, a decision must be made whether or not to include them in the extension of the term. Such decisions are frequently made in the light of evaluations of the conjectured consequences of those acts, and under the influence of the purposes (whether explicit or tacit) of those making the decisions. Nevertheless, the fact that evaluations and purposes enter into the formation of such decisions does not blur the distinction between "is" and "ought." On the contrary, that fact does not make nonsense of the question whether, prior to a decision to count a given action as an instance of negligence, the action *ought* to be included in the scope of some law dealing with behavior deemed to be negligent, or whether, subsequent to that decision, the action *ought* to have been so included. Unless an action, even though a borderline case for the application of the law, is presented to a court by way of an account which is at least partly non-evaluative, I confess my inability to understand what there is for the court to decide.

Accordingly, when individuals disagree in their judgments on whether or not a given action is marked by negligence, their disagreement may have various reasons: The individuals may agree in their conceptions or criteria of negligence, but may differ in their evaluations of the likely consequences of actions similar to the one under consideration; they may agree in their criteria, but they may be basing their judgments in this particular case on different non-evaluative accounts of the action being discussed; or they may disagree (just as men often disagree in classifying some person as bald) primarily because of the vagueness of the term "negligence" and because the given action is a borderline case. Professor Fuller's claim that the term "negligence" is "plainly a term of evaluation," and that its use illustrates the merging of fact and value, thus seems to me to be a consequence of his lumping together under the ambiguous rubric "evaluation" such quite distinct factors that may control men's judgments.

Professor Fuller's examples show beyond doubt how difficult it frequently is to make descriptive judgments not colored by tacit assumptions concerning human purposes and by implicit moral evaluations. But he is flaying an imaginary whipping boy when he castigates those who believe a distinction must be made between "is" and "ought," if he supposes them to maintain that the distinction is one that men invariably make or can make easily and without effort. He is not arguing to the point when he notes, in support of his major thesis, that the Opinion Rule is condemned by careful students of the law of evidence. For the issue, as I understand it, is not whether most witnesses are able to disentangle fact from opinion, or fact from value, especially when they are testifying on matters in which they may have received no serious

training. The issue is whether the distinction between "is" and "ought" is not implicit in all moral deliberation, and whether, in the interest of making our evaluations more responsible, a persistent effort to make that distinction explicit in practice is not of highest moment.

## II

I now turn to Professor Fuller's view that there is "a process that may be called the collaborative articulation of shared purposes," exhibited not only "in the affairs of daily life" (p. 73) but also in the history of the common law. (p. 74) In my *Reply* I stated my agreement with his rejection of an atomistic conception of human purposes and goals. But I also expressed my disagreement with what seemed to me to be a "holistic" interpretation of individual and social purposive action which he adopted, an interpretation according to which, as I understood it, there is an implicit collaborative pursuit of valid "forms of social order" by men, even when this end-in-view is not explicitly entertained by them. In his *Rejoinder* Professor Fuller charges me with misquoting him, when I criticized him for maintaining that men pursue such objectives even when they are "out of view." (p. 95) However, this is a gratuitous accusation, and he obviously did not consult his original essay from which the quotation (n.b., not *misquotation*) was taken and to which page reference was given. But in any event, in his *Rejoinder* he repeats the substance (though not the phrase "out of view") of the position I had criticized, for he declares that "in disposing of controversies and issuing directives we may operate within a framework of purposes which conditions our decisions even though only certain of these purposes are called into consciousness by the facts of the case at hand." (p. 96) Since in my *Reply* I did say that "an end-in-view that is nevertheless not explicitly present in active consciousness seems to me just a myth" (p. 81), I am bound to explain why in my opinion Professor Fuller is accepting a myth as "an almost obvious truth of psychology." (p. 96)

Let me say at once that like Professor Fuller I accept as an obvious truth the familiar fact that many of our purposive actions, directed toward realizing some objective lying in the future which had been consciously envisaged by us as an end-in-view at some time or other, are performed by us through force of habit, so that the objective is not continuously in consciousness during the action. For example, it would never have occurred to me to question such facts as that I often leave a friend's home with the intent of returning to my own residence, and then walk, board a train, converse with companions, and do much else besides, without the thought of my objective crossing my

mind during most of the process. Nor do I question that I may gather with neighbors with the aim of developing plans for getting better schools in our community, but that this objective does not remain in the foreground of anyone's attention at every moment of the discussion, and that none of us had any clear ideas at the start of the meeting as to what such plans involve. I do deny, however, that if, as a consequence of a set of actions which have been deliberately instituted for realizing a certain goal, a quite different outcome is obtained that was neither intended by anyone nor ever consciously entertained even as a possible end-result, this actual outcome is the "end-in-view" that controls and determines the various decisions which may have been made during the process. I readily admit that the ends-in-view we consciously pursue are often only vaguely conceived by us when we begin to deliberate about ways to realize them or when we initiate some action in order to realize those ends; and I also admit with equal alacrity that when such initially vague objectives become more definite, and are perhaps even realized in some precise but surprising form, we may judge the outcome of our deliberation or action as something that we had "really wanted" from the beginning. But I regard it as a myth to suppose, and at best as a perversion of language to say, that the *unintended* product of our actions is the "end-in-view" toward which those actions had been *directed* all along. Such a supposition seems to me no less a myth because it is professed by some contemporary schools of psychology, which maintain that unconscious *purposes*, though never actually entertained by an individual, are nevertheless the "objectives" and determinants of his behavior.

In point of fact, Professor Fuller does not make it easy for his readers to grasp what he understands by the "collaborative articulation of shared purposes." In his original essay he rejected the claim that it is futile in human affairs to debate means until ends are proposed; and he construed the history of the common law in particular as a process in which rules of law are improved, not only to achieve the explicit ends-in-view courts entertain in interpreting precedents when applying them to the concrete cases under litigation, but also "in the light of ends then out of view because not stirred into active consciousness by the facts of the case being decided." (p. 74) In my *Reply* I agreed that there is indeed a collaborative articulation of shared purposes, in the sense that at various times and among various groups of men there are collaborative attempts at establishing and articulating common goals.<sup>4</sup> But I took issue with what seemed to me the possible import of Professor Fuller's words that however much men may be separated in space and

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4. Professor Fuller takes me to task for admitting the existence of a collaborative articulation of shared purposes only with the qualification stated in the text. He construes the

time, and however little they may be explicitly aware of any common objectives, mankind is a single community engaged in a collaborative search for "forms of social order," and that the history of the common law illustrates this collaborative articulation of shared purposes. And I rejected this view, though I expressed doubt whether Professor Fuller subscribed to it, on the ground that it is mythical (in the sense of the preceding paragraph) and that it is incredible history.

In his *Rejoinder* Professor Fuller dismisses my criticisms of this view as beside the point and as not pertinent to anything he said in his original essay. He now reformulates his thesis, and helpfully offers a temporally ordered series of five (imaginary but allegedly typical) judicial decisions to illustrate the collaborative articulation of shared purposes in the common law. Nevertheless, I still fail to understand what his thesis is, if it is not the one I found untenable in my *Reply*. He declares his examples "show that communication among men, and a consideration by them of different situations of fact, can enable them to see more truly what they were all trying to do from the beginning" (p. 98) — as if I had denied that communication between men often clarifies common purposes. The difficulty I find in the examples is that though they supposedly illustrate a collaborative articulation of shared purposes, Professor Fuller himself suggests that each judicial decision in the series can be assumed to be separated from its predecessor by a half century, and that courts deciding the five cases might well be those of five different nations. But what reason is there for supposing that the problem confronting the court in the fifth decision was envisaged by the first court, or that the actual purposes and ends-in-view of the first court were shared by the last one in the series? If there is no compelling evidence for such supposals, how does Professor Fuller differentiate his view from the one I criticized in my *Reply*, and why does he think he is not subscribing to the mythical notion of purposive human action which I had attributed to him?

Let me therefore cite some actual examples of judicial decisions rather than contrived ones. To the best of my knowledge, no one has shown that a common, shared purpose underlies the series of judicial decisions concerning

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qualification to mean that according to me such processes take place "only within a group where some uniformity of social values has already been impressed on its members by a common social environment." He therefore asks with obvious irony "why collaborative discussion could clarify or improve a culturally conditioned uniformity." (p. 85) However, Professor Fuller has read my qualification in a sense I had not intended; and I certainly did not maintain, as he suggests I did, that it is absurd to suppose "a pooling of insight and experience could assist the members of the group to understand more truly their own ends." As I explain in the text above, my qualification was intended to express my rejection of the notion that a single "purpose," at best only occasionally at the focus of explicit attention of a relatively small number of men, underlies the development of such institutions as the common law.

the liability of manufacturers of "things by their nature dangerous," beginning with *Thomas v. Winchester* in 1852 and terminating in *MacPherson v. Buick Motor Co.* in 1916. I do not find it obvious that there is such a purpose; a reading of some of the leading decisions in this bit of legal history does not seem to me to support the claim that there is one; and in any event the hypothesis that there is one does not, as far as I can make out, help to explain why the notion of inherently dangerous things has undergone the transformations that it did. Similarly, it is far from evident that the purposes of the U. S. Supreme Court in *Plessy v. Ferguson* in 1896 were shared by the Court in 1954 when the latter reversed the "separate but equal" rule laid down by the former. At any rate, I can find little but an expression of a blind act of faith in the view that the history of common law is the history of an implicit search for "those principles which will promote a satisfactory life in common for the human beings we know and understand." (p. 99) It is a conception of history dominated by the tendency, so rightly censured by Professor Butterfield, of seeing in the outcome of a series of historical changes "a purpose that has been attained, when very often it is a purpose that has been marred."<sup>5</sup>

Perhaps because I have failed to understand Professor Fuller's thesis concerning the collaborative articulation of shared purposes, I have also failed to find in his *Rejoinder* a resolution of my difficulty in seeing any connection between that thesis and his central thesis on the merging of fact and value. To be sure, he may believe that the truth of his views on the moral purposes underlying the development of the common law entails the truth of some form of natural law doctrine, so that the principles which promote a satisfactory human life are eternally valid and are gradually discovered through the collaborative articulation of common purposes. In consequence, if there were such an entailment, that doctrine would be a necessary presupposition of the interpretation of the development of the common law which Professor Fuller appears to hold. However, the conception of the nature of moral principles and moral values implicit in that doctrine has been historically associated with a firm *distinction* between the "is" and the "ought," and certainly does not imply the denial of this distinction. Accordingly, even if this doctrine as well as Professor Fuller's perspective on the history of the common law were accepted as sound, his views on that history would nevertheless not constitute relevant evidence for his central claim that fact and value merge. I am therefore compelled to render the Scotch verdict that a connection between these views and this central claim has not been proven.

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5. HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 40 (London, 1931).

## III

I would like, finally, to comment briefly on two subsidiary issues Professor Fuller raises in his *Rejoinder*.

1. Professor Fuller asserts that the general acceptance of the thesis espoused by me (he does not explicitly say which thesis, but the context suggests that it is the one which maintains the "is" and the "ought" to be distinct) is responsible for the triviality of prevailing ethical philosophy. (p. 99) Although I believe neither his description of current ethical philosophy nor his wholesale condemnation of it is well informed, this does not seem to me to be the occasion for citing chapter and verse in disproof of his contentions. But I cannot bypass this opportunity to express my astonished wonder over the novel claim that to maintain a sharp distinction between "is" and "ought" is to court triviality. It is a distinction to which Aristotle, Spinoza, Kant, Mill, and more recently Santayana, M. R. Cohen, and Dewey subscribed, to name but a few thinkers who helped me to realize its importance. And I must add, for whatever it may be worth, that until Professor Fuller raised the issue, it had never occurred to me that the ethical philosophies of these men are trivial. I must also confess, furthermore, that until he expressed an ostensible doubt whether there is "any ethical theory that does not profess 'the natural law doctrine' and yet yields 'objective standards for the moral evaluation of the law'" (p. 85), I had always assumed that Mill and Dewey, among others, did propound ethical theories which propose objective standards of moral evaluation.

2. Professor Fuller comments adversely on the notion, stated briefly and only in passing in my *Reply*, that judgments of value are hypotheses about ways of resolving conflicting needs and interests. For he maintains that no theory of law is acceptable which holds the purpose of the law and of morality to be exhausted in the resolution of conflicts. (p. 103)

I would be seriously lacking in appreciation of the complex problems any ethical theory must solve, were I to attempt at the tail end of what is essentially a polemical article an adequate statement and defense of the conception of value judgments which I professed in my *Reply*. I can do no more on this occasion than indicate briefly why Professor Fuller's strictures on that conception seem to me without force. In the first place, he observes quite rightly that not all conflicts are harmful, and not all require legal intervention. He therefore rejects as inadequate the conception that value judgments are hypotheses for resolving conflicts, on the ground that this conception does not state how beneficial conflicts are to be distinguished from harmful ones. However, my brief formulation of that conception was not advanced as a

full-scale analysis, but only as an indication of a necessary condition for the institution of value judgments, not the sufficient conditions for their introduction. The formulation was intended to suggest why value judgments cannot rightly be regarded as self-certifying, and why questions concerning their validity can be settled only by reference both to the actual ends-in-view men entertain in given situations as well as to non-evaluatively described matters of fact (including the satisfactions and dissatisfactions men obtain, or are likely to obtain, from pursuing those ends). But in any event, I agree with Professor Fuller (if that is indeed the point of his criticism) that the distinction between beneficial and harmful conflicts cannot be made exclusively in terms of the notion of conflict. For without reference to the kinds and varieties of satisfactions and dissatisfactions men obtain from their activities, the distinction makes no sense to me. However, no proponent of the conception of value judgments under discussion has to my knowledge ever assumed anything to the contrary. The first part of his criticism therefore seems to me to be directed against a nonexistent target.

But Professor Fuller also maintains, in the second place, that if the resolution of conflicts is to be effected through a rational process, principles must in time be developed that enter into and shape the lives of men for good and evil. He therefore rejects the view of value judgments under consideration, because it allegedly fails to state how those principles are to be articulated by which conflicts and disputes are to be decided. However, though to be sure my *Reply* did not discuss these questions, the standard and readily available literature on the subject certainly does, so that the allegation seems to me baseless. In brief, the answer to Professor Fuller's censure is as follows. Certain types of conflict generate consequences that are discovered to be injurious to the well-being not only of those who may engage in them, but in various ways and degrees of other members of a community. These conflicts are also discovered to be capable of regulation, where some forms of regulation turn out to acerbate the undesirable consequences of conflicts, while other forms are found either to diminish the harm those conflicts produce or to divert the springs of human action into channels so as to generate consequences which augment human satisfactions. Accordingly, the principles by which conflicts are to be decided are principles whose use has been discovered to yield greater human satisfactions or lesser dissatisfactions or both, and in general to increase the happiness and well-being of the communities of men in which those principles are employed. This answer certainly offers no solution to any concrete problems in which conflicts require to be adjudicated. It suffices to show, however, that Professor Fuller's criticism is far from fatal.

Professor Fuller's animus against those he calls "positivists" — a category which appears to include everyone who maintains a firm distinction between "is" and "ought" — seems to me to have its source in the curious belief that anyone who accepts this distinction is barred in principle from evaluating the law in terms of objective moral standards. But such a belief is not only incompatible with the historical record concerning the role of "positivistic" philosophy as a critique of social institutions. The belief is also based on a false conception of how the study of fact can be related to the study of value. I find it difficult to escape the impression that those who hold the belief accept it on grounds of a fallacious argument — an argument entirely analogous to one which would conclude that a biologist, seeking to ascertain the various characteristics of microorganisms, whatever may be the import of such organisms for human life, is thereby precluded from distinguishing bacteria harmful to the human body from bacteria beneficial to man.