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The Fission and Fusion of Is-Ought in Legal Philosophy

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THE FISSION AND FUSION OF *IS-OUGHT* IN LEGAL PHILOSOPHY

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HOW ARE THE FACTS of the world in which man lives related to the values or norms he lives by, the norms which are made imperative in law; are the realms of fact (*is*) and value (*ought*) related in a particular way? Theories of law have sometimes issued according to the way this question has been perceived by their formulators. The principle that one cannot derive a conclusion which is not explicitly or enthymematically contained in its premises is basic to deductive logic. Similarly, there can be no induction from the property of one thing to something which is other than the thing itself,[1] induction being a process of generalization of the nature of an entire class from the characteristics ot a number of members of that class. Within the constraints of these principles of logic, attempts have been made to reduce *ought* to *is* by replacement of *ought* statements with *is*-supportable statements[2] and by derivation of an *ought* statement from *is* statements concerning desires and beliefs.[3] Attempts have also been made to deduce *ought* from *is* through the notions of the performative aspect of *ought*,[4] the constitutive rules of institutional

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1. For a contrary view, *see* Brecht, *The Myth of Is and Ought*, 54 HARV. L. REV. 811, 812 (1941).

2. Zimmerman, *A Note on the "Is-Ought" Barrier*, 76 MIND 286 (1967); Zimmerman, *The "Is-Ought": An Unnecessary Dualism*, 71 MIND 53 (1962). For a criticism of Zimmerman's position, *see* Hanly, *Zimmerman's "Is-Is": A Schizophrenic Monism*, 73 MIND 443 (1964).

3. Gewirth, *Must One Play the Moral Language Game?*, 7 AM. PHILOSOPHICAL Q. 107 (1970). For criticism of Gewirth's position, *see* Frondizi, *The Axiological Foundation of the Moral Norm*, 50 PERSONALIST 241 (1969).

4. Black, *The Gap Between "Is" and "Should,"* 73 PHILOSOPHICAL REV. 165 (1964). For criticism of Black's position, *see* Cohen, *"Is" and "Should": An Unbridged Gap*, 74 PHILOSOPHICAL REV. 220 (1965); Phillips, *The Possibilities of Moral Advice*, 25 ANALYSIS 37 (1964–65).

facts,[5] the reason for acting,[6] the ideal observer,[7] and the underlying commitment.[8] In legal theory, two opposite perceptions of the *is-ought* relationship have emerged: one, the fission of *is* from *ought*; the other, the fusion of *is* and *ought*. The pure theory of law proposed by Hans Kelsen follows the former route.[9] The latter approach is taken by both the purposive theory of law, proposed by Lon Fuller,[10] and by the phenomenological theories of law, proposed by N.A. Poulantzas,[11] W. Maihofer,[12] and others. This article will seek to determine whether any of these attempts have succeeded in the fission or the fusion of *is-ought*.

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5. J. SEARLE, SPEECH ACTS 175–98 (1969); Searle, *How to Derive "Ought" from "Is,"* 73 PHILOSOPHICAL REV. 43 (1964). For a critical look at Searle's theory, *see* W. HUDSON, MODERN MORAL PHILOSOPHY 288–89 (1970); Cooper, *Two Concepts of Morality*, in THE DEFINITION OF MORALITY 72 (G. Wallace & A. Walker eds. 1970); Flew, *On Not Deriving "Ought" from "Is,"* 25 ANALYSIS 25 (1964); Genova, *Institutional Facts and Brute Value*, 81 ETHICS 36 (1970); Hare, *The Promising Game*, in THE "IS/OUGHT" QUESTION 144 (W. Hudson ed. 1969); Hudson, *The "Is/Ought" Controversy*, in THE "IS/OUGHT" QUESTION 168 (W. Hudson ed. 1969); Ofstad & Bergstrom, *A Note on Searle's Derivation of "Ought" from "Is,"* 8 INQUIRY 309 (1964); Stocker, *Moral Duties, Institutions, and Natural Facts*, 54 THE MONIST 602 (1970); Thomson & Thomson, *How Not to Derive "Ought" from "Is,"* in THE IS/OUGHT QUESTION (W. Hudson ed. 1969); Wilkins, *The "Is"-"Ought" Controversy*, 80 ETHICS 160 (1970); Zemach, *Ought, Is, and A Game Called "Promise,"* 21 PHILOSOPHICAL REV. 61 (1971).

6. G. GRICE, THE GROUNDS OF MORAL JUDGMENT 8–35 (1967); Grice, *Hume's Law*, 44 ARISTOTLEIAN SOC'Y: SUPPLEMENTARY VOLUME 89 (1970). For a criticism of Grice's position, *see* Edgley, *Hume's Law*, 44 ARISTOTELIAN SOC'Y: SUPPLEMENTARY VOLUME 105 (1970).

7. Allen, *The Is-Ought Question Reformulated and Answered*, 82 ETHICS 181 (1972); Allen, *From the "Naturalistic Fallacy" to the Ideal Observer Theory*, 30 PHILOSOPHICAL & PHENOMENOLOGICAL RESEARCH 533 (1970).

8. Frankena, *Ought and Is Once More*, 2 MAN AND WORLD 515 (1969); *cf.* Prior, *The Autonomy of Ethics*, 38 AUSTRALIAN J. PHILOSOPHY 199 (1960). For a criticism of Prior's view, *see* Shorter, *Professor Prior on the Autonomy of Ethics*, 39 AUSTRALIAN J. PHILOSOPHY 286 (1961).

9. *See* H. KELSEN, GENERAL THEORY OF LAW AND STATE (1945) [hereinafter cited as KELSEN, GENERAL THEORY].

10. *See* L. FULLER, THE MORALITY OF LAW (rev. ed. 1969) [hereinafter cited as FULLER, MORALITY OF LAW]; Fuller, *Human Purpose and Natural Law*, 53 J. PHILOSOPHY 697 (1956), *reprinted in* 3 NATURAL L.F. 68 (1958).

11. N. POULANTZAS, NATURE DE CHOSES ET DROIT (1964); Poulantzas, *Notes sur la phénoménologie et l'existentialisme juridiques*, 8 ARCHIVES DE PHILOSOPHIE DU DROIT 213 (1963).

12. Maihofer, *Idealogie und Naturrecht*, in *Idealogie und Recht* 121 (W. Maihofer ed. 1969).

I. THE FISSION

The pure theory of law[13] is grounded in Immanual Kant's epistemology,[14] which draws a fundamental distinction between man as part of nature, subject to the laws of causality (*mundus sensibilis*), and man as a partly intelligible object which regulates its conduct by imperatives (*mundus intelligibilis*). This distinction results in an essential difference between *is (Sein)* and *ought (Sollen)*, the *ought* being the expression of a necessity or relationship which is not evident in the realm of nature. Kant maintains that absolute reality as such *(Ding an Sich)* is unknowable.[15] Kant also draws a basic distinction between form and matter: while sense impressions constitute the matter of experience, the form is composed of the mental modes of

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13. This theory, also known as the normative theory of law, was originally propounded by Frantisek Weyr and Hans Kelsen.

For a more detailed look at Weyr's theories, *see* F. WEYR, NORMATIVNI TEORIE (Normative Theory) (1946); F. WEYR, PRISPEVKYK TEORII NUCENYCH SVAZKU (On the Theory of State) (1908); F. WEYR, TEORI PRAVA (Theory of Law) (1936); F. WEYR, ZAKLADY FILOSOFIE PRAVNI (Philosophy of Law) (1920); F. WEYR, ZUM PROBLEME EINES EINHEITLICHEN RECHTSSYSTEMS (The Unitary System of Law) (1908); Weyr, *Die Rechtswissenschaft Als Wissenschaft von Unterschieden*, 28 ARCHIV FÜR RECHTS-UND SOCIAL-PHILOSOPHIE 364 (1935); Weyr, *Reine, Rechtslehre und Verwaltungsrecht*, in GESELLSCHAFT, STAAT UND RECHT: FESTSCHRIFT GEWIDMET HANS KELSEN ZUM 50. GEBURSTAGE 366 (A. Verdross ed. 1931); Weyr, *Natur undNorm*, 6 REVUE INTERNATIONALE DE LA THÉORIE DE DROIT 12 (1932); Weyr, *Rechtsphilosophie und Rechtwissenshaft*, 2 ZEITSCHRIFT FÜR OFFENTLICHES RECHT 671 (1921).

For more extensive research into Kelsen's theories, *see* H. KELSEN, ALLGEMEINE STAATSLEHRE (1925); H. KELSEN, DER SOZIOLOGISCHE UND DER JURISFISCHE STAATSBEGRIFF (1928); KELSEN, GENERAL THEORY, *supra* note 9; H. KELSEN, HAUPTPROBLEME DER STAATSRACHTSLEHRE ENTWICKELT AUS DER LEHRE VON RECHTSSATZE (1911); H. KELSEN, REINE RECHTSLEHRE (1934) [PURE THEORY OF LAW (M. Knight transl. 1967)].

The fundamental postulates of this theory may be summarized as follows:

First: a Kantian conception of the world on the basis of the School of Marburg, with special emphasis on the dualism between "Being" (*Sein*) and "Ought to be" (*Sollen*) contrasted from a formal logical viewpoint.

Second: absolute purity of the juridical method, especially as opposed to political and axiological influence.

Third: a monistic theory of the Science of Law on the basis of a strict normative unity.

Fourth: the identity between State and Law.

Fifth: a graded structure (*Stufenbau*) of the Sources of Law.

Sixth: the primordial grade of international law within the unity of the juridical order.

De Bustamonte y Montoro, *Kelsenism*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 43–44 (P. Sayre ed. 1947). *See also* A. DE BUSTAMONTE Y MONTERO, TEORIA GENERAL DEL DERECHO 16–19 (2d ed. 1940).

14. *See* I. KANT, KRITIK DER REINEN VERNUNFT (Critique of Pure Reason) (1781) [hereinafter cited as KANT]. *See also* W. EBENSTEIN, THE PURE THEORY OF LAW 3–42 (1969); Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 CALIF. L. REV. 617, 621–23 (1971).

15. KANT, *supra* note 14.

the cognitive subject (time and space) and the pure categories of understanding (quantity, quality, relation, and modality). Formal categories bring order to the chaos of emotion and sensations. Thus, through the forms of space and time, emotions become perceptions. Similarly, through the categories of understanding — substance and causality, quality and quantity — perceptions become experience, with the judgments of experience being connected by general principles. There is a fundamental scission between nature and mind, and, correspondingly, between the realms of cognition and volition.[16]

Proceeding from this epistemological distinction between *is* and *ought*, the pure theory of law divides the sciences into causal sciences and normative sciences.[17] The former deal with reality, *i.e.*, the *is* of actual events. The latter deal with ideality, *i.e.*, ethical, legal, esthetic, or other *oughts*. Law is a normative science, normative here being employed in the sense of knowing the norm rather than constructing it. Being normative, law deals not with the actual world of events *(is)*, but with norms *(ought)*. Having made this formal-logical separation of the realms of *is* and *ought*, the pure theory of law maintains that the inquiry into the sanction of an *ought* can lead only to another *ought*. Although the content of the *is* may or may not coincide with the content of the *ought*, a contentual coincidence does not affect the logical division of the two spheres of knowledge.

The pure theory of law claims to be a formal and universal theory, concerned with essentials of law of any kind, at any time, and under any conditions. Its purity derives from being pure knowledge in the Kantian sense, without "empirical admixture," and from being free of the alien elements of morality and ethics. The pure theory characterizes the legal relation as containing the threat of a sanction from an authority in response to a certain act. The legal norm constitutes a relation of condition and sequence: if A is done, B ought to happen.[18] A legal system is composed of a heirarchy of normative propositions, each being derived from its superior. Every legal norm ultimately derives from a highest basic norm *(Grundnorm)* which, not being capable of deduction, must be assumed as an initial hypothesis.

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16. *Id.*

17. *See* note 13 *supra.*

18. Kelsen phrases it as follows:

> If "coercion" in the sense here defined is an essential element of law, then the norms which form a legal order must be norms stipulating a coercive act, *i.e.*, a sanction. In particular, the general norms must be norms in which a certain sanction is made dependent upon certain conditions, this dependence being expressed by the concept of "ought."

KELSEN, GENERAL THEORY, *supra* note 9, at 45.

A norm is a valid[19] legal norm only by virtue of the fact that it has been created according to a definite rule, with the basic norm of a legal order being the postulated ultimate rule from which the legal norms are created or annulled. Law, consequently, is created or annulled by acts of human beings. Therefore, it is positive and independent of morality.

Several aspects of the *is-ought* dichotomy in the pure theory of law are troublesome.[20] First, based upon the methodological dichotomy between natural (causal) sciences, which operate by the method of causality, and social (normative) sciences, which employ the volitional method, this theory posits that law is a normative science, concerned with *ought,* rather than a natural science concerned with *is.* However, the truth seems to be neither that the method of natural sciences is purely causal and rigidly deterministic, nor that the method of social sciences is rigidly volitional. In natural sciences, the choice between alternative hypotheses is often one of convenience, wherein identical conclusions may even be derived from different premises.[21] Experiments cannot possibly be made without preconceived ideas; conversely, each experiment yields generalizations which serve as predictions for other experiments. For example, in physics, this interaction between speculative assumptions and experiment is well demonstrated by the persistent inquiries and continually changing theories concerning the structure of the atom, the theory of relativity, and the interchangeability of matter and energy.[22] Likewise, the method used in the social

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19. Validity in this case refers to existence and not efficacy. *See* KELSEN, GENERAL THEORY, *supra* note 9, at 29–44.

20. For a rather unfair criticism of Kelsen in this regard, *see* S. SHUMAN, LEGAL POSITIVISM, ITS SCOPE AND LIMITATIONS 95–119 (1963) [hereinafter cited as SHUMAN]. For example, Shuman seemingly reads Kelsen's theory as dismissing the apparent need to have men believe in some objective values, and he then questions this proposition. *Id.* at 100. Also, he interprets Kelsen's statement that "[t]he legal norms enacted by the law creating authorities are prescriptive; the rules of law formulated by the science of law are descriptive," KELSEN, GENERAL THEORY, *supra* note 9, at 45, to mean "that scientific laws prescribe nothing while legal norms describe nothing." SHUMAN, *supra,* at 105. After accepting such an obviously overbroad interpretation of Kelsen's views, Shuman then proceeds to criticize this proposition as well. *Id.* at 105–19. In the process, he overlooks Kelsen's own distinction between legal and ethical norms. *Id.* at 107.

21. This thesis of Henri Poincaré has had far-reaching impact upon the philosophy of science. H. POINCARÉ, SCIENCE AND HYPOTHESIS (1952). *See also* E. NAGEL, THE STRUCTURE OF SCIENCE 293–98 (1961); Bridgman, *Determinism in Modern Science,* in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 43, 57 (S. Hook ed. 1958).

22. The subatomic phenomenon defies causal explanation altogether, partly due to the uncertainty formula propounded by Heisenberg. According to this theory, the relation between the momentum and the position of a given subatomic particle at a given moment cannot be precisely determined because of the unpredictable variations in the momentum and position of subatomic particles produced by the interaction of

sciences is not exclusively volitional; instead, an increasing emphasis is being placed on certainty and measurability. Even in law, the American realist movement has emphasized fact research and analysis in the legal decisionmaking process and, in more recent times, behavioral research, which employs quantitative techniques in the analysis of factual data, has been put to significant use.[23] Therefore, a closer examination of the methods of science disallows the methodological dichotomy claimed by the pure theory of law.

A second difficulty created by the *is-ought* dichotomy in the pure theory of law concerns the descriptive function of this theory. As a consequence of the dichotomy, the pure theory holds that the rules of law formulated by the science of law are descriptive, while the legal norms enacted by the law-creating authorities are prescriptive.[24] The pure theory maintains that, as a general theory, its task is not to describe a particular legal system; it is merely to show how a particular legal system should be described, *i.e.*, which concepts should and should not be used in making this description. The resulting description must take the form of rules (or *ought* statements) in a descriptive sense. This conclusion is puzzling because, at this point of inquiry, the description would not be a set of rules or *ought* statements, but instead, a set of statements explaining the meaning of the rules.[25] Indeed, it may be a mistaken belief that law, a science of norms, can be explored using norms as tools, for then law becomes a science with conclusions of law, not a science with norms or legal rules as its objects of inquiry.[26] Perhaps Kelsen simply meant that his purely scientific statements explaining the meaning of a law men-

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these particles with the measuring instruments. W. HEISENBERG, THE PHYSICAL PRINCIPLES OF THE QUANTUM THEORY 3 (C. Eckart & F.C. Hoyt transl. 1930).

23. *See, e.g.*, NOMOS VIII, RATIONAL DECISION (C.J. Friedrich ed. 1962); Berns, *Law and Behavioral Science*, 28 LAW & CONTEMP. PROB. 185 (1963); Kort, *Simultaneous Equations and Boolean Algebra in the Analysis of Judicial Decisions*, 28 LAW & CONTEMP. PROB. 143 (1963); Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, 28 LAW & CONTEMP. PROB. 164 (1963).

24. *See* notes 14 & 15 *supra*.

25. *See* Hart, *Kelsen Visited*, 10 U.C.L.A.L. REV. 709, 712–13 (1963), wherein he states:

> So we would expect the general form of the statements of the normative science of English or California law if its task is simply that of describing or representing the law of those systems, to be the kind indicated by the following blank schemata:
>
> Section 2 of the Homicide Act of 1957 which provides . . . means that . . . .
>
> Section 18, subsection 2 of the California Penal Code means the same as . . . .
>
> Statements of the form of these two schemata are of course *about* the rules of English or California law in the sense that they tell us what these rules mean but they are not themselves to be identified with the rules whose meaning they explain. They are jurist's [sic] statements *about* law, not legislative pronouncements *of* law.

Id. at 713.

26. A. ROSS, ON LAW AND JUSTICE 9–10 (1959).

tion certain rules or *ought* statements as the equivalent in meaning of that law.[27] This interpretation of Kelsen's theory appears to be overly generous. Nevertheless, it has been ingeniously argued in Kelsen's defense[28] that the *use* of words differs from the mention of them, the latter being descriptive. Thus, although the law-creating authority within a particular legal system may employ certain words to enact a law, the formulation of the meaning of the law by the science of law merely mentions these words in conjunction with other words which explain the meaning of the law.

A third consequence of the *is-ought* dichotomy in the pure theory of law is the division between reality (causal sciences) and ideality (normative sciences), with law and morality pertaining to the latter. Positive law is viewed as a system of valid norms; thus, according to the theory, morality cannot also be a system of valid norms. Consequently, a valid rule of law cannot be contradicted by a valid moral rule, since

> [n]either the jurist nor the moralist asserts that both normative systems are valid. The jurist ignores morality as a system of valid norms, just as the moralist ignores positive law as such a system. Neither from the one nor from the other point of view do there exist two duties simultaneously which contradict one another. And there is no third point of view.[29]

This theory describes the collision of moral duty and legal duty in the mind of an individual as the psychological result of his being under the influence of two ideas which pull him in different directions, not the simultaneous validity of two contradictory norms.[30] Consequently, the pure theory of law regards this collision as one of "factuality" rather than "normativity."[31] This position would seemingly apply both to the case of the individual involved in the conflict and, *mutatis mutandis,* to the case of an observer who considers the law in question to be valid but in conflict with morality.[32] However, the difficulty with the pure theory's conclusion lies in the fact that when an individual experiences this conflict he believes not only in

27. Golding, *Kelsen and the Concept of "Legal System,"* 47 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 355 (1961).

28. *Id.*

29. KELSEN, GENERAL THEORY, *supra* note 9, at 374.

30. *Id.* at 375.

31. *Id.* at 375–76.

32. Hart criticized Kelsen for dealing only with the situation where the moral duty and legal duty actually collide within a specific individual, and for ignoring the possibility of the moral criticism of law where the critic, although under no duty imposed by the law, nevertheless objects to that law on moral grounds. *See* Hart, *supra* note 25, at 724, 726. This criticism, however, seems to be inapposite since Kelsen's theory appears to apply in both situations.

the existence of the conflict, but also in the impossibility of discharging both the duties. Thus, the requirements of a valid law conflict with the requirements of a moral principle. This finding is clearly one of normativity, not of factuality. Moreover, even if one accepts Kelsen's claim that neither the jurist nor the moralist asserts the validity of both normative systems, it does not follow that such assertions of conflict between law and morality cannot meaningfully be made.[33]

In summary, the *is-ought* dichotomy in the pure theory of law results in separate, unconnected worlds of nature and validity. This result is unsatisfactory, for if the purpose of the system of norms is to interpret the social reality by revealing its consonance with the normative system, then the two systems must have something in common. Only the synthetic association of reality and validity makes the normative system a meaningful referent of social reality to the category of validity.[34]

Furthermore, the theory itself fails to maintain the purity of its *is-ought* dichotomy. Under the pure theory of law, the legal norms derive their validity from the basic norm,[35] but the validity of the basic norm is presupposed. If this means that there are basic procedures accepted in a particular society for identifying authoritative

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33. Hart, *supra* note 25, at 725 n.26. Criticizing Kelsen, Hart states that the statement that a valid legal rule *conflicted* with a valid moral rule would not be equivalent to the joint assertion of "A ought to be" and "A ought not to be" which he considers a contradiction; it would be equivalent to the statement *about* "A ought to be" and "A ought not to be" to the effect that they conflict. This certainly is not a contradiction or logically impossible though Kelsen would be entitled to argue that it was false.

Id. at 727. The fallacy of this criticism lies in the very equivocation against which Kelsen warns when he explains that

> terms like "norm" and "duty" are equivocal. On the one hand, they have a significance that can be expressed only by means of an ought-statement (the primary sense). On the other hand, they also are used to designate a fact which can be described by an is-statement (the secondary sense), the psychological fact that an individual has the idea of a norm, that he believes himself to be bound by a duty (in the primary sense) and that this idea or this belief (norm or duty in the secondary sense) disposes him to follow a certain line of conduct. It is possible that the same individual at the same time has the idea of two norms, that he believes himself bound by two duties which contradict and hence logically exclude one another . . . .

KELSEN, GENERAL THEORY, *supra* note 9, at 375.

34. A. ROSS, TOWARDS A REALISTIC JURISPRUDENCE, A CRITICISM OF THE DUALISM IN LAW 42–44 (1946). Ross also interprets Kelsen as considering morality as a natural order and law as a normative order, and his criticism of Kelsen is based upon that proposition. *Id.* at 46–48. However, it would appear that Kelsen considers both law and morality as belonging to ideality (not reality) and, therefore, to normative sciences (not natural sciences).

35. For a searching critique of the basic norm, *see* H. HART, THE CONCEPT OF LAW 245–47 (1961) [hereinafter cited as HART, CONCEPT OF LAW]; J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 98–136 (1964); Stone, *Mystery and Mystique in the Basic Norm*, 26 MODERN L. REV. 34 (1963). For Kelsen's response to Stone, *see* Kelsen, *Professor Stone and The Pure Theory of Law*, 17 STAN. L. REV. 1128 (1964).

rules,[36] then they are not presupposed, but experienced,[37] and thus are found in the realm of factuality, not normativity. Moreover, under this theory, the determination of the valid basic norm is founded upon its "principle of effectiveness,"[38] the conformity of man's actual behavior to the legal order. The proof of the minimum of effectiveness necessary for the legal order obviously requires an inquiry into political and social facts; therefore, the proof is a matter of *is,* not *ought.*

There are at least six admissions within the theory which infuse factuality *(is)* into a structure of normativity *(ought)* and, consequently, fail to support the claimed dichotomy of *is* and *ought.* These admissions are: 1) the admission that the efficacy of the legal order taken as a whole is a condition of the validity of individual norms; 2) the recognition that legal norms may be created by a revolution; 3) the acceptance of the fact that an individual norm may lose its validity due to inefficacy of the legal order; 4) the assertion that the basic norm is not an arbitrary creation, since its content is determined by facts; 5) the view that the basic norm effects the transformation of power into law; and 6) the suggestion that law is a specific technique of social organization.[39] Moreover, the very hierarchy of legal norms involves ranking various manifestations of legal will, such as statutory enactments and judicial decisions, and thus implies a certain evaluation of state activity.[40] This ranking cannot be achieved by

36. An example of such procedures would be rules of recognition along the lines of Hart's analysis in THE CONCEPT OF LAW. *See* HART, CONCEPT OF LAW, *supra* note 35.

37. *Cf.* Hughes, *Validity and the Basic Norm,* 59 CALIF. L. REV. 695, 699–700 (1971).

38. Kelsen explains:

> If we attempt to make explicit the presupposition on which these juristic considerations rest, we find that the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behavior of men does no longer conform to this old legal order . . . . The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order.

KELSEN, GENERAL THEORY, *supra* note 9, at 118–19.

39. J. KUNZ, SÔBRE A PROBLEMÁTICA DA FILOSOPHIA DA DIREITO NOS MEADOS DO SÉCULO XX 24–26 (1952).

40. *Cf.* Lauterpacht, *Kelsen's Pure Science of Law,* in MODERN THEORIES OF LAW 131 (1933).

In addition to the doubts as to the claimed purity of the pure theory of law, one might also raise doubts as to its claimed universality. The hierarchy of the pure theory purports to express the pure and universal form of law. In order for that claim to be valid, no possible legal system could fall outside it; but that is not the case. As Friedmann says,

> [u]nder National Socialism and Facism the will of the leader is the fundamental norm from which the legal order derives its validity. But below this norm there is no clear hierarchy between statute, administration, judicial decision, etc. Law courts are directed to disregard the expressed norm of a statute, if it seems incompatible with the political ideals of National Socialism. Administration, judicial decision and other manifestations of law are all supposed to be inspired by the

separating the realm of facts from the realm of norms. Thus, contrary to its pretensions, the theory does imply a minimum of rationality in the structure of law, and the law is bound to include in its structure certain ontological elements, giving content to the concepts which formalize it.[41]

The pure theory of law does not really succeed in the fission of *is* from *ought* because of its fallacious methodological dichotomy, its mistaken descriptive task, its unsatisfactory resolution of the conflict between law and morality, its unrealistic separation of the worlds of nature and validity, and its failure to apply the *is-ought* dichotomy consistently within the structure of its own propositions.

II. THE FUSION

The fusion of *is* and *ought* has been attempted by both the purposive theory of law and the phenomenological theories of law. Proponents of these theories would argue that the very distinction between *is* and *ought* disappears in a certain type of activity. They would contend that the two do not represent autonomous spheres of phenomena but only essential particularities in the structure of the phenomena.

A. *Fusion in the Purposive Theory of Law*

It has been argued that in a purposive interpretation of human behavior the distinction between *is* and *ought* disappears, and fact and value merge.[42] A conception of the activity's purpose becomes necessary in order to interpret what is being observed. There are two aspects to understanding events: the control of events and the prediction of events. The argument is that understanding cannot be achieved in either of these two aspects without kowledge of the purpose of the activity being pursued. Value inheres, for example, in a purely factual prediction that a certain course of action will or will not be followed, since this prediction is dependent upon knowing whether that course of action is suitable for its purpose, or, in other

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will to realize National Socialism as personified by the leader. In this task they rival with each other, but are not superior to one another. The very notion of a fixed formal structure is anathema to this conception of state and society.

W. FRIEDMANN, LEGAL THEORY 286 (5th ed. 1967) [hereinafter cited as FRIEDMANN, LEGAL THEORY].

41. *Id.*; Liebholz, *Les tendances actuelles de la doctrine de droit public en Allemagne*, 1931 ARCHIVES DE PHILOSOPHIE DU DROIT ET DE SOCIOLOGIQUE JURIDIQUE 209–10.

42. Fuller, *Human Purpose and Natural Law*, 53 J. PHILOSOPHY 697 (1956), *reprinted in* 3 NATURAL L.F. 68 (1958). For an interpretation of Fuller's thesis, *see* Witherspoon, *The Relation of Philosophy to Jurisprudence*, 3 NATURAL L.F. 105, 117 (1958).

words, whether it possesses value when judged in light of the purpose. This value element is claimed to be intrinsic to the facts of a purposive activity. Thus, the purposive theory does not view a concurrence of the observation of events, the perception of the purpose, and the provisional acceptance of this purpose as creating an illusion of the merger of fact and value. On the contrary, it holds that the course of events cannot be understood except through participation in a process of evaluation.[43]

This is the epistemology of Lon Fuller's purposive theory of law which maintains that the legal process is the collaborative articulation of shared purposes. Therefore, law is a purposive activity in which the merger of fact and value occurs because of the internal morality of law.[44] This inner morality of law consists of eight principles: 1) its generality; 2) its availability to the party affected (promulgation); 3) its prospective legal operation (the general prohibition of retroactive laws); 4) its intelligibility and clarity; 5) its avoidance of internal contradictions; 6) its avoidance of impossible demands; 7) its constancy through time (avoiding frequent changes); and 8) congruence between official action and declared rule.[45] This section of the article will examine whether Fuller's theory succeeds in fusing the realms of *is* (fact) and the realms of *ought* (value). This examination involves two areas of inquiry: 1) whether the *is-ought* distinction disappears in a purposive activity, and 2) whether the distinction disappears in law when viewed as a purposive activity.

It is doubtful that the *is-ought* distinction disappears in a purposive activity for several significant reasons. First, the argument seems to be predicated upon the very distinction it denies. In order to judge whether an activity possesses the value attributed to it, it is necessary to know to what the value is being attributed. This value ascription made upon something otherwise valueless is possible only after identifying that thing in nonevaluative terms. Thus, the distinction remains between the value *(ought)* and the fact *(is)* to which the value is being attributed. Second, the interpretation of purposive behavior necessitates an inquiry into whether specific acts

43. Fuller, *supra* note 42.

44. FULLER, MORALITY OF LAW, *supra* note 10; *cf.* R. VON JHERING, LAW AS A MEANS TO AN END (I. Husik transl. 1913).

45. FULLER, MORALITY OF LAW, *supra* note 10, at 39. It would be tempting to compare Fuller's internal morality of law with the minimum requirements of a legal system set forth in Kelsen's concept of the minimum of effectiveness, KELSEN, GENERAL THEORY, *supra* note 9, at 119, Hart's concept of natural necessity, Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 621–24 (1958), or Ross' concept of inner coherence of meaning, A. ROSS, ON LAW AND JUSTICE 32, 34 (1958). However, such a comparison is outside the scope of this article.

achieve certain goals. In so examining, value judgments necessarily occur in addition to those which are intrinsic to the behavior in question. Not only are such judgments initially made on the basis of values, but furthermore, these values are not limited by those claimed to be intrinsic to the facts of the particular behavior.

Third, the fact that some behavior is purposive in nature implies only that the actor has the purpose, not that he ought to have it. In other words, both are *is* statements. *Ought* is not merged with *is* merely because the purpose in fact exists. Moreover, when law is represented as a purposive activity under this theory, the meaning of "purpose" is not clear. It may mean, for example, something of which one must be conscious, the forces determining one's conduct, intentional acts, the pursual of a specific end, the determinant of the means-end relationship, proximate or ulterior consideration, or something to be discerned from observable behavior alone.[46] Whatever meaning is ascribed, it does not follow from the fact of purpose that the purpose is an *ought*. A purpose may be as it *is* or as it *ought* to be. Although the theory claims that *is* and *ought* merge when the activity is purposive, even assuming the claimed merging of purpose and *action,* it does not follow that *ought* and *is* have thereby merged. Additionally, the theory seems to confuse the judgments about the purpose of an activity with judgments about its morality; the two are not the same. Hart uses the example of poisoning as a purposive activity which, in light of its purpose, has its own internal principles, such as the avoidance of poisons which cause the victim to vomit, and the avoidance of poisons whose shape, color, or size is likely to attract notice.[47] Such principles of the poisoner's art cannot be called the morality of poisoning, for that characterization would fail to distinguish the efficiency of an activity from its morality.

Another criticism of this theory is that the knowledge of the actor's purpose, while assisting the observer in organizing the observational data in a certain manner, reveals nothing about the moral quality of that purpose. The knowledge of the actor's purpose may disclose his dispositional characteristics,[48] his permanent possibilities of perform-

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46. D. EMMET, FUNCTION, PURPOSE AND POWERS 111 (1958); Laird, *It All Depends Upon the Purpose,* 1 ANALYSIS 49 (1934); Nakhnikian, *Professor Fuller on Legal Rules and Purposes,* 2 WAYNE L. REV. 190, 197 (1956); Sparshot, *The Concept of Purpose,* 72 ETHICS 157 (1962); Taylor, *Purposeful and Non-Purposeful Behavior: A Rejoinder,* 17 PHILOSOPHY OF SCI. 327 (1950).

47. Hart, Book Review, 78 HARV. L. REV. 1281, 1286 (1965).

48. G. RYLE, THE CONCEPT OF MIND 43 (1949).

ance,[49] or even purposive criteria for evaluating his actions.[50] It does not, however, reveal the *ought*ness of his purpose. No value is derived from the mere fact. Finally, while it is true that the adequacy of a description can be judged only with reference to the purpose for which the descriptive account is made,[51] the account itself does not therefore become intrinsically evaluative.[52] What is evaluative here is not the account itself, but the judgment on the adequacy of the account rendered. The totality of these reasons leads to the conclusion that a purposive analysis of human behavior fails to demonstrate that *is* and *ought* are conceptually indistinct.

Secondly, does the *is-ought* distinction disappear in law when viewed as a purposive activity? This claim is based upon the assertion that the eight principles of Fuller's purposive theory[53] constitute an intrinsic, internal morality of law. This claim is difficult to accept since these eight principles appear to be no more than the minimum components of an efficiently functioning modern legal system. Furthermore, the formula seems to omit other conditions which may very well be considered as additional minimum requirements. For example, such conditions may include establishing authoritative law-making procedures at the outset, complying with these procedures, providing institutions for the authoritative interpretation of law, and providing for the execution of a law by public official or private citizen.[54] In any case, to assert that this formula of efficacy[55] is a statement of moral principles in any substantial sense of the term "morality"

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49. Spilsbury, *Dispositions and Phenomenalism,* 62 MIND 339 (1953).

50. Nakhnikian, *supra* note 46.

51. Nagel observes:

> [W]hen the physicist offers a non-evaluative account of a given system of pulleys (*i.e.,* when he assumes a "descriptive posture" toward his subject matter), if his aim is simply to discover what is the mechanical advantage of the system, his account is *not* inadequate because he fails to note the weight of the pulleys, the length and tensile strength of the cord, or the purchase price of the machine. On the other hand, a builder assessing the physical and economic suitability of the pulley system for lifting construction materials used in his business, *would* be giving an inadequate account were he to ignore these items.

Nagel, *Fact, Value, and Human Purpose,* 4 NATURAL L.F. 26, 28 (1959).

52. SHUMAN, *supra* note 14, at 75–83; Cohen, *Law, Morality, and Purpose,* 10 VILL. L. REV. 640 (1965); Nagel, *supra* note 51; Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller,* 3 NATURAL L.F. 77 (1958). *See also* Lewis, *An Anaylsis of "Purposive Activity": Its Relevance to the Relation Between Law and Moral Obligation,* 16 AM. J. JURISPRUDENCE 143 (1971).

53. *See* text accompanying note 45 *supra.*

54. *See* Summers, *Professor Fuller on Morality and Law,* 18 J. LEGAL ED. 1, 19–21 (1965).

55. The formula of efficacy could be compared to Kelsen's minimum of effectiveness, Hart's natural necessity, or Ross' inner coherence of meaning. *See* note 45 *supra.*

appears to claim too much. Although infringement of any of these eight requirements may result in a less effective legal system, this consequence is hardly sufficient to arouse a sense of moral culpability. On the other hand, violations of moral principles may occur from a law-making which may have fulfilled all of these requirements. Thus, the issue of morality remains untouched by these eight principles.[56] Due to this very fact, one could say that these requirements apply to any legal system regardless of its ideology.[57] Moreover, a mere violation of any of these requirements does not, in itself, result in official wrongdoing; rather, such wrongdoing arises from the unjust consequences resulting from the official's action. Therefore, these eight requirements do not provide the standard for determining immorality.

Fuller nevertheless defends the moral claim for the eight principles on a variety of grounds:

1. *Only through these principles can substantially moral laws be achieved.*[58] However, while law is admittedly a precondition to good law, it is also clear that the adoption of these eight principles can result in immoral as well as moral laws.

2. *The requirements of generality, publicity, and congruent administration tend to assure morally good laws.*[59] While this may indeed be the tendency, morally good laws do not necessarily follow from these requirements. Also, the fact that these requirements may tend to achieve moral laws in no way proves that the requirements themselves are moral.

3. *The requirement of clarity is a moral principle, since some evil purposes cannot be clearly articulated in laws.*[60] This proposition, too, is difficult to accept, since some good purposes are as

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56. *See also* Cohen, *Law, Morality and Purpose,* 10 VILL. L. REV. 640 (1964); Dworkin, *Philosophy, Morality, and Law — Observations Prompted by Professor Fuller's Novel Claim,* 113 U. PA. L. REV. 668 (1965); Dworkin, *The Elusive Morality of Law,* 10 VILL. L. REV. 631 (1965); Summers, *supra* note 54, at 24–26.

57. Friedmann states:

> Even the one requirement that might be thought of as expressing a particular — liberal — philosophy, i.e., the general — though not absolute prohibition of retroactivity is essential to the functioning of any legal system. No totalitarian legal order could survive for any length of time if all or a great majority of its laws were made retroactive; legal order would break down in confusion. On the other hand, as Fuller himself says, democratic legal systems may sometimes have to admit retrospective legislation.

FRIEDMANN, LEGAL THEORY, *supra* note 40, at 18–19.

58. FULLER, MORALITY OF LAW, *supra* note 10, at 155.

59. *Id.* at 157–59.

60. *Id.* at 159–62.

difficult to articulate as some evil ones. Conversely, some morally repugnant laws are as clearly articulated as some morally laudable ones. Moreover, a law concerning a matter upon which there is general moral agreement in society makes no great demands for clear and precise articulation.

4. *The internal morality claimed by the purposive theory is moral because it impliedly views man as a responsible agent.*[61] However, one need not conclude that, because a proposition implies a view of man as responsible, the implication itself is moral. Second, by adopting these eight requirements, one may become responsible for the *efficacy* of the law but not for its *morality*. Third, the fact that a man is responsible does not ensure that he is thereby morally good in any substantive sense.

5. *Because these eight requirements are principles of institutional or political morality, or the morality of the officials acting in that capacity, they nonetheless constitute morality.*[62] No one questions that the political morality or the morality of official conduct is properly called morality; rather, the issue is whether these eight requirements are determinative of the moral character of the official act. Clearly, for reasons mentioned above, the moral question remains untouched by these requirements. Nothing morally commendable follows from adherence to these principles; nothing morally reprehensible follows from nonadherence to them. It is possible to inflict a moral wrong by laws which are general, prospective, and clear, just as it is possible to correct a moral abuse by a retroactive law, the moral character of which will not be determined by the mere fact of its retroactivity.

6. *Violation of any of these requirements undermines the integrity of the law itself.*[63] If "the integrity of the law itself" means being efficacious as a result of being a) general, b) promulgated, c) prospective, d) intelligible and clear, e) uncontradictory, f) not impossible in the demands it makes, g) constant through time, and h) congruent of official action and declared rule, then the point is well taken. However, this concept of integrity of the law cannot determine whether that law itself is moral.

In an attempt to defend the claim of morality for the above eight principles, it has been argued: 1) the requirement of consistency is a

61. *Id.* at 162–67.

62. Fuller, *A Reply to Professors Cohen and Dworkin,* 10 VILL. L. REV. 655, 656–59 (1965).

63. *Id.* at 660. Some of these points which support the claim of morality are pursued further in FULLER, MORALITY OF LAW, *supra* note 10, at 200–23.

moral condition since it would be morally unsatisfactory to impose sanctions where it is impossible to comply with inconsistent directives; 2) the requirement of not making impossible demands is a moral condition since it reflects the Kantian principle that *ought* implies *can*; and 3) the requirements of promulgation, understandability, and prospectiveness are moral conditions since it would be morally unsatisfactory to be punished for directives of which one is unaware, or which cannot be understood, or which are not prospective.[64] The totality of the principles constitute the intrinsic morality of law. Since the application of these principles can achieve a morally perverse law, it can be said, consistent with the purposive theory, that although a morally bad law has been achieved, the morality of law, nevertheless, remains intact because the eight conditions have been fulfilled. This is a very curious position. Fuller and Mullock may respond by noting that this criticism relates to the substance of law, a matter of extrinsic morality, while they are concerned with the form of law, a matter of intrinsic morality. This response brings to focus my point that the morality of law cannot be apprehended by the distinctions proposed by this theory. It cannot be apprehended by including things claimed by this theory to be intrinsic while excluding things claimed to be extrinsic. This "inner morality of law," represented by Fuller's principles, fails to account fully for the morality of law, because a moral accounting of law must do more than limit itself to matters of form. It must take recourse to that which is of substance, to that which is external to its form. Therefore, the realm of fact *(is)* and the realm of value *(ought)* do remain distinct realms even in law. While one may speculate as to the relationship between the two realms, it cannot be said that the fact and value (*is* and *ought*) merge in law in the sense claimed by Fuller's purposive theory. The purposive theory sets forth the conditions deemed necessary and sufficient for the existence of a legal system, comparable to those conditions proposed by Kelsen, Hart, or Ross, but the theory by no means establishes a logically necessary connection between moral principles and law. The connection which it establishes may be necessary practically, but not logically.[65] In conclusion, it cannot be said that the purposive theory of law has proved that the distinction between *is* and *ought* does not exist.

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64. Mullock, *The Inner Morality of Law,* 84 ETHICS 327, 329 (1974).

65. This distinction may be similar to that made by Plato and Aristotle between the theoretical (causal, logical) and the practical. *See generally* ARISTOTLE, ETHICA NICHOMACHEA; PLATO, STATESMAN. For an attempt to defend Fuller's theory along these lines, *see* Mullock, *supra* note 64, at 327-28.

B. *Fusion in the Phenomenological Theories of Law*

Phenomenology[66] indicates two things: 1) a particular method of observation outlined by Edmund Husserl;[67] and 2) the development of certain doctrinal themes, or the drawing of ontological, metaphysical, and anthropological consequences, by different phenomenologists, including Husserl.[68] Phenomenology appears in a variety of ways. It may appear as an objective inquiry into the logic of essences and meanings, as a theory of abstraction, as a psychological description of consciousness, as a speculation on the transcendental ego, as a method for approaching concretely lived existence, or as existentialism itself.[69] Several kinds of phenomenology are evident in the work of Husserl himself.[70] However, the conceptual unity of this philosophical movement results from its method.[71] This method consists of a series of

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66. Johann Heinrich Lambert first spoke of phenomenology in his *Neuess Organon,* referring to it as the theory of illusion. J.H. LAMBERT, NEUESS ORGANON (1764). Immanuel Kant, Lambert's contemporary, termed "phenomena" those objects and events as they appear in our experience. He distinguished them from "noumena," which are objects and events as they are in themselves — beyond the forms imposed upon them by our cognitive faculties. Kant argued that man can know only "phenomena," not "noumena." *See* KANT, *supra* note 14. This theory was disputed by Georg Wilhem Friedrich Hegel. G. HEGEL, PHENOMENOLOGY OF THE SPIRIT (1807). In the middle of the 19th century, phenomenology denoted a purely descriptive study of any given subject matter. *See* W. HAMILTON, LECTURES ON METAPHYSICS (1858); E. VON HARTMANN, PHENOMENOLOGY OF MORAL CONSCIOUSNESS (1878). At the turn of the century, C.S. Peirce extended phenomenology beyond a descriptive study of all that is observed to be real, to include whatever is before the mind — real, illusory, imaginary, or dreamy. Edmund Husserl, the father of modern phenomenology, used the term in the early years of this century to denote a manner of approaching philosophy. *See* note 67 and accompanying text *infra.* Thus, in the modern parlance of philosophy, phenomenology became a philosophical method.

67. E. HUSSERL, CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY (1960); E. HUSSERL, IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY (1931); E. HUSSERL, IDEEN ZU EINER REINEN PHANOMENOLOGIE UND PHANOMENOLOGISCHEN PHILOSOPHIE, VOL. II PHÄNOMENOLOGISCHE UNTERSUCHUNGEN ZUR KONSTITUTION (M. Biemel ed. 1952); E. HUSSERL, IDEEN ZU EINER REINEN PHÄNOMENOLOGIE UND PHÄNOMENOLOGISCHEN PHILOSOPHIE, VOL. III DIE PHÄNOMENOLOGIE UND DIE FUNDAMENTS DER WISSENSCHAFTEN (M. Biemel ed. 1952); E. HUSSERL, THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY (1970); E. HUSSERL, THE IDEA OF PHENOMENOLOGY (1964); E. HUSSERL, THE PARIS LECTURES (1964); HUSSERL, *Phenomenology,* in ENCYCLOPEDIA BRITIANICA (14th ed. 1927) (new translation by R. Palmer in 2 J. BRITISH SOC'Y FOR PHENOMENOLOGY 77 (1971)).

68. P. AMSELEK, METHODE PHÉNOMÉNOLOGIQUE ET THÉORIE DU DROIT 86 (1964); E. BRÉHIER, HISTOIRE DE LA PHILOSOPHIE ALLEMANDE 182 (3d ed. 1954); H. POS, PROBLÈMES ACTUELS DE LA PHÉNOMÉNOLOGIE: ACTES DU COLLOQUE INTERNATIONAL DE PHÉNOMÉNOLOGIE 31 (1951).

69. For a survey of the phenomenology of Husserl, Heidegger, Sartre, and Merleau-Ponty, *see* P. THÉVENAZ, WHAT IS PHENOMENOLOGY? AND OTHER ESSAYS 37–92 (1962).

70. *See* 1 H. SPIEGELBERG, THE PHENOMENOLOGICAL MOVEMENT: A HISTORICAL INTRODUCTION 74–75 (1960) [hereinafter cited as SPIEGELBERG].

71. R. CALLOIS, PANORAMA DES IDÉES CONTEMPORAINES 55 (1951). *See also* Natanson, *Phenomenology and the Social Sciences,* in 1 PHENOMENOLOGY AND THE SOCIAL SCIENCES 23–24 (M. Natanson ed. 1973); Amselek, *La Phénoménologie et la*

three reductions: 1) philosophical reduction, achieved by bypassing all theories and explanatory concepts about things, thereby returning to the things themselves; 2) eidetic reduction, achieved by eliminating the factual elements of the objects under investigation so as to perceive their essence *(eidos),* through discerning their typical structures;[72] and 3) transcendental reduction, achieved by eliminating other objects of consciousness to disclose the thing's consciousness, or intentionality, thereby enabling the consciousness to perceive itself in pure transcendental ego. According to one observer,[73] the steps of the phenomenological method are: 1) investigating particular phenomena; 2) investigating general essences; 3) apprehending essential relationships among essences; 4) watching modes of appearance; 5) watching the constitution of phenomena in consciousness; 6) suspending belief in the existence of the phenomena; and 7) interpreting the meaning of phenomena.

Various attempts have been made to apply the phenomenological method to the description of law, resulting in several phenomenological theories of law.[74] The major elements of these theories include:

1. The bridging of the antinomy between fact and value, by demonstrating that values are objective realities, immanent in the appreciation of the world of facts.

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droit, 17 ARCHIVES DE PHILOSOPHIE DU DROIT 185, 188 (1972), translated as *The Phenomenological Description of Law,* in 2 PHENOMENOLOGY 367 (M. Natanson ed. 1973).

72. Husserl explains:

> If one keeps no matter what object fixed in its form or category and maintains continuous evidence of its identity throughout the change in modes of consciousness of it, one sees that, no matter how fluid these may be, and no matter how inapprehensible as having ultimate elements, still they are by no means variable without restriction. They are always restricted to a set of *structural types,* which is "invariable," inviolably the same as long as the objectivity remains intended as *this* one and as of this kind, and as long as, throughout the change in modes of consciousness, evidence of objective identity can persist.

E. HUSSERL, CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY 51 (1960).

73. SPIEGELBERG, *supra* note 70, at 659.

74. For a survey of these theories, *see* Friedmann, *Phenomenology and Legal Science,* in 2 PHENOMENOLOGY AND THE SOCIAL SCIENCES 343, 346–459 (M. Natanson ed. 1973). Friedmann classifies these theories using three approaches:

> (a) the deduction, from the essence (*Wesenheit*) of legal concepts and institutions, of certain structural qualities, believed by the proponents of this approach to be a priori, immanent, and therefore immutable; (b) a somewhat related, but more elastic, approach to the legal order, whose key concept is the *Natur der Sache* (*nature des choses, "nature of the thing"*); and (c) an essentially Latin American trend in contemporary legal philosophy, which is derived from the phenomenological value philosophies (*Wertphilosophie*) of two German thinkers, Max Scheler and Nicholai Hartmann.

Id. at 347. Amselek classifies these theories into a) axiological and b) existential phenomenology. Amselek, *La Phénoménologie et le droit,* 17 ARCHIVES DE PHILOSOPHIE DU DROIT 185 (1972), translated as the *Phenomenological Description of Law,* in 2 PHENOMENOLOGY AND THE SOCIAL SCIENCES 367, 377–80 (1973).

2. The application of the phenomenological concepts of *Wesenheit* and *Wesensschau* to the world of law, leading to the distillation of essential and "immanent" properties of legal concepts and institutions.

3. The dynamic use of the fusion of fact and value, particularly in the concept of the *Natur der Sache*, for a theory of social change and human progress, i.e., as a way to attain certain ideals of law.[75]

The several theories assert these elements in different combinations and with varying emphasis.

The phenomenological assertion with respect to *is-ought* (fact-values) is that facts constitute legal values per se; thus the theory claims a fusion of fact and value. Human existence, by its very ontological structure, is deemed a value, such that man cannot exist or act without values; therefore, these values are created because man must exist. The process of comprehension of juridical values must be perceived through the practical activity of man at a given place and moment of history. Values are thus objectively realized in the factual activity of man.[76] *Ought* does not represent an autonomous sphere of phenomena, but only an essential particularity of the structure of certain phenomena, such as law, which express a thing to be realized.[77] Instead of a dualism between fact and value, there is an immanent sense of the real, the totality of which is comprised of both fact and value.[78] In law, the identification of fact and value is exhibited by the existence of certain factual relationships which have "immanent" legal value. For example, the courts have been able to attribute legal consequences to certain relationships which fall outside the forms prescribed by the relevant statutes, thereby demonstrating a direct and immediate transposition of the practical situation into the juridical universe.[79]

There are three major problems with this argument. First, it is difficult to accept this surfacing of the immanent as either a fusion of fact and value or as the abolition of the distinction. This may be one explanation of the interrelationship of law and social change, but there are others. An axiological process may even be demonstrated;

75. Friedmann, *supra* note 74, at 359.

76. N. POULANTZAS, NATURE DES CHOSES ET DROIT 82–103, 290, 292 (1964); Poulantzas, *Notes sur la phénoménologie et l'existentialisme juridiques,* 8 ARCHIVES DE PHILOSOPHIE DU DROIT 213, 229–30 (1963); Poulantzas, *Response à M. Kalinowski,* 8 ARCHIVES DE PHILOSOPHIE DU DROIT 271, 271–72 (1963).

77. Peschka, *A Sein és Sollen problémcija a modern jogomélethen,* 11 ALLAM-ÉS JOSTUDOMÁNY 400 (1908); Peschka, *La Phenomenologisme dans la philosophie du droit moderne,* 12 ARCHIVES DE PHILOSOPHIE DU DROIT 259 (1967); Peschka, *Sein und Sollen in modernen Rechtsphilosophie,* 11 ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICAE 3 (1969).

78. N. POULANTZAS, NATURE DES CHOSES ET DROIT 8–9 (1964).

79. *Id.* at 292.

however, the mere adjustment of legal values to new social facts does not indicate fusion of the two.[80]

Second, if fact and value merge in the nature of things, certain inevitable values would surface, leaving an axiological fatalism. This merging would eliminate the question of choice between different values or ideologies, and discard the conflict between them as non-existent. This is clearly not the case. The very issue of morality, the very genesis of moral decisions, is predicated upon the existence of these choices. If one did not have these choices, there would be no need for moral judgment of human acts.

Third, adherence to this thesis is merely a disguise for what is undoubtedly only one particular ideology. Thus, this argument has led some of its adherents to believe in the development of human freedom as an existential role[81] or in the progress toward human freedom and the classless society as essential realities of our time.[82] To believe that human freedom and the classless society, or even progress toward these ends, are realities of our time is certainly too fanciful to accept. Even apart from the incredibility of this account of contemporary reality, the theoretical point remains that such a characterization is merely a disguise for a preferred ideology, not a fusion of the realms of *is* and *ought*.

III. CONCLUSION

The interpretations of the *is-ought* relationship have been various. The pure theory of law takes the epistemological position that the two are dichotomous. The purposive theory of law posits that the two merge in purposive activity, such as law, so that the *is* of the activity cannot be understood without the *ought* of it. Certain phenomenologi-

80. Friedmann states:

> It is only to the extent that legislators and courts respond to the new relationships — which they do with much discrimination — that legal values are adjusted to new social facts. As one of many examples, we might cite the way in which the law takes note of the cohabitation of a man and a woman who are not legally married. For certain purposes, but not for others, this relationship may be recognized as legally relevant. Thus, during World War II, the military authority in Britain regarded a de facto wife as entitled to dependents allowances to the same extent as a properly married wife. But for most other purposes, *e.g.*, rights of succession, legitimacy of children, etc., the legal distinction between marriage and de facto relationships remained unchanged. The legal order, i.e., the system of legal values, responds — sometimes quickly, sometimes haltingly, and sometimes not at all — to new phenomena of society, but this does not mean the fusion of fact and value.

Friedmann, *supra* note 74, at 362.

81. For a list of works by one adherent, Poulantzas, *see* note 75 and accompanying text *supra*.

82. Maihofer, *Ideologie und Naturrecht*, in IDEALOGIE UND RECHT 121 (W. Maihofer ed. 1969).

cal theories maintain that the two are fused together because of the very ontological structure of human existence. This author has no quarrel with a universal explanation of the legal phenomenon as desired by the pure theory, or with a recognition of the input of values in law as desired by the purposive theory, or with the argument made by certain phenomenologists for human freedom through the use of philosophic, eidetic, and transcentental reductions. Nevertheless, it is submitted that none of those theories succeeds in either the fission or fusion of *is-ought.* Although the objectives of these theories could perhaps be achieved without taking such epistemological positions, the respective positions taken concerning *is-ought* seem untenable.

Thus, the principles of logic stated at the beginning of this article remain intact when used to comprehend the nature of the legal phenomenon. It is clear that the connection between the *is* of the law and the *ought* of the law is not that of logic. While the two realms may be related in some manner, they remain conceptually distinct. The effort to achieve some semblance of relationship between the law and the values of its ethos has been one constant of mankind's jurisprudential thought, as well as an essence of much of its political history. Varied notions have been used in juristic theory in attempting to define this relationship.[83] Achieving the relationship between the two realms requires a value judgment which cannot be escaped by making a logical deduction. If *is* (facts) and *ought* (values) were not distinct, one could arrive at values by simply deducing them from facts, as in a mere game of logic. Instead, the responsibility for making value judgments remains, in the final analysis, with those who make them.

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83. For examples of the different concepts used throughout history to define the relationship between the law and the value of its ethos, *see* A. BASHAM, THE WONDER THAT WAS INDIA 30–31, 112–13 (1954) (virtue); CICERO, DE RE PUBLICA DE LEGIBUS (C. Keys transl. 1952) (right reason); E. CAHN, THE SENSE OF INJUSTICE 1–2 (1949) (the sense of injustice); M. EDEL & A. EDEL, ANTHROPOLOGY AND ETHICS 19–33 (rev. ed. 1968) (anthropology); FULLER, MORALITY OF LAW, *supra* note 10, at 5–6 (inner morality of law); Aristotle, *Politica,* in 10 THE WORKS OF ARISTOTLE 1287a (W.D. Ross ed. 1961) (nature); Brown, *Huntsmen, What Quarry?,* in LAW AND PHILOSOPHY, A SYMPOSIUM 177, 179–85 (S. Hook ed. 1964) (relation of moral truths and general facts); Chroust, *Natural Law and Legal Positivism,* 13 OHIO ST. L.J. 178, 186 (1952) (relativity of rights and restraints); Dabin, *General Theory of Law,* in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 332–36, 416–31 (K. Wilk transl. 1950) (morals); D'Entreves, *The Case for Natural Law Re-examined,* 1 NATURAL L.F. 5, 28–49 (1956) (deontology); Selznick, *Sociology and Natural Law,* 6 NATURAL L.F. 84, 99–108 (1961) (sociology); Siches, *Human Life, Society, and Law: Fundamentals of the Philosophy of the Law,* in LATIN AMERICAN LEGAL PHILOSOPHY 18–27 (G. Ireland transl. 1948) (objective practical values).