

BOOK REVIEW

THE MORALITY OF LAW

By Lon L. Fuller

New Haven and London: Yale University Press, 1964.

Pp. viii, 202... \$5.00.

This little volume is an expanded version of lectures given at the Yale Law School by Professor Fuller in 1963. Professor Fuller is Carter Professor of Jurisprudence at Harvard, and one of the leading exponents of non-Thomist natural law. Among his previous contributions to the field has been *The Problems of Jurisprudence*, a selection of readings supplemented by his own comments, which includes some imaginary cases, ingeniously contrived by him, illustrating widely divergent judicial approaches to the solution of legal problems. More recently, he has been stimulated to expound his views as a kind of reaction to the new analytical positivism of the linguistic legal philosopher, H. L. A. Hart. Thus, the famous "Hart-Fuller Debate" in 1958¹ comprised Hart's statement of his own position on the relation between law and morality, and Fuller's rebuttal thereof.

The present volume seems to be, at least in part, a similar effort to counter some of the views expressed by Hart in his book, *The Concept of Law*.² In this sense, *The Morality of Law* may be considered a kind of continuation of the Hart-Fuller debate, shifted to slightly different ground. However, the reader who seeks in this book the long-awaited systematic exposition of Professor Fuller's philosophical views will be disappointed. This is not to say that the book is not of great interest, for in fact there are numerous sections of quite penetrating thought. It is merely that the discursive, chatty lecture method of exposition used in the book lends itself to digression, and sometimes the thread of the argument appears difficult to follow, especially as the four chapters into which the book is divided are really separate essays, and the connection between them is at times tenuous. But the style is always stimulating, the book is eminently readable, and the chief pleasure to

¹ H. L. A. Hart, *Positivism and the Separation of Law and Morals* (1958) 71 Harv. L. Rev. 593; Lon L. Fuller: *Positivism and Fidelity to Law. A Reply to Professor Hart*, (1958) 71 Harv. L. Rev. 630.

² Oxford University Press, 1961.

be derived from it, as in the case of almost any significant work, is the joy of following the workings of an intelligent mind.

In his first chapter, which is not concerned with the law at all, Fuller defines his ethical philosophy in terms of a dichotomy between the morality of duty ("Thou shalt") and of aspiration. He perceives a spectrum of morality, with duties at the bottom, aspirations at the top, and an invisible pointer marking the shifting, fuzzy boundary between them. Fuller introduces here his analogy between morality and economics, which recurs later in the book and which appears to be conditioned by his own political and economic theories.

Chapter II is a statement of Professor Fuller's views on the internal or structural morality of law, without which it cannot exist. He points out several ways in which a legal system may founder: failure to publicize its rules, abusive use of retroactive legislation, failure to make rules intelligible, enactment of contradictory rules, rules impossible of performance, rules changed so frequently that action in accordance with them cannot be oriented, and failure of rules as formulated to correspond to their enforcement and interpretation.

To Professor Fuller, an entire legal system may cease to deserve to be characterized as such if it fails too extensively in any of these particulars. He observes that there can be no rational ground for asserting that a man can have an obligation to obey a rule that does not yet exist, or is kept secret from him, or cannot be understood, or is contradicted by another rule, or demands the impossible, or changes every minute. It is on grounds such as these that Fuller would apparently have liked to see the post-war German courts handle the so-called "informer" cases, by saying that the law under which they acted was not law, rather than by reference to another, higher law. The interesting thing about all this is, of course, that if this is what Fuller means by natural law, then he and Hart would seem to have little to quarrel about. Hart's major focus is naturally analytical and not concerned with value as such; but he is very much aware that a legal system has certain minimum requirements. If Professor Fuller were a linguistic positivist, he could have incorporated his several criteria into his definition of what a legal system is, and much of the acrimony of the discussion might evaporate.

Chapter III of the book borrows its title from Hart, and is headed "The Concept of Law". Here Fuller defines law as the *enterprise* of subjecting human conduct to the governance of rules" (*Italics mine*). His critique of a static, analytical approach to law, particularly of Kelsen's hierarchical method, is well-reasoned, and he emphatically rejects power as the foundation of law. His example of a military system is particularly interesting, in relation to the attempted use of

the hierarchy of authority as the distinguishing feature of a legal system. In a subsequent section, Fuller compares law with science, and shows how in the cases of both law and science, the key questions must remain unanswered in any philosophy that abstracts from the nature of the activity: What should the policy of government be towards science (or law)? How can scientific (legal) research be most effectively introduced and cultivated in newly emerging nations? What precisely is the cost society pays directly and indirectly, when the responsibilities of scientific (legal) morality are ignored or loosely observed? In his approach to law as an *enterprise*, Professor Fuller seems to come very close to Myres McDougal's definition of law as a *process* of authoritative decision; and in his emphasis on values and the determination of answers to serious human problems, he is very much akin to McDougal whose concern, although stated in a complex, behavioural science jargon, is for values which he (McDougal) epitomizes in the phrase *human dignity*. One reflection that occurs to me is that the leaders of the contemporary jurisprudential schools may have much more in common than they themselves realize, although their vocabularies may vary and their concern and emphasis be in different sectors. Certainly McDougal could not but agree with Fuller's statement (at p. 145) that law must be viewed "as purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals". As Fuller says, no doubt Hart does prefer to treat law as "a manifested fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become", although Hart himself might use different words to describe his own views. But it seems to me that Fuller's criticism of Hart is at times obscured by a mere difference in emphasis that fails to see the forest for the trees.

The book's final chapter attempts to deal with the substantive morality of law; here Fuller touches on the neutrality of the law's internal morality towards substantive aims, legality as a condition of efficiency, legality and justice, the limits of effective legal action, the problem of institutional design, and finally, the minimum content of a substantive natural law. Fuller notes here that Hart, in his *Concept of Law*, presents a minimum content of natural law, starting with the single objective of human survival, from which a comprehensive set of rules may be derived by purposive implication; and then denies the validity of this theory. For Fuller, *communication* between human beings would be the fundamental principle, rather than mere survival, and as a necessary condition for survival. Here one senses that Fuller may be on the brink of some new insight, but unfortunately the book

closes without relating the objective of communication to linguistic analysis, the new behavioural science of general semantics, or the use of symbolic logic in legal theory, all areas of great potential development. Fuller's last paragraphs state the objective of communication as the central principle of substantive natural law in what might be termed an existentialist direction, perhaps only one step removed from Martin Buber's formulation of the I - Thou relationship. On this note, the last chapter ends.

The book contains an appendix, "The Problem of the Grudge Informer", one of Fuller's imaginary cases or problems, this one based on a very real situation which existed in Nazi Germany at the end of the World War II³.

The Morality of Law should be read by all those concerned with the problems of jurisprudence. It will stimulate and provide pleasure, although it may at times digress to the point of apparent irrelevancy. It may well leave the reader in a mood of expectation, hoping for the advent of Fuller's *magnum opus*, a definitive exposition of his own modern philosophy of natural law.

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³ See *Puttfarken's Case*, discussed in an article by Gustav Radbruch in the *Süddeutsche Juristen-Zeitung*, Vol. 1, p. 105, August 1946; another German "informer" case is discussed in (1951) 64 *Harv. L. Rev.* 1005.

CASE and COMMENT