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NOTES

THE RELATION OF PHILOSOPHY TO JURISPRUDENCE*

I. INTRODUCTION

Mortimer Adler stated a few years ago that "[t]he very existence of intellectual community has never before been so seriously threatened by diversities of method, language, principles, and conclusions."¹ The comment by Professor Nagel upon the recent paper by Professor Fuller entitled "Human Purpose and Natural Law"² is some evidence that Dr. Adler's statement was not wide of the mark. In view of the fact that the paper commented upon represented a very significant development in the thinking of Professor Fuller for the field of philosophy and contained a blueprint for the future functioning of jurisprudence in light of that development, the reply by Professor Nagel, a philosopher, is disappointing. It neither clarified the central problem raised by Professor Fuller, nor in the main responded either to the arguments directed toward showing the existence of that problem or to those made in support of a proposed *modus vivendi* in light of its existence.

Professor Nagel indicated his fear that his reply might not be responsive by stating that he was "frankly puzzled by the considerations" introduced by Professor Fuller to support his views and that he was "not at all confident" that he had "grasped his intent or argument."³ From Professor Nagel's viewpoint the communication by Professor Fuller of his problem and his proposal was not successful. Having been invited to comment upon the initial stage of the discussion between Professor Fuller and Professor Nagel, I propose to do three things. First I shall restate in somewhat different words what it seems to me Professor Fuller has already stated in a reasonably clear and articulate way in his paper. I shall draw freely from his previous writings, as they form a natural context for providing additional illumination.⁴ Then I shall show in what respects the com-

* This note is a comment on the first two stages of the discussion between Professor Fuller and Professor Nagel which appears in this issue of the FORUM at 68-82.

1. 27 NEW SCHOLASTICISM 99 at 100 (1953).

2. 3 NATURAL LAW FORUM 68 (1958).

3. *Id.* at 78.

4. THE LAW IN QUEST OF ITSELF (1940); *Reason and Fiat in Case Law*, 59 HARVARD LAW REVIEW 376 (1946); PROBLEMS IN JURISPRUDENCE (1949); *American Legal Philosophy at Mid-Century*, 6 JOURNAL OF LEGAL EDUCATION 457 (1954); Memorandum and statement quoted in BERMAN, ON THE TEACHING OF LAW IN THE LIBERAL ARTS CURRICULUM at 37-43, 63-64 (1956); *Freedom—A Suggested Analysis*, 68 HARVARD LAW REVIEW 1305 (1955).

ment of Professor Nagel does not respond to the statement of the central problem, of the proposal, and of the arguments with regard to both made by Professor Fuller. Finally, I shall suggest a reformulation of the problem and discuss two objections against giving the problem an affirmative answer. In performing these three tasks, it is my hope, as a student of philosophy as well as of jurisprudence, to serve the cause of intellectual community.

The cause of intellectual community is an important one, particularly in the fields of philosophy and of jurisprudence. In these two fields the nature of the scholarly activity involved requires and in the past has tended to produce the "universal" mind capable of reasonably competent and speedy orientation with regard to unfamiliar problems and fields. Moreover, these two disciplines in some of their divisions are closely related as two different approaches to the same problem. Historically, they have been deemed so related and, indeed, sometimes confused. When, in this age of the special sciences and the resultant increase in specialization, even the philosopher and the jurist have difficulty in communicating with each other, we have considerable cause for concern.⁵ Yet it remains the simple and fundamental truth that "all sciences and arts are ordered to one objective, namely to the perfection of man, which is his happiness."⁶ To achieve this end as far as possible is the special contribution of these disciplines to the common good. This common end can only be served by the collective approach stated by Aristotle since by it the best thinking any individual can do will be vastly improved, and without it is destined to failure, however magnificent.⁷ Service of this end requires of each generation of scholars not only careful consideration of past discussion but also vital engagement in contemporary discussion. Yet profitable and not mere discussion is required, and for this we must have intellectual community.

Intellectual community is a community not so much of affirmation as of understanding. Its minimum procedural aim is to produce in men who adhere to different doctrines a mutual understanding of the causes and consequences of their disagreement. A still greater procedural aim is to enable the mind of the scholar to move in a disciplined way throughout the world of thought not only within his own discipline but also within related disciplines. By this is meant the opportunity for each scholar, in light of the unity of understanding and organization in the world of thought, to relate his theory or doctrine to past, present, or potential thinking upon the same and closely related points without fear of social, economic, or political recriminations. It is still unfortunately necessary to emphasize that discrimination within the intellectual world itself based upon race or religion or intellectual thesis is a canker capable of rotting away the very substance of its activity. Achievement of these procedural aims requires not only the desire to understand and to agree among those who disagree but also the maintenance of the conditions that make agreement possible. The

5. Cf. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 282-286 (1950). See also McKeon, *Communication, Truth, and Society*, 67 *ETHICS* 89 (1957).

6. ST. THOMAS AQUINAS, in Book 12, *METAPHYSICS*, Proemium 1 (Marietta, 1950).

7. ARISTOTLE, *DE ANIMA* 403b22-25 (Ross ed., 1931); *METAPHYSICS* 993a32-993b3 (Ross ed., 1928).

first condition required is effective communication between the participants in a discussion. So far as the listener's function in intellectual communications is concerned, one of the first requirements is that he assume that the one talking has something to say and that he place himself as far as possible in the shoes of the one talking. Compliance with this requirement is the *sine qua non* for breaking through the barrier of self-limitation and for obtaining new insights. A second basic requirement is that the listener observe carefully for the senses and limitations with which the one talking uses his main words and phrases. Context, which includes purpose, is the necessary guide in this determination. A third requirement is that the structure of the speaker's argument be determined in order that its chief points may be noted and the supporting arguments carefully aligned to the points for which they were intended. This done, a careful criticism is at least possible. I think closer regard to the latter two of these basic requirements would have helped Professor Nagel in understanding and criticizing what Professor Fuller had to say.

II. PROFESSOR FULLER'S DEVELOPMENT OF AN EARLIER THESIS AND PROPOSAL

In his paper Professor Fuller has continued to develop the central jurisprudential thesis he first stated nearly two decades ago in his lectures for the Julius Rosenthal Foundation at Northwestern University Law School.⁸ These lectures are now generally recognized as a landmark in Anglo-American jurisprudence. Like the well-instructed scribe to whom Christ referred the example of the storekeeper, he has brought forth from his storeroom things new and old.

Professor Fuller has so discussed his subject that it falls logically into two parts. In the first part, as a means of raising the central problem discussed there, he has undertaken to reinforce and clarify his earlier contention that "[i]n the field of purposive human activity, which includes . . . the law, value and being are not two different things, but two aspects of an integral reality."⁹ He had also stated in the same general context that a statute or a decision "is not a segment of being, but, like the anecdote, a process of becoming."¹⁰ These two statements about the nature of being involve an entire metaphysic for the philosopher, and they present in their broadest reaches difficult philosophical problems. Nevertheless, the modest application that Professor Fuller has previously given this statement of principle has served to limit the meaning one might otherwise have deemed assignable to it in light of the broadness of statement utilized. That application has indicated that his main concern has been to show that the best way for the judge, the lawyer, the law teacher, or the law student to spend his working day is to refuse to distinguish sharply between the law *that is* and the law *that ought to be*. That this is true, he has said, may

8. *THE LAW IN QUEST OF ITSELF* (1940).

9. *Id.* at 11.

10. *Id.* at 10.

be seen from the fact that the law involves a set of words directed by the law-maker toward one or more objectives. Yet words alone of a rule are insufficient to guide those who must administer it. One permissible reading of the words may serve the objectives for which the rule was formulated, whereas another reading of them may fail to do so. Again, each of several permissible readings of the words may serve the objectives of the rule but in different ways and with different degrees of efficiency. New circumstances may arise in the administration of a rule that cause previous interpretations of it to disserve some of the objectives for which the rule was originally constructed, and yet new meanings capable of serving these objectives are permissible in light of the language used. Administration which keeps the meaning of the words of a rule in close accord with its purpose in light of changing circumstances respects the fundamental nature of the rule. Whether one has regard to efforts at definition of the general notion of law or to the administration of a particular law or legal rule, one cannot reasonably disregard the human purposes toward which law is directed. 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*. The administration of a legislative or decisional rule is a process by which the rule is enabled, through reinterpretation, to become constantly what it ought to be. This has been the central, recurrent thesis in Professor Fuller's writings, a thesis which he has effectively directed against some but not all of the negative aspects of positivism for the purpose of returning jurisprudence to what he conceives to be its proper functions: "attempting to give a profitable and satisfying direction to the application of human energies in the law."¹¹

In the first part of his paper Professor Fuller gives new examples that illustrate his basic principle concerning the relationship between value and being in the field of purposive human activity. One relates to a person observing a boy apparently contemplating doing something with a small round object in his hand. After the boy directs several types of acts toward the object, the observer is led to conclude that he has been trying to open a clam. If the observer can predict that the boy's attempt to open the clam in some particular way will be given up, it is because the observer knows that that is not a "good" way to open clams and that it lacks value when judged in light of the boy's purpose. Professor Fuller expresses his earlier stated principle in new words when he says that "in any interpretation of events which treats what is observed as purposive, fact and value merge. . . . Here the structure of the events as they unroll — the reality of what happens through time — contains an element of value, so that we may say: 'This is bad, it will not last,' or 'This is good, we may expect it to continue.'"¹² While he does not repeat to an audience of philosophers what has been his constant modest application of that principle with regard to law, it is obvious from this paper that he adheres to it and that his main concern is with its operation within jurisprudence.

Upon restating his central thesis of earlier years and illustrating it with sev-

11. *Id.* at 2.

12. *Op. cit. supra*, note 2 at 69.

eral examples, Professor Fuller then takes up an argument that he feels sure will be raised: "that my observations confuse the question of ultimate value with that of selecting the most effective means for realizing an immediate purpose. It may be true, it will be said, that to understand and describe purposive action we have to participate vicariously in an act of valuation, but any such valuation is necessarily relative to what Dewey called the 'end-in-view.' That there are good and bad ways of opening clams leaves untouched the question whether opening clams is itself an activity entitled to be called good."¹³ In the process of discussing this objection, Professor Fuller states the central problem which he had expressly indicated earlier was the main point of the first part of his paper. This problem relates to the possibility of attaining to philosophical science concerning right ends and means of human action. Deeming the central problem he raises as without a present solution, he makes a proposal concerning the scope of jurisprudence in its study of human ends and means. The proposal, which is set forth in the second part of his paper, is made as a counter to the positivist position that a profitable study of human ends cannot be made in jurisprudence. It seems appropriate to outline this proposal before examining the central problem which he raises.

The proposal which Professor Fuller makes is based upon his earlier proposal in 1954 of a study, as a branch of jurisprudence, to be called Economics.¹⁴ What is advocated is the study, solely from the procedural point of view, of forms for social ordering such as contract, adjudication, and legislation as well as the processes and procedures by which a particular contract, judgment, or statute is produced. This approach puts to one side the study of objective guides for determining or criticizing the content or substance of contracts, judgments, or statutes issuing from these processes or of substantive principles by which that content might be determined. Instead it focuses upon the procedural ends and means given effect by any mode of form for social ordering and seeks to determine what is the right functioning, procedurally considered, of the particular social purpose-forming process involved. The foundation for conclusions about these procedural ends and means is dialectical and prudential, not philosophical. This purely procedural conception of the role of jurisprudence so far as the study of human ends and means is concerned is deemed to be the only fruitful and possible one in light of the central problem stated in the paper.

In his 1954 article proposing the role of Economics for jurisprudence Professor Fuller had stated that he would later "indicate what the view here advocated has to say about the question how the goodness of a particular purpose should be judged."¹⁵ The paper under review here is responsive to that statement and continues the presentation of jurisprudence as Economics primarily by stating reasons for confining the study in jurisprudence of human ends and means to that originally envisaged for Economics. Although this is a distinct and liberating

13. *Id.* at 70.

14. *American Legal Philosophy at Mid-Century*, 6 JOURNAL OF LEGAL EDUCATION 457 at 473-481 (1954).

15. *Id.* at 470.

advance as compared with the traditional positivist position, in that ends become a legitimate concern for jurisprudence, it is a limited advance. So long as the central problem Professor Fuller states stands unresolved, the effect of his proposal is also a *limitation* upon the scope of jurisprudence. The limitation is the conduct of the study of right human ends and means without reference to philosophy as an explicative science either in its speculative part or in its practical part, which includes philosophy of law.¹⁶

III. THE CENTRAL PROBLEM RAISED BY PROFESSOR FULLER

Having set forth in outline the scope of jurisprudence in the study of human ends and means as proposed by Professor Fuller, it becomes appropriate to examine the reasons given for the proposal. The reason for the proposed expansion of jurisprudence to the study of human ends is aligned with Professor Fuller's rejection of the distinction between the *is* and the *ought* in the administration of law and in the definition of the notion of law. Since Professor Fuller has made this point tellingly in his previous writings and will undoubtedly refer to it again in replying to Professor Nagel, I feel my contribution can best be made by making clear his reasons for limiting the scope of jurisprudence, at least presently, to that of Economics, a prudential dialectic, in the study of right human ends and means.

As earlier remarked, in the course of developing his central thesis concerning the relationship between value and being in the field of human purposive activity, Professor Fuller seeks to answer an objection to that thesis. The objection asserts that his thesis, even if valid for describing the relationship of a given means to an immediate purpose or proximate end, does not respond to the question of whether or not that purpose or end is itself good. The response to this question, it is asserted, involves one judgment of value that does not merge with a judgment of fact. The answer of Professor Fuller to this objection begins with the proposition that in order to understand a course of human action having any complexity requires one to refer to more than one purpose. Usually a congeries of related purposes must be examined if one would understand a complex human action. Moreover, he states, the meaning of any one of these purposes is controlled by latent purposes in interaction with it. He asks the question: "Shall we treat the shift from one purpose to another as a kind of miracle, neither requiring nor permitting any participation by the observer in the evaluation that produced the shift?"¹⁷ We might add to his question the following for driving home the point he had been previously making: "and thus in determining the capacity or aptness of a given means to be productive of a congeries of related purposes, which is a matter of fact?" The example he gives is again of the boy seeking to open a clam. He suggests a considerable shift in the boy's activities as compared with what he had been doing, such as his going to an aquarium nearby where

16. See MARITAIN, *LES DEGRÉS DU SAVOIR* 65-68, 618-622, 879-896 (1946). Also see note 63, *infra*.

17. *Op. cit. supra*, note 2 at 70.

he can observe clams feeding and digging in the sand as they normally would. He then raises the question whether there has been a complete break in the continuity of the boy's actions or merely a shift to a better means of satisfying what his true purpose was from the beginning of a given sequence of activities. The suggestion is that, as a person shifts from one purpose to another, the difficulty of understanding the action that takes place as a consequence of that shift in purpose may increase, but the nature of what is judged does not. It remains throughout the shifting of purposes the problem of determining the relationship of action to purpose, or more properly, to a number of purposes, and this is basically a question of value that merges with a question of fact.

Unless one follows closely what Professor Fuller is saying, nothing new seems to have been added to what he has been saying over the years concerning his central thesis about the relationship between fact and value in the field of purposive human activity. But something quite new has been said. To insure that the reader will not miss what has been added, Professor Fuller then proceeds to show that he has sought to answer the objection about his not probing the question of the goodness of a proximate end of an act by raising a problem concerning the very possibility of such a determination. By way of cautious emphasis, in order that he will not be misunderstood, he then restates the problem. After all, he had stated in his 1954 article that he would later answer this type of question, and he wishes it to be known that this is the promised answer.¹⁸ The problem he raises is related to the operative effect of asserted facts. The first is the datum of interaction at the level of prudential judgment between human purposes, from one point of view, or between human ends and means, from another. This datum is interpreted to mean that the content of ends does not fully or adequately determine the means but rather that the content of the ends is determined by means, and the content of means by ends, in a process of constant interaction between them. Other senses of the datum will be noted in Part VII below. Interaction is also asserted to take place between immediate and remote purposes, as was sought to be shown by the example of the boy with the clam. The second asserted fact is the inability of man to "determine by analysis and observation" what his terminal end or purpose *qua* man is, although it is taken for granted that man does "have" such an end or purpose.¹⁹ These two facts create the central human problem it was the express purpose of Professor Fuller to set forth in the first part of his paper.

The central problem can be stated as follows: If man's reason enables him to shape means toward particular ends but not to determine what his terminal end or purpose is, although he does have such an end or purpose, and if the content of particular ends and means (or remote and immediate purposes) is determined by a constant interaction between these two elements, an insuperable difficulty seems presented to man so far as developing a philosophical science concerning what his intermediate ends and means should be relative to his terminal end or purpose. This appears to be true not only because the terminal

18. See note 15, *supra*.

19. *Op. cit. supra*, note 2 at 72.

end or purpose cannot be known but also because the process of prudential judgment exhibits an inherent unruliness to direction with regard to ends arranged in tandem fashion by virtue of the fact that ends and means are always giving content to each other by a process of interaction.

Stating that he does not know how to remove the difficulties presented by the problem, Professor Fuller then discusses these difficulties. He suggests that part of the trouble is the nature of language, which is "an awkward instrument for dealing with interaction."²⁰ This suggests that the reality to which, as a commonsense matter, we refer by the terms "end" and "means" is not very well suggested by use of these terms. Just as the sun gives us the illusion that it is moving around the earth so do these terms give us the illusion that a means is sharply divided from an end and an immediate purpose from a remote purpose. The reality suggested is that not only can ends not be determined apart from means but also that ends and means are not intrinsically different from each other. Consequently, if this is his suggestion, the better answer to the question about how to view a great shift in the activities of the boy who had been attempting to open a clam is that one should not apply too strictly the notions of "means," "end," "remote purpose," and "immediate purpose." These really amount to linguistic tools that enable the observer of the boy to describe or judge the human action he is observing and that enable the boy who is performing the action to overlook temporarily the process of interaction so as to come to a decision and try again. We can never describe everything that is involved in human action any more than we can come to a decision on all that is involved in human action that is to be performed. These linguistic tools at least permit inadequate description of human action in the one case and inadequate decisions to act in the other. Within limits both inadequacies can be corrected as the dynamism to which they are addressed is better understood. A second suggestion is made in addition to the one concerning the inadequacy of language to fit the facts of interaction. This is to the effect that the true source of the difficulty lies beyond language and is "an outcropping of the deeper mystery of life itself."²¹ "Indeed," he says, "I believe the issue is not that of solving the problem. . . ."²²

The form in which the problem is stated would seem to justify the position taken by positivists that all study of human ends by philosophy or jurisprudence is fruitless because philosophical science concerning them is impossible. On the contrary, Professor Fuller points out, when one appreciates that in order to understand purposive human arrangements, which include law, one must not separate the *is* of these arrangements from the *ought*, one is provided with a *modus vivendi* in jurisprudence. While a philosophical science of right human ends and means may not be possible, nevertheless jurisprudence must have regard to human ends. An adequate and profitable alternative is the study of these by a dialectical-prudential process that we already see at work in the administration of decisional and statutory law. While the outline of this has already been given, it can now be

20. *Id.* at 72.

21. *Id.* at 72.

22. *Id.* at 73.

seen better why the study was probably confined to procedural ends and means of forms for social ordering like contract, legislation, and adjudication. Since the basis for choosing one end rather than another is to be agreement, a dialectical process rather than a scientific process, agreement is more likely to be reached with regard to the procedural ends of contract, legislation, and adjudication. The substantive ends reflected in the content of decisions issuing from processes employed for effectuating these institutions are the resultant of disagreement and compromise. These institutions are designed to serve people with differing interests. Further, the substantive ends are far more likely to change with the passage of time than the procedural ends.

Although Professor Fuller in his Rosenthal lectures referred to the field of jurisprudence as "legal philosophy"²³ (a frequent use of the latter term in this century) and even stated a central thesis broadly enough to call for philosophical analysis in the traditional sense, he carefully avoided talking like a philosopher and gave his thesis a narrow, jurisprudential application. In his recent paper he not only has squarely raised a philosophical problem but also has related his central thesis to it. In so doing, he has asserted two reasons for giving a tentative negative answer to it. Philosophical science of right human ends and means appears to be impossible; and since it is not disproved that philosophy seeks for the impossible, jurisprudence can presently have no use for it and must become self-sufficient. If I may be permitted to paraphrase a statement by Professor Fuller in his Rosenthal lectures: by becoming more clearly what it is, his central thesis becomes what it was previously only trying to be.²⁴ By his proposal for Economics or collaborative articulation of shared purposes, jurisprudence climbs above some of the limitations placed upon it by traditional legal positivism but it does not differ *in result* from the denial by positivism of philosophy or at least of practical philosophy including philosophy of law. I say "in result" because in fact there is a difference as wide as the ocean between the position of Professor Fuller and that of positivism. He does *not* deny philosophy *can* solve the problem of justifying its existence. The positivist does deny this. Professor Fuller by way of contrast has invited the help of philosophy in solving the philosophical problem he has stated.

IV. PROFESSOR NAGEL'S BASIC MISCONCEPTION

Professor Nagel does not discuss the central problem raised by Professor Fuller. The reason he does not discuss this problem is that, almost incredibly, he somehow concluded that the aim of Professor Fuller was to develop moral standards for guiding the formation and criticism of legal rules, principles, and practices. He repeats this misconception throughout his paper and finally observes in his last paragraph: "I am entirely unclear how his [Professor Fuller's] claim concerning the fusion of fact and value, even if the claim were sound, is relevant to his belief in the possibility of an objective moral evaluation of the law . . ." ²⁵

23. *Op. cit. supra*, note 8 at 2.

24. *Id.* at 10.

25. *Op. cit. supra*, note 2 at 82.

As we have seen, nothing was farther from Professor Fuller's mind. He was in fact raising a question as to the capacity for philosophy to attain to a science of right human ends and means. The only parts of his paper that could possibly have led Professor Nagel to the opposite conclusion were the title, in which was used the term "natural law," and the last statement in the paper as to the necessity for our reacquiring "some measure of sympathy for the essential aims of the school of natural law."²⁶ The mere use of the words "natural law" may still stimulate the adrenalin glands in the twentieth century but rarely is cause for genuine alarm even for a positivist. Moreover, sympathy for the aims of natural law theory is not "commitment"²⁷ to that theory or to the possibility of objective moral standards for evaluation of law. It may mean, as Professor Fuller's previous writings have clearly shown, merely a jurist's affirmation of the primacy of purpose in the administration and definition of law. In every other part of his paper Professor Fuller makes it abundantly clear that the very thing he was *not* proposing was an objective basis for a moral criticism of law. In view of this first and crucial error by Professor Nagel, it seems important to quote the following statements from Professor Fuller's paper:

(1) I am *not*, in any usual sense, advancing "a theory of natural law." I do not bring with me any code of nature. . . . My concern is primarily to present a problem, and only incidentally and imperfectly suggest a solution for it.²⁸

(2) The problem I have in mind is that which arises when we attempt to reconcile the now generally accepted dichotomy of fact and value with a purposive interpretation of human behavior. . . . Now it can be demonstrated, that in any [such] interpretation . . . fact and value merge . . . the view that value is something foreign to a purely factual account—something projected by the observer on the thing observed—simply will not stand scrutiny.²⁹

(3) At this point it will be argued, I am sure, that my observations confuse the question of ultimate value with that of selecting the most effective means for realizing an immediate purpose.³⁰

(4) In my now sadly overworked molluscolidal illustration I described a case where a series of apparently discrete acts were directed toward what I called a single purpose. Actually it would have been better, even in that simple case, to speak, not of a purpose, but of a congeries of related purposes. . . . The essential point I am trying to convey is that to understand a course of action of any complexity a single "purpose" does not suffice. . . . Any single human purpose—whether expressed in actions or words—is an incomplete thing when severed from the total system of which it forms a part. *The meaning of any given purpose is always controlled by latent purposes in interaction with it.*³¹

(5) *The dilemma* we confront when we attempt to apply the fact-value dichotomy to human purpose *may be restated* in terms of the means-end relation. To anyone who reflects on moral issues two lines of thought will

26. *Id.* at 76.

27. *Id.* at 77.

28. *Id.* at 68. Italics supplied by the author.

29. *Id.* at 68.

30. *Id.* at 70.

31. *Id.* at 71. Italics supplied by the author.

open up with respect to means and ends, each carrying with it the quality of self-evidence. On the one hand, it seems clear that the *selection of an apt means for the realization of a given end is an activity engaging man's reasoning faculties* and his capacity for accurate analysis and observation. The other line of thought leads, with equal persuasiveness, to the conclusion that this activity must have a terminal point and that *the end ultimately pursued cannot be determined by analysis or observation, but must in some manner or other be projected upon events*. These two lines of thought can coexist peacefully so long as they are not applied to any process of decision. When that happens the distinction that holds them apart disappears and *their latent conflict becomes manifest. For when we are confronted with the necessity of making an actual decision about a course of action, means and ends no longer arrange themselves in tandem fashion, but move in circles of interaction. . . .* this conflict manifests itself precisely at the only point where theory makes any difference in human affairs.³²

One notices that Professor Nagel's observation about his inability to see the relevancy of one part of the paper to what he conceived to be Professor Fuller's aim related to the discussion not of the central problem actually presented but to a discussion of the fact-value dichotomy in one of its applications. Yet Professor Fuller had expressly indicated, as shown in quotation (2) above, that his interest was in presenting that central problem and only incidentally in discussing the fact-value dichotomy. His interest in the latter was to show that an attempt to apply it to purposive human activity would lead one to see the central problem he had in mind. One notes further that Professor Fuller says that he is "restating" the problem in terms of the means-end relation (see quotation (5) above). The overwhelming bulk of the discussion prior to this "restatement" concerns a problem which is not identical with the one "restated" but rather a different though related one. This prior problem, which concerns whether fact and value merge in the field of purposive human activity, is not and cannot be equated with the subsequent problem of determining how man's terminal end gets impressed on his *hic et nunc* activity in light of the interaction taking place between his remote and immediate purposes (or his ends and means). The reason for the discussion of the earlier problem was to lead to the discussion of the central problem by means of it. This, we saw earlier (also see quotation (3) above), was accomplished by the vehicle of raising an anticipated objection to the universal validity of the asserted merger of fact and value as applied to the question of the goodness of the proximate end of a human action. It was in the answer to this objection that the first discussion of the interaction between remote and immediate purposes was begun. Of course, while the facet of interaction is part of the problem, as "restated," it is not the whole of it or even a complete facet in itself. It must be related to the problem of the terminal end of man before it becomes a complete facet in the central problem sought to be raised. Search as you will the discussion before the "restatement" of the central problem Professor Fuller wanted to raise and you will not find the other necessary facet which concerns the terminal end or purpose of man. The state-

32. *Id.* at 71 ff. Italics supplied by the author.

ment quoted in (4) above suggests the central problem, however, when it is compared with the "restatement" of that problem. While this "slip" was made, it could not reasonably have caused Professor Nagel to fail to see what the central problem was since the central problem was explicitly and fully "restated." He could not reasonably conclude that the validity of the fact-value dichotomy was the major preoccupation of Professor Fuller in the first part of his paper. The discussion of this dichotomy was expressed to be and was a mere means to the end of presenting the central problem of the paper. Consequently, we must conclude that Professor Nagel erred in concluding (1) that the validity *vel non* of the fact-value dichotomy was the central problem which Professor Fuller wished to raise; (2) that Professor Fuller's aim was to develop objective standards for guiding the formation or criticism of the positive law; and (3) that the discussion of the fact-value dichotomy was not relevant to Professor Fuller's aim in fact.

While Professor Nagel does not discuss the central problem as such presented by Professor Fuller, he does devote a few remarks to a part of it, the datum of interaction between remote and immediate purposes. However, in directing his remarks to this datum, he associates Professor Fuller's discussion of it with the latter's discussion of other matters bearing no relation in the overall argument to each other. The latter matters concerning "a process of collaborative articulation of shared purposes"³³ relate not to the presentation of the datum of interaction as a part of the central problem raised by Professor Fuller in the first part of the paper but to the presentation of his proposal in light of the problem raised for the study in jurisprudence of forms for social ordering through a prudential-dialectic to be named *Economics*. It is as if Professor Nagel had taken Professor Fuller to have said that "apples and nails constitute the same kind of thing and exist." If Professor Fuller had said that the datum of interaction and the datum of collaborative articulation of shared purposes constitute the same kind of thing and truly exist, then it would have been appropriate for Professor Nagel to discuss them as if they were the same thing and to deny them together. Professor Fuller asserted no such thing, and in fact discussed the two matters separately because each related properly to different argument structures contained in different parts, the two logical divisions, of the whole paper. That each datum related to the subject matter of purposes did not make them equivalent or related in the overall structure of argument. After all, Professor Nagel himself had spent most of his paper asserting that judgments of fact and judgments of value in relation to the same subject matter, purposive human activity, constitute different things or data. Despite this second error in analyzing Professor Fuller's paper on the part of Professor Nagel, the question remains whether he stated an adequate argument against the existence of the datum of interaction, upon which the central problem in part depends as stated. His only answer is: "But is the only alternative to an atomistic conception of human purposes and goals one which assumes that all immediate purposes, whether individual or social, are elements in a temporally

33. *Id.* at 74.

developing but organically integrated system of ends?"³⁴ After quoting the statement of Professor Fuller about the datum of interaction between purposes plus unrelated statements bearing on his argument in the second part of the paper, Professor Nagel merely observes: "Such a view, in any case, I find incredible, for it is incompatible with the identifiable facts of contemporary human experience, as well as with the known character of human history."³⁵ He then proceeds to discuss "evidence" relating not to the datum of interaction but to the datum of collaborative articulation of shared purposes. The discussion is wholly unresponsive to Professor Fuller's assertion of the datum of interaction and thus to the central problem presented in the first part of his paper. Thus, the *one* opportunity of which Professor Nagel did avail himself even to refer to the central problem, by way of referring only to a facet of it, totally miscarries.

V. THE DISCUSSION OF THE FACT-VALUE DICHOTOMY

The point has already been made that Professor Fuller's discussion of the validity of the fact-value dichotomy for interpretation of purposive human activity plays a distinctly secondary role in the first part of his paper. That discussion enables him to point the way to the central problem of whether philosophical science can be attained concerning right human ends and means. Nevertheless, the invalidity of that dichotomy for the field of purposive human activity is asserted by Professor Fuller, and its validity is asserted by Professor Nagel. Since the proposal in the second part of the paper depends directly upon the assertion of its invalidity, it is necessary to discuss the two positions taken concerning the dichotomy. My purpose here is to determine whether the two discussants are talking about the same thing; whether, if so, they disagree and how; and who is correct if they are in disagreement.

Let us first see what Professor Fuller is saying. Reduced to its simplest terms, his assertion is that given a segment of activity being performed by a given human person, one *can* view it as involving a factual problem. Every element of the human activity involved belongs to the realm of the real. When the observer seeks to describe adequately this human activity, *what* he describes is an integrated reality or a part of it; and his *description*, to the extent it is true, is factual. Moreover, what is referred to as "value" in human activity, insofar as it is part of the human activity being engaged in or being described, is a part of reality. The true description of this "value" element in human activity is a fact. Consequently, it is not correct to distinguish, with regard to their reality, between "fact" and "value" insofar as we are referring to elements to be found in the reality of ongoing purposive human activity. Earlier, Professor Fuller had said that "they are not two different things, but two aspects of an integral reality."³⁶ In this paper, he expresses the same thing when he says that in this activity "fact

34. *Id.* at 80.

35. *Id.* at 81.

36. *Op. cit. supra*, note 8 at 11.

and value merge."³⁷ I happen to think his earlier form of statement is a more felicitous one, but this is a matter of form, not of substance.

The examples he gives indicate the *quite limited way* in which he is questioning the validity of the fact-value dichotomy. He frequently has made use of the dichotomy in the past and undoubtedly will in the future — in quite different contexts. In addition to showing by example the quite limited way in which he is questioning the validity of the dichotomy, he expressly states that he wishes to show the inaccuracy of the view that value "is something foreign to a purely factual account — merely something projected by the observer on the thing observed."³⁸ His point is a narrow one especially related to the administration of law and the definition of law.

Let us consider his examples in order to tie down what it is he has in mind by the use of the word "value" with reference to purposive human activity. He refers to a boy who is handling a small, gray, roundish object and to a person observing the boy. The observer eventually judges that the boy is holding a clam and is attempting to open it. The boy performs many different operations relative to the clam. Each operation, we will assume, is related to opening the clam. His purpose is to open the clam. It so happens that the observer knows something about clams and has had much experience in opening them. Now each operation utilized by the boy will either serve or will not properly serve his purpose of opening the clam. Let us assume one of the devices used in an effort to open the clam is a wet sponge. Another is a patented "clam-opener." The former will not, the latter can if properly used, enable the boy to open the clam. Professor Fuller is saying that the term "value," as one among many of its impositions, has been attached to the capacity or aptness of a given human means to produce a given end. He does not so much question the use of the term "value" in this situation as he questions the judgment frequently made that imposition of the term is not made here with regard to what is an element of the reality of the human action involved. He wishes to emphasize that "value" in the sense of the capacity or aptness *vel non* of a given human means to produce a given end is not different from the "fact" concerning this capacity or aptness. It should be emphasized what he is not saying, what he is not talking about. He is *not* talking about the *judgment* of the boy or that of the observer of the boy's actions or about *the validity of these judgments* concerning the real capacity (aptness) or incapacity of a given human means to achieve a given end. These judgments are capable of being true or false, and they may rise to the status of knowledge or, on the contrary, be remitted to the realm of opinion, and this either as a temporary matter or a permanent matter. He is *not now* talking about *value judgments*. He is talking about the *capacity or aptness of the means being judged* to achieve a given end. What that capacity or aptness is, is something inherent to the reality of the human act. It is to the imposition of the term "value" to this inherent capacity or aptness that he refers in questioning the validity of the fact-value dichotomy. The judgment of the boy or that of the observer of the

37. *Op. cit. supra*, note 2 at 69.

38. *Ibid.*

boy with regard to this inherent capacity or aptness, i.e., with regard to its value, may be right or wrong and reached as a matter of knowledge or opinion. Professor Fuller is not talking about the "value imputation" or "value judgment" of either the boy or his observer. Another way of putting this, which is precisely a corollary of the other, is to say that a judgment of value, insofar as it is true, insofar as it conforms to the reality of the value in ongoing purposive human activity, is also a judgment of fact or simple existence. Professor Fuller does not yet speak to the problem of how a judgment of value on the part of the boy and from his point of view is determined to be true or valid before being reflected in the reality of his action as a value which is in turn the subject of a judgment of value by an observer which, if true, is also a judgment of fact or simple existence. So much has been said in this past sentence that one shudders to utter it. Yet it must be said and may help clear the air. I must also observe that I am using the term "value" in two senses, from one point of view; and in but one sense, from another point of view, in that sentence. This point, however, must be the subject of another paper.³⁹

Now as soon as we read Professor Nagel's reply to Professor Fuller concerning the validity of the fact-value dichotomy in the realm of purposive human activity, we recognize that he has completely missed the sense in which Professor Fuller has been challenging it or, more accurately, qualifying it. This is the third major error of analysis committed by Professor Nagel, and the commission of this error substantially exhausts the remaining discussion in his paper not covered by his earlier two errors of analysis. Almost his first statement in reply to Professor Fuller's discussion of the dichotomy is the following: "He [Professor Fuller] bases his dissent on the claim . . . that *value judgments* cannot be regarded as 'something foreign to a purely factual account.'"⁴⁰ In fact, Professor Fuller had stated: "the view that *value* is something foreign to a purely factual account — something projected by the observer on the thing observed — simply will not stand scrutiny."⁴¹ A *value* is not a *value judgment*, and Professor Fuller made it as clear as it can be stated in the English language and by his examples that he was not, in the first instance, talking about *value judgments* but about the *value of a human act or in a human act as an object of value judgments*. Moreover, he stated what he meant by value: the capacity or aptness of a given human means, however correct or erroneous the value judgment about it, to achieve a given end.

In light of the foregoing, it hardly seems necessary or profitable to take up Professor Nagel's attempt by example to counter what Professor Fuller was not saying. If, however, what has been said above by way of explanation of what Professor Fuller was and was not saying is not clear, it may become clear by showing the inapplicability of Professor Nagel's examples to this. One of Professor Nagel's examples relates to a physician who prescribes penicillin for a patient.

39. Compare MARITAIN, NEUF LEÇONS SUR LES NOTIONS PREMIÈRES DE LA PHILOSOPHIE MORALE 25-86, 134-135, 157-158 (1951) with VON HILDEBRAND, CHRISTIAN ETHICS (1953).

40. *Op. cit. supra*, note 2 at 78. Italics supplied by the author.

41. *Id.* at 69. Italics supplied by the author.

It is said that the physician's "*value judgment*, if it is competently grounded, is predicated on the assumption that he knows the condition of the patient as well as the effects of the drug on the human body; and though the physician may tacitly assume the correctness of the factual data, and may be uninterested in the descriptive facts except insofar as they bear upon his aim to effect a cure, it is imperative to distinguish clearly between what *the facts* are and an *evaluation of them* with respect to a certain end. . . . Indeed, unless a careful factual account can be given, one which is not colored by a surreptitious *value imputation*, we cannot judge competently whether the act does have *the value* attributed to it."⁴² Carefully examined, this statement reveals that Professor Nagel actually admits that the distinction between the *facts* concerning an act and an *evaluation of them* is equivalent to the distinction between the *value which an act actually has* and an *imputation of value to that act*. This is precisely Professor Fuller's point. It is his contention that the *facts concerning an act* include the *value which that act actually has* understood as its capacity or aptness to achieve a given end. Consequently, in the example given, Professor Fuller would say that he simply means that the human act in question involves the use of penicillin and that this is a fact. Further, he would say that the penicillin has a capacity or aptness to cure certain diseases. Still further, he would observe that the very act of prescribing penicillin on the part of the physician has or does not have in fact an aptness or capacity for effecting the cure of the disease the patient has. Penicillin *qua* penicillin and the physician's act of prescribing it *qua* act either have respective capacities or aptnesses or do not have them, and the possession or not of these is a fact. It is the "value" of either, i.e., in the sense of capacity or aptness of either, to cure certain diseases or this disease, that he is talking about, and this is a fact. That is the primary thing which Professor Fuller has observed about the application of fact-value dichotomy to ongoing purposive human activity. He is not talking, in the first instance, about the *judgment* of the physician who prescribes the penicillin and whether it is well-founded or ill-founded insofar as he has judged the *value* (capacity or aptness) of penicillin to cure a given disease or the *value* (capacity or aptness) of his act of prescribing in light of the patient and his condition to achieve a cure. He is talking about the *value* judged. Professor Nagel clearly evidences that he makes the same distinction between the *value that a human means actually has* and the *judgment concerning the existence vel non* of that value in the human means. He even warns us that the failure to make the distinction between fact and value may cause one to fail to make the distinction between the *value that a human means actually has* and the *judgment concerning the existence vel non* of that value in the human means. This warning makes sense only when it is read as drawing the distinction between *existence in fact of value* in a human act and *judgment about the existence vel non of that value*. It appears that Professor Nagel has conceded the argument of Professor Fuller without realizing it. He did not realize it because he insisted upon reading Professor Fuller as talking about *value judgments*, in the first instance, rather than about *values in fact existing in a given human means* and

42. *Id.* at 79. Italics supplied by the author.

only incidentally and derivatively about judgments correctly affirming the existence of that value.

What has been said about the example of the physician applies equally to the example given by Professor Nagel of a court rendering a judgment in a criminal case. Professor Fuller is not talking about a court's judgment of the act of the alleged criminal relative to a legal standard for judging it. He would refer to the value which actually existed in the act the criminal has performed relative to the criminal's end and the disvalue which also actually existed in that act relative to the end of the state in maintaining public order and justice. The judgment of a court may or may not adequately correspond to the disvalue actually in a criminal's act or to the absence of that disvalue in an alleged criminal's act.

Professor Nagel has said that Professor Fuller's illustration presupposes the distinction between fact and value. And so it does, not only in one respect but in two. The failure to see that the distinction is between two aspects of reality lies at the base of Professor Nagel's difficulty with understanding how this distinction can be presupposed without violence to the position Professor Fuller is taking. This is the first of two possible respects in which the distinction between fact and value can validly be taken. In this first respect we are talking about structural elements of the composited dynamism which is the human act. One of these elements is the purpose or end for which that which is done is done. Another is the thing which is done for that purpose or end. Still another is the capacity or aptness of the thing which is done for achieving the end or purpose for which it is done. Each of these structural elements of the human act is equally a real aspect of the whole. The third element, the capacity or aptness of the thing which is done, stands in an intrinsic relation to the first, the purpose or end for which the thing done is done. We call the third element of the composited dynamism the "value" of the act; yet not only it but also the first two elements of that dynamism are real so that propositions which truly describe each of them are factual. Consequently, it is correct to say, in one sense of the distinction between fact and value, that the distinction is one between one fact and another related fact as well as that the distinction is presupposed in the point that Professor Fuller is making.

There is another respect in which the distinction between fact and value may be said to be presupposed in the point that Professor Fuller is making. There comes a time when we must ask the question whether a given human act is right or good relative to whatever is the measure of rightness or goodness in human actions *qua* human. This raises the question of whether there are objective or true measures of rightness or goodness. However this question is resolved, if such measures do exist or may be grasped by the mind, it still remains true to say that the act which conforms to that measure does so by virtue of what the act is or of what the act possesses. The act of respecting my neighbor's property really does differ from the act of not respecting my neighbor's property. When we say that the former conforms to the measure of right human action, we do so also by virtue of the fact that real elements of the act or its circumstances enable us to judge it as different from some other act that does not conform to that meas-

ure. The realness of these elements of the human act is just as real as that of the elements which are noticed by the use of the term "value" previously discussed. Consequently, even though this point is not explicitly made by Professor Fuller, it is clearly implied the moment he raises an anticipated objection to his argument that "fact and value merge" and provides an answer to the objection not only by showing that real elements of human activity with multiple purposes must be regarded if we would understand the value of that activity but also by showing there are difficulties in the way of asserting a philosophical science of what is right human action. Thus Professor Nagel not only fails to see that he has conceded Professor Fuller's first argument about the reality of "value" but also fails to see that Professor Fuller fully concedes that there is a problem in determining what are the true "values" or goods of human living and true norms for giving them effect. This latter problem is the central problem which Professor Fuller wished Professor Nagel to discuss.

VI. PROFESSOR NAGEL SPEAKS TO THE PROPOSAL

There remains one last argument of Professor Nagel. It is the only one he addresses to Professor Fuller's proposal for limiting the scope of jurisprudence to the study of forms for social ordering by the method of a prudential dialectic. The argument he makes is that Professor Fuller's proposal is not feasible or practical, that the approach of a prudential dialectic will not work. The real issue, however, was not whether it would work but whether it would be sufficient without the assistance and contribution of philosophy.

And, of course, the method of a prudential dialectic does work. Since Professor Fuller has, as I discovered upon reading the galley of my paper, devoted a full quarter of his second paper to a full explanation of its operation, I have decided to eliminate my own discussion of the point as being repetitive. I would like to say, however, that the collaborative articulation of shared purposes has its roots in the deeper psychological process of natural knowledge of moral values. A full and adequate discussion of this would lead us to the realm of philosophy.⁴³ In his four philosophical essays⁴⁴ published in 1954, Professor Richard McKeon has showed an excellent grasp of what Professor Fuller is talking about. He speaks of communication which is "the elaboration of the shared beliefs and postulates that unite communities."⁴⁵ In his essay upon "Love and Philosophical Analysis"⁴⁶ he develops the four forms or levels of group thinking. The fourth, he says, is that "in which the result exceeds, not only what any member of the group has thought, but also what emerges as the sum of their individual thoughts . . . in which the truth is expressed by no one

43. See the very important discussion in MARITAIN, *NEUF LEÇONS SUR LES NOTIONS PREMIÈRES DE LA PHILOSOPHIE MORALE* (1951).

44. MCKEON, *THOUGHT, ACTION, AND PASSION* (1954).

45. *Id.* at 12.

46. *Id.* at 30-53.

speaker but is found in the total development of the discussion."⁴⁷ I suggest that when the collaborative articulation of which Professor Fuller speaks reaches its internal perfection it will be at the fourth level of group thinking of which Professor McKeon is speaking.

VII. FACING UP TO THE CENTRAL PROBLEM

I believe that the foregoing comments upon the papers presented by Professors Fuller and Nagel may be of some assistance in any renewal of their discussion and contribute to the establishment of intellectual community between the disciplines of philosophy and jurisprudence. I have shown that Professor Fuller has (1) raised a problem of major concern to both of these fields concerning the study of human ends and means; (2) asserted that he did not know how to solve this problem in view of certain difficulties presented; and (3), consequently, has proposed a limitation upon the scope of jurisprudence which, while it extends it to the study of human ends and means through the method of a prudential dialectic, severs it from the method or contribution of philosophy as an explicative science. I have also further explained the central problem raised and showed that, as it is formulated, the problem questions the possibility of philosophical science concerning the right ends and means of human action. I have also showed that Professor Nagel (1) misconceived the aim of Professor Fuller in the latter's paper; (2) failed to discuss the central problem raised by Professor Fuller and, consequently, whether or how it is solvable; (3) misconceived the point of the discussion by Professor Fuller of the fact-value dichotomy as applied to purposive human activity and even gave some evidence of agreeing with the real point of the latter's argument. If these points have been validly made, Professor Nagel can now renew the discussion profitably by speaking to the real problems and positions as I have indicated them.

In the final part of my paper I wish to speak to the central problem raised by Professor Fuller and to the proposed limitation for the scope of jurisprudence made in light of it. The problem relates to how it is possible for man to attain to philosophical science concerning his true ends and means in view of his inability to determine his terminal end by analysis and observation as well as the operative effect of the datum of interaction between ends and means at the level of prudential decision.

It is the apparent impossibility of philosophical science of right human ends and means, at least at the present, that has led Professor Fuller to propose their study in jurisprudence only by a prudential dialectic. I have already examined this proposal in outline and wish to affirm unequivocally that I think Professor Fuller has added in it an important facet to the enormously important contribution he has already made to Anglo-American jurisprudence. A process which is both dialectical and prudential is essential to jurisprudence. It is a way of

47. *Id.* at 52.

getting both at the means as well as the ends from the latter of which, as he has well showed⁴⁸ as against the positivists, we cannot separate either the study or the administration of law. If I had a criticism of the method, considered internally, it would be that there seems as much justification for studying substantive ends as for procedural ends of forms for social ordering. The need for study is as great, if not greater, with regard to the substantive ends. If the agreement obtainable is less, it still may be very precious agreement. However, my remarks are to be addressed to the proposal and its adequacy without the support and contribution of philosophy as an explicative science. For, in light of the central problem he states and the decision for a *modus vivendi* he makes as a consequence of that problem, he has in fact answered it to the extent that he asserts, as he does, that jurisprudence may then *adequately* perform its task. As Professor Henry Hart of Harvard has so well pointed out, a court really decides a justiciable controversy when it refuses to determine it on the merits of existing law upon the basis that the question is a more proper one for the legislature to decide. One who asserts the existence of a right before that court receives in effect a final determination that he has no right. The analogy is obviously imperfect since Professor Fuller makes only a tentative decision upon the problem. This leads me to my first point about his statement of his central problem.

The problem Professor Fuller states is more than a statement of a problem. It is also a statement of two bases for giving a tentative negative answer to the problem. These are thus in the nature of objections to giving the problem an affirmative answer. I propose a reformulation of the problem that will separate these two objections from its statement. This will permit a clearer statement of the problem as well as consideration of the objections raised, any other possible objections, and replies to them. The problem can be more simply stated as follows: "Is it possible to attain to philosophical science concerning the right ends and means of human action?" The first objection to its affirmative answer is the assertion that man is unable to determine his terminal end by analysis and observation. The second objection is the assertion of the datum of interaction between means and ends at the prudential level of decision. By making this reformulation of the problem and separation of objections from it, it becomes clear what the role is for one who wishes to respond to the statement of the central problem. There are three possible routes for him to take: (1) to show that the problem asserted is a pseudo-problem; (2) to show that the objections taken to giving an affirmative answer to the problem are either valid or invalid; and (3) if the objections are valid, to show that there are independent reasons for asserting an affirmative answer to the problem. An invitation was implicitly given by Professor Fuller to Professor Nagel to take one of these courses. As I have showed, the latter did not respond despite the fact that he affirmed several times that one of the major tasks of an adequate philosophy of law is to develop "norms for a responsible assessment of legal rules."⁴⁸ He gave no hint of what he had in mind as the content for philosophy of law.

While it is to be hoped that a responsive answer will now be made by

48. *Op. cit. supra*, note 2 at 77.

Professor Nagel, I think it is well to be realistic about the difficulty of the problem presented and the conditions necessary for its resolution. The problem is one of the most basic problems of philosophy, and its resolution requires many minds. No one man is adequate to the task. The task is a task not merely of this generation of scholars but of past and future generations as well. Since this is the case, the question should now be frankly faced as to whom Professor Fuller should turn for additional help in discussing his problem. The history of "modern" philosophy from Descartes forward stands as a stern reminder to Professor Fuller that he may be looking for the veritable needle in the modern haystack. Philosophers of this group are the ones who have least respected the necessity for the collective approach of Plato and Aristotle. An even sterner reminder is the history of "twentieth-century philosophy," by which is usually meant all other work in the field of philosophy than that carried on in the tradition of the *philosophia perennis*. An excellent descriptive article by Professor Nakhnikian in the 1957 issue of the *Forum*⁴⁹ and two careful critical studies in 1956, one by Professor Morton White⁵⁰ and the other by Professor Kattsoff,⁵¹ present us with the situation in "twentieth-century philosophy."

I agree with Professor White that there have been some important contributions by the analytic, empiricist, and pragmatic movements, as there always are in new philosophical developments. On the other hand, the analytic tradition in philosophy, mainly by making its model for philosophy the reduction of mathematics to logic, as he says, has not only led to a situation "in which cliché and shibboleth threatened to replace insight" (I should say it did do so in many quarters) but also to the repudiation of metaphysics.⁵² "General metaphysics was replaced by general metalinguistics, and philosophers took to saying that *all* metaphysical statements are meaningless, that *all* logical and mathematical statements are analytic, that *all* empirical statements about material objects are reducible to statements about sense data, that *no* ethical statement is translatable into an empirical statement."⁵³ If this analytic tradition had properly understood the inner integrity it possessed, it would have recognized that analysis inevitably led it back to asking the fundamental questions of metaphysics, as Professor Kattsoff has showed,⁵⁴ and, indeed, as I should add, of all philosophy, speculative as well as practical. It is to be hoped that the work of scholars like Professors White and Kattsoff will have the profound and lasting influence upon analytic philosophy that it deserves to have. Still, "twentieth-century philosophy" is not in a position at the present time even to begin an adequate answer to Professor Fuller's basic question of whether philosophical science concerning the right ends and means of human action is possible or even more what its content is, if possible.⁵⁵ The most fundamental questions of philosophy, including the one

49. *Contemporary Ethical Theories and Jurisprudence*, 2 NATURAL LAW FORUM 4 (1957).

50. TOWARD REUNION IN PHILOSOPHY (1956).

51. LOGIC AND THE NATURE OF REALITY (1956).

52. *Op. cit. supra*, note 50 at 290.

53. *Id.* at 291.

54. *Op. cit. supra*, note 51.

55. See the candid portraits of the "larger self" in G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1 (1958) and W. Cerf, *The Eleventh International Congress*

raised by Professor Fuller, either are not discussed, or are dismissed, or are given short shrift in "modern" philosophy. Moreover, the very character of much of the discussion that does go on is such that there would be great difficulty in obtaining a just treatment of the problem. This results not merely from lack of familiarity today with the work of those who in the past have given and those today who still give these problems careful consideration. It frequently arises from the fact, as Professor Kattsoff has well stated, that the role of the philosopher has been forgotten in philosophical discussion: "We hear today terms used in new contexts — 'emotive discourse,' 'persuasive definitions,' and even 'commitments.' The new look in philosophy calls for such questions as what are your commitments?"⁵⁶ While there is an appropriate commitment of the philosopher to the pursuit of truth, the other sense implied in the previous statement for "'commitment' becomes either non-rational or irrational."⁵⁷ The task for today, therefore, is not so much the "reunion" of "twentieth-century philosophy," to borrow from Professor White's contribution, as it is its "reconstruction."

It remains that if Professor Fuller wants a full-dress discussion of his problem, among those to whom he must certainly turn are those who earlier have carried on and those who today still carry on the tradition of the *philosophia perennis*. They have been obtaining a constantly increasing audience in the twentieth century throughout the world of intellectual discussion. The difficulty arises as to just how a discussion between them and Professor Fuller should begin in order to maximize on the mutual exchange. Professor Fuller has not only raised

of *Philosophy*, 64 THE PHILOSOPHICAL REVIEW 280 (1955). Referring to the "utter confusion" of the Congress at Brussels, to the "purposelessness of contemporary philosophy" which the presentations at the Congress evidenced, and to the worst examples of "cranks" and "exhibitionists" he had ever seen, the latter author urged, among other things, limiting the philosophizing at future congresses "to members of professional philosophical organizations and to such non-members as have letters of recommendations by at least two members." (Cerf, *op. cit.* at 280-282.) The traumatic experience of the Congress at Brussels may be one of the reasons for the emphasis given by analytical philosophers today to the distinction between professional and nonprofessional philosophers. Legal scholars and political scientists who in increasing numbers throughout the world deem philosophy an essential adjunct to their respective disciplines may also have something to do with their drawing of the distinction. While wholeheartedly joining with this author in his criticism of those who have not prepared themselves intellectually and morally to participate in philosophical discussions, I suggest that any other use by analytical philosophers of a distinction between professional and nonprofessional philosophers is unworthy of the philosophical discipline and its purpose. This author has other suggestions: "The need to make our ideas clear arises with urgency only where reasonable beings come together to discuss their ideas. But it does not follow that the main task of philosophy is to make our ideas clear (including the idea of clarification itself). This would follow only if philosophy itself cannot be the source of ideas." (*Id.* at 298.) He also has this trenchant observation in a footnote: "Even in Sydney Hook's brilliant attack on Being there seems to be a certain uneasiness, as if he suspected that he might be missing something." (*Ibid.*) Proposing a wedding between analytical philosophy and existentialism, he suggests: "Here is the point where Thomism can enter the arena, in the role of benevolent adviser, not to be imitated, but to be admired as a couple of newlyweds may admire their ancestral Philemon and Baucis." (*Id.* at 299.) There are signs on all sides that analytical philosophy has run its course. See also JOHN WILD, THE CHALLENGE OF EXISTENTIALISM (1955).

56. *Op. cit. supra*, note 51 at 235.

57. *Id.* at 236.

a philosophical question but he has given two reasons for giving it a negative answer that ousts philosophy from one of its traditional tasks. On the other hand, the classical realists in philosophy have not only asked this same question but also have given an affirmative answer and have supported it by a foundation of explication that has continued to grow in depth and explicitness in this century. Since the collective method of Aristotle appears to be the only adequate approach in philosophy (even for non-Aristotelians), I should affirm that Professor Fuller, having raised a philosophical question and provided the basis for his tentative answer to it, is entitled to have his objections seriously considered and that he, in turn, should now state why, if it is the case, he is not prepared to accept the reasons of the classical realists for their affirmative answer to the same question. This latter, it seems to me, is a fundamental obligation of those who enter philosophical discussions.

With a view to promoting the discussion of his central question, I wish to affirm that the problem he presents, as I have reformulated it, is a genuine philosophical problem. We are, therefore, presented with two remaining tasks. The first is to examine the two bases he states for his tentative negative answer to it. The second is to examine any independent reasons for giving the question an affirmative answer. I shall not attempt to perform the second task in this paper. It is my hope in future papers, God willing, to attempt to develop for lawyers the answer of classical realists to this problem. This would be far better done by an Adler, a Maritain, a Gilson. Yet it has fallen to me to begin the discussion with Professor Fuller of this approach. It may be that a lawyer may be able to make the classical realist position more understandable to lawyers, relatively speaking.

Returning to the first task stated above, I would like to examine the first basis utilized by Professor Fuller for concluding tentatively that philosophical knowledge of proper human ends is not possible. Let me quote his precise statement of it: "The other line of thought leads, with equal persuasiveness, to the conclusion that this activity [of choosing 'an apt means for the realization of a given end'] must have a terminal point and that the end ultimately pursued cannot be determined by analysis or observation, but must in some manner or other be projected upon events."⁵⁸ Professor Maritain, in a criticism of Bergson, shows his full agreement with Professor Fuller in one sense of this statement. He has stated: "Aussi bien nul philosophe ne peut-il nous dire quelle est en réalité l'ultime fin de notre existence. C'est Dieu qui nous l'appris, lui qui nous a faits pour qu'en définitive nous le voyions comme il nous voit."⁵⁹ This was in answer to Bergson's contention that man is made solely for his action (*homo faber*), i.e., particularly for transitive as opposed to immanent action. We do not and cannot know in this life "en réalité l'ultime fin de notre existence," which is

58. *Op. cit. supra*, note 2 at 71 ff.

59. MARITAIN, *LA PHILOSOPHIE BERGSONIENNE* 323 (2nd ed., 1930). ["Likewise no philosopher can tell us what, in reality, is the ultimate end of our existence. It is God who has taught us this, He who has made us in such a way that finally we may see Him as He sees us."] Of course, there are truths about God which human reason can investigate, and there is a science whose subject matter is God.

God. The terminal end in question here, of course, is our supernatural one. There is an end short of our supernatural end to which one may refer as in some sense terminal. Some have called it our natural or temporal terminal end.⁶⁰ It is the latter which the context indicates Professor Fuller has in mind.

What then are we to say about his objection that the natural end of human living cannot be determined "by analysis or observation"? Since there is no philosophical or other analysis in his paper devoted to the support of this objection, and the matter is not self-evident, the reason he has for reaching his conclusion cannot be examined. Some of his discussion could be taken to indicate that he would support this conclusion upon the basis of the psychological datum that men at the level of prudential decision do not have a very firm notion of the ends they wish to pursue. If this were to be offered (and I do not assert that it has been) as the basis for concluding that knowledge concerning the natural terminal end of man is not possible, it must be replied that this mode of proceeding begs the very issue for discussion. Men are always uncertain before they attain certainty, without knowledge before they attain knowledge. The very issue is whether they can attain knowledge of a certain sort. To assert that because they are uncertain or do not have knowledge of something, they cannot attain certainty or knowledge about that thing is to foreclose discussion of the issue raised. Consequently, I do not believe that Professor Fuller would rely upon this argument. Yet I do not know what his argument is as to why man cannot achieve scientific knowledge concerning what his terminal end is in this world and concerning universal means for attaining it. It seems to me that to support his position he must inevitably show why the position of classical realists who assert that knowledge about man's true ends in this world is attainable and has been attained in increasing measure is wrong. I have particularly in mind, as a basis for possible future discussion, such material as the Treatises on The Last End, Human Acts, Justice, and Law of St. Thomas Aquinas.⁶¹ These should be examined for errors and inadequacies as well as for the substantial truths they may contain upon the question which Professor Fuller raises. This comment applies especially to the Treatise on Law. As Dr. Adler has observed of this treatise in an article that will richly repay reading for all in philosophy of law and jurisprudence:

St. Thomas does not pretend to write the philosophy of law in a manner that is adequate to its principles and problems. Here, as elsewhere in the *Summa*, he uses philosophical knowledge and analysis in the service of theology, as an instrument to achieve some understanding of revealed truth. This does not mean that philosophical truth is not present in the *Summa*; it is neither lacking, nor obscured. But it is subordinated, and many points are treated too briefly and too simply which, if the aim were exclusively philosophical, would demand much more extensive discussion and much more complicated analysis than is needed or justified in a theological work.

60. Adler and Farrell, *The Theory of Democracy: Part II*, 3 THE THOMIST 598-607 (1942).

61. SUMMA THEOLOGICA, I-II, QQ. 1-21 (The Last End); I-II QQ. 22-48 (Human Acts); I-II, QQ. 57-122 (Justice); I-II, QQ. 90-108 (Law).

We have no right to complain, we can only regret, that St. Thomas did not write about human and natural law with the fullness proper to philosophical discussion in itself and apart from theology. Nor need we rest there, for within the scope of a few compact questions St. Thomas has given us enough to enable us to do a job which, under the exigencies of his life and times, he was not called to do. We not only can, but should, write about law in a purely philosophical manner. . . . That sort of work is our historical vocation, as St. Thomas had his.⁶²

I should like to add to Dr. Adler's statement the comment that the Treatise on Law is most likely to be misunderstood by moderns unless read *after* or at least in conjunction with the other Treatises I have mentioned, especially the Treatise on Justice.

The second base from which Professor Fuller concludes tentatively that philosophical science of human means and ends is not possible is the datum of interaction. It should be noted that neither in this paper nor in his previous writings does Professor Fuller define the datum of interaction. He does give an example in his first paper of how a person may shift from one purpose to another in a given sequence of action and of the difficulty with which either that person or an observer of him has in determining what his real purpose is or when he has in fact shifted from one purpose to another. Somewhat later he states that forms of language "are an awkward instrument for dealing with interaction."⁶³ In the immediate context he refers to the choice of ends and means as seeming to be described aptly as a reasoning process. He also states that at the level of prudential decision ends and means no longer arrange themselves "in tandem fashion."⁶⁴ All these statements are suggestive of several senses in which he may be using the notion of interaction. It becomes important to determine what the sense is or the senses are in which the notion is used, since it is claimed that the datum of interaction in some way prevents the possibility of a philosophical science of proper human ends and means. Yet a claimed result cannot be properly assigned to a given cause unless that cause is known. Moreover, it is important to know the arguments made by Professor Fuller as to why or how it is claimed that the datum of interaction is operative to prevent a philosophical science of proper human ends and means. This is true because although it may be true that interaction between ends and means, in some sense, does occur, it may nevertheless not be true that this prevents philosophical science of proper human ends and means.

Since Professor Fuller neither specifies the sense or senses in which he uses the datum of interaction nor develops the reasons why the datum is operative to prevent philosophical science of proper human ends and means, it would be entirely appropriate to bring my discussion to a close by the observation that he does not show that the problem as reformulated should be answered one way rather than another. Since I am not interested in fencing with Professor Fuller but am vitally concerned with engaging in a cooperative effort with him

62. *A Question about Law*, ESSAYS IN THOMISM 207 at 208-9 (1942).

63. *Op. cit. supra*, note 2 at 72.

64. *Id.* at 72.

in attaining truth whether it suits my fancy or not, I think it wise to discuss some of the possible senses of the datum and the reasons that might be offered why the datum is operative to prevent philosophical science of proper human ends and means. It is clear that he feels the datum in some sense and for some reason does prevent philosophical science of those ends and means. That is enough for me. I shall try to see what he means. In this way, I can lay a foundation for future profitable discussions. Proceeding in such a way, I am sure that no one will misunderstand me to be saying that any of the senses of the datum to be stated or arguments to be made in conjunction with them are Professor Fuller's own. The desire for intellectual community must involve some risks of being misunderstood.

Taking the whole context of his discussion in this paper and comparing it with earlier statements by him, the following are senses in which Professor Fuller may be using the notion of interaction:

(1) that means always determine ends, and ends determine means. I understand this to mean that the means determines the very content of the end that is pursued or is achieved either by way of diminishing its content or by way of adding to its content. Similarly, I understand it to mean that the end determines what the means is in the sense that the means is shaped in light of the end to be pursued.

(2) that ends and means are not generically different from each other or cannot be sharply distinguished from each other. Rather they represent a kind of mental structure for economically describing or determining upon human action. Human action actually involves far more than can be described, and projected human action involves far more than can be actually considered before taking action. By thinking of human action as the selection of a means toward an end, we reduce what is in a very real sense indivisible to a manageable datum for describing or for deciding upon action. We do not really know where we are headed, but we can act as if we do. After we have decided upon a way of acting and followed our decision by action, we can then look upon where we have gone and readjust our thinking and our action by once again acting as if what is really indivisible is divisible into means and ends.

(3) that one cannot sharply distinguish between the process of determining to pursue a new end and the process of determining upon a more effective means for achieving an end already being pursued or purposed. Similarly, that one cannot sharply distinguish the process by which one adopts or abandons one purpose and the process by which he clarifies a purpose already held.

Recalling that these senses are asserted as merely possible senses of the datum that Professor Fuller has in mind, it is next necessary to conceive what possible arguments could be made as to any or all of the senses that the datum so construed prevents philosophical science of proper human ends and means. I shall consider the senses and accompanying arguments in inverse order.

If (3) is an intended sense of the datum of interaction, the only argument I can conceive that could be made that the datum prevents philosophical science of proper human ends and means is the following: since there is a confusion of or difficulty in distinguishing between succeeding mental states concerning pur-

poses or between thinking about means and thinking about ends, the study of purposes or ends must be responsive to this reality in ordinary thinking and only study remote purposes in conjunction with immediate purposes of human action and ends in conjunction with means. Further, since the determination of means (or immediate purposes) involves the exercise of prudence rather than philosophical science, and means (or immediate purposes) must be studied along with ends (or remote purposes), philosophical science of ends or of ends and means is impossible. There are several aspects to this argument that require answer. The basic answer to this argument is that it seeks to answer a philosophical problem by resort to psychological data that, while relevant to psychological problems and productive of psychological conclusions, is utterly irrelevant to philosophical problems. The philosophical problem relates to how one can attain to philosophical knowledge of proper human ends and means. The psychological datum permits description of thinking about ends and means but does not speak to the problem of how to do that thinking in order to attain to the philosophical knowledge desired. The mere psychological fact that a person has difficulty in making up his mind as to what end he wants to pursue does not mean that he or someone else cannot consider any given end and whether it is a proper one to be pursued. The mere psychological fact that a person may sometimes lose sight of the end with respect to which he is considering the desirability of different means and may begin the consideration of new ends does not mean that either of these ends is not susceptible of being studied and judged separately as to whether it is a proper human end. The real question is how, if at all, when these ends are separately studied one is to determine the propriety of ends. Thus, the vagaries sometimes followed by the mind which psychology can reveal to us by investigation do not speak to the potentiality of the mind for knowledge of proper human ends. The same statements made about study of ends applies to means.

Another aspect of the argument attached to possible sense (3) of the datum relates to prudence being the only way that ends and means can be studied and determined. This aspect of the argument attaches to all three possible senses of the datum. If the argument is that the process of prudential decision where ends and means interact is not susceptible of rising above the level of prudence or prudential knowledge in determining what is the right action in terms of ends and means and that there is no science, philosophical or otherwise, by which one can provide a calculus for the performance of this prudential process, this has always been a central point in the classical realist philosophical position. This argument is true not primarily because ends and means interact in whatever sense at this prudential level, but more simply and fundamentally because we are dealing with the problem of what is right for the particular case in all its individuating circumstances. There is no science of what to do in particular cases. There may be art or prudence but not science with respect to this. For the same reason there is no science to replace the prudential judgment of the legal scholar, legislator, administrator, judge, or lawyer in the performance of their various tasks. Nevertheless, this argument is wide of the mark and the issue. That there is no possible science of prudence of the here-and-now to be done,

does not prove that philosophical science of proper human ends and means is not possible. The issue here concerns ends and means in another sense than that they occupy at the prudential level of decision. Just as an individual redwood tree can be considered as involving the reality of redwood tree, of a tree, and of vegetative life, so too can individual ends and means at work in the process of here-and-now decision-making be considered as to the moral types or species of ends and means. Just as the reality is the measure of the degrees of reality in a redwood tree so too there may be a measure of what is a good type or species of human ends and means. The point is that the argument about the inability to think about ends and means except as they have the individuating circumstances that are attached to them in the process of here-and-now or prudential decision will not hold water. The real point is, not whether they cannot be thought about but whether in thinking about them one can attain to philosophical science, to universally valid judgments about types or species of right human action, and how one may put that science to work in human living. The argument does not speak to this; or, if it is said to speak to it, it does so only by denying that this knowledge or use of knowledge is possible. A mere denial, however, is not an argument. The issue requires discussion for its resolution. Unless some argument can be developed concerning sense (3) of the datum of interaction, the datum does not establish that philosophical science of proper human ends and means is impossible.

Next to be considered is possible sense (2) of the datum of interaction. The only argument I can conceive that might be made that the datum in this sense prevents philosophical science of proper human ends and means is the following: since "ends" and "means" in ongoing human action, in *actu exercito*, do not differ generically or cannot be sharply distinguished from each other, neither can any thinking about them sharply distinguish between them. If an "end" is to be studied, "means" must be studied along with it. Since the determination of means involves a process of prudence rather than philosophical science, the necessary study of means and ends together cannot rise to the level of philosophical science. This is, of course, the very converse of the argument attached to sense (3) of the datum. In the first place, the same basic error is made in argument as was made with regard to sense (3) of the datum insofar as it is argued that only prudence can be used to study or determine means or ends. The answer given earlier applies equally to that part of the argument. Moreover, there is the obvious answer to the argument here that it proves too much, for if philosophical science of ends is not possible, neither is prudence with regard to ends. The very function of prudence is to shape means towards ends. If ends become indiscernible from means, how is prudence to become operative? If prudence has no field of action, we have reduced ourselves to vegetables. A more basic answer to the argument here, however, goes to the meaning of the notion of "means" used in the argument and calls for a better reflection of the reality being examined in the use of the term. If by "means" we mean, as it seems we must, a whole human act, then every human act is composed of a material object, the thing done, and a formal object, the end for which it is done. The "means," a whole human act, consists of both "the thing done" and "the end" for which

it is done. If then we say that a means is directed toward an "end," what we must mean if we intend to reflect reality is the remote end of a whole human act (including both what is done and the immediate end for which it is done). But in this case the first end of the whole human act is a means of producing the second end. If this is true, then it is not true to say that ends and means are not distinguishable from each other. To deny this is to deny the principle of identity. The failure to be careful in reflecting reality underlies the argument made with regard to possible sense (2) of the datum of interaction.

There is a further possibility that possible sense (2) of the datum might be intended as a basis for argument analogous to the position of Hume with regard to our knowledge of cause and effect and the reality it reflects. Since this is the error of psychologism and it seems unlikely that this basic argument of the grandfather of modern positivism would be used by Professor Fuller, I shall not speak to that possible argument here. I have spoken about it in an earlier article.⁶⁵

Finally to be considered is possible sense (1) of the datum of interaction. I can conceive of two arguments that this sense of the datum prevents philosophical knowledge of proper human ends and means. The first is not unlike the argument with regard to sense (3): since means always determine ends and ends always determine means, one reflecting upon the other, at the level of prudential decision, they must be studied together if the study is to be valuable; and since study or determination of means is a matter of prudence rather than philosophical science, there can be no philosophical science of right human ends and means. This argument is answerable in precisely the same way that the argument concerning sense (3) was answered so far as it asserts that prudence is the only way that human ends and means can be profitably studied. It need not be repeated here. A second argument concerning sense (1) of the datum would assert that since means always determine ends, means are a source of new ends in human living; and since one end is a means to the next above it, means are a source of new ultimate ends of human living. This argument involves the error of Bergson, for he took the position that the self is not but becomes. It is not a being, but a continual and a pure changing that is indivisible. This is an absolute "phenomenism," a denial of the principle of finality, and the destruction of the human person. While this is a possible argument with regard to sense (1) of the datum of interaction, I will not attempt to answer it until it is clear that it is the argument intended.

I have completed the task, so far as it can be profitably completed at the present time, of commenting upon the central problem raised by Professor Fuller. I have proposed a reformulation of the problem with a view to its simplification and separation from two objections raised to giving it an affirmative answer. The problem is whether man can attain to philosophical science concerning the right ends and means of his action. I have showed that the first objection to giving an affirmative answer, which asserts that man cannot determine his terminal end by analysis and observation, is valid in one sense but not proved in the sense in which Professor Fuller is speaking. I have showed that the second objection to

65. *Philosophy and the Law*, 33 TEXAS LAW REVIEW 310 (1955).

giving an affirmative answer, which asserts that there is an interaction between ends and means at the level of prudential decision which prevents it, needs elucidation before it can be adequately answered. Nevertheless, in the interest of advancing the discussion as rapidly as prudence would permit, I examined three possible senses of the datum of interaction suggested by statements in the paper as well as possible arguments that might be made that the datum prevented philosophical science concerning right ends and means of human action. I showed that all arguments associated with the three senses (except two that I doubted Professor Fuller would urge) failed. It is, of course, possible that Professor Fuller had in mind some other sense for the datum of interaction; or if he had in mind one of those mentioned, he may have had another argument associated with it than those I considered. In any event, I have sought to answer both objections he raises to answering the central question of his paper affirmatively as well as I could with a view to providing as profitable a base as possible for any future discussion between ourselves or with others. As suggested earlier in this part, there remains the still larger task of examining the grounds upon which classical realists in philosophy affirm that man can attain and has attained to philosophical science concerning the right ends and means of his action. This shall be my task in future papers.

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