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The Morality of Law, by Lon L. Fuller

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BOOK REVIEWS

THE MORALITY OF LAW. By Lon L. Fuller. New Haven, Connecticut: Yale University Press. 1964. Pp. viii, 202. \$5.00.

American society since the early 1930's has been subjected to the stresses and strains which are inherent in a widespread modification of long adhered to tenets of legal doctrine. Within the last decade the rapidity of change appears to have gained momentum. By the beginning of the 1960's, change rather than consistency seems to have become one of the characteristics of the American legal system. Many of the changes have had an especially stunning impact upon the thinking of individuals who had previously supported the role assigned to law in American society. A large number of Americans have experienced a great deal of unpleasantness in adapting to the harsh realization that principles which they had regarded as fundamentally correct and immutable have been swept away. In their place stand novel ideas not tested by mankind's experience but promising a better tomorrow. In this setting it is not surprising to find that one of the nation's foremost legal philosophers has turned his attention to the formulation of a set of standards which he believes can be employed in determining the propriety of our current and future rules governing human activity.

In an era when Kierkegaard's fear that "'statistics' (majority vote) would replace ethics"¹ may in fact become a reality, Lon Fuller in *The Morality of Law*² has proposed a set of principles which he asserts should be used to decide the propriety of legal doctrines, popular will to the contrary notwithstanding. Instead of arguing for expanded acceptance of the techniques offered by the proponents of jurimetrics and the utilization of the tools of the physical scientists in the formulation of legal rules, Fuller calls for increased recognition of the idea that law is basically a technique of balancing mankind's conflicting objectives. He asserts that law cannot be evaluated in terms of absolutes. When administrators, legislators, or judges are called upon to announce a rule of law, Fuller asks that they keep in mind the fact that, whatever principle they may

1. SHUMAN, LEGAL POSITIVISM: ITS SCOPE AND LIMITATIONS 132 (1963).

2. "This book is based on lectures given at the Yale Law School in April 1963." FULLER, THE MORALITY OF LAW v. (1964) [hereinafter cited as FULLER]. Fuller states that he preserved in this book the lecture form; and accordingly, he writes, the reader is exposed to the congenial lecture form which permits an informal and argumentative presentation.

ultimately accept, in most instances it was but one of several available alternatives. He requests that the arbiter not lose sight of the fact that in the course of arriving at his decision he was compelled to engage in a process of compromise and accommodation of conflicting objectives. His final judgment should not be viewed as the only possible solution. Properly, it should be regarded as nothing more than the most desirable when tested by the standards used by the decision maker. It is in this context of picking and choosing from among a number of possible alternatives that Fuller calls for the consideration of the standards which he has formulated to guide the lawmakers in their promulgation of legal principles.

Early in his book Fuller comes to grips with the question of the relationship between law and morality. He elects to subdivide the term morality into four different categories, lumping them into what can be described as two different sets of morality, each set having two opposite components. One set contains the "morality of aspiration" and the "morality of duty."³ The components of this division are somewhat comparable to the approach employed by other authors in their attempt to distinguish the terms morality and ethics. They have used the term morality to describe the standards actually followed by human beings at a particular time and place, while the word ethics has been employed to connote a desired norm of human conduct independent of any consideration of actual current human activities.⁴ Fuller's "morality of aspiration" is comparable to the foregoing concept of ethics while his "morality of duty" is similar to the meaning ascribed to the term morality. In spite of the resemblance between Fuller's terms and the approach of other writers, the "morality of aspiration" and the "morality of duty" cannot in every instance be used interchangeably with the foregoing definitions of morality and ethics.⁵

Fuller's second set of moralities contains what he calls the "external morality of law" and the "internal morality of law." The "internal morality of law" is essentially concerned with the procedure of making law. It is the technique used by the lawmaker in deciding which rule of

3. This breakdown is similar to the approach of Henri Bergson. Bergson wrote that morality may result from pressure or aspiration and he described what he called the law of pressure and the law of aspiration. Bergson saw each of these giving rise to distinct forms of morality. Fuller sees the "morality of aspiration" and the "morality of duty" giving rise to different standards of prescribed conduct. Bergson's thinking appears in *THE TWO SOURCES OF MORALITY AND RELIGION* (1956). Bergson's approach is explored by Jacques Maritain in *MORAL PHILOSOPHY* (1964).

4. *E.g.*, *PATTERNS OF ETHICS IN AMERICA TODAY* (Johnson ed. 1960).

5. A different concept of the relationship between ethics and morality is expressed in the following statement: "Ethical principles and moral ends acquire whatever weight or importance they appear to possess as a result of certain human decisions." SWANS, *AN ANALYSIS OF MORALS* 36 (1960).

substantive law should be applied to the particular case which he has been called upon to decide. The "external morality of law" refers to the content of the substantive rules of law which are actually applied by the arbiter in arriving at his decision. Just as at times it is difficult to clearly distinguish between adjective and substantive law, so too one may find Fuller's distinction between "external morality" and "internal morality" lacking the kind of specificity which might be desirable. Fuller admits the absence of such precision, finding it to be unavoidable due to the structure of our legal system.

The "morality of aspiration," to a great extent, is comparable to what might be regarded by some as the pro forma approach of the natural law theorists. Just as an exponent of the natural law theory may find that a particular command of a sovereign is not to be classified as law as the proponents of this school define law,⁶ so too might the norms demanded by the "morality of aspiration" demand something not required by the "morality of duty." As far as Fuller is concerned, the "morality of aspiration" is keyed to the needs and desires of the individual which would serve to promote man's best interests. Legal principles would satisfy this brand of morality if they advanced the full realization of human powers by bringing out the finest traits which individuals have to offer. The "morality of duty," on the other hand, demands just enough of the individual so as to insure the orderly functioning of society. The epitome of the propriety of human conduct would find expression in rules predicated on the requirements of the "morality of aspiration." In Fuller's opinion the need to insure an orderly society demands the minimum essentials required for such an objective. Therefore, he argues, legal principles formulated to attain this objective should be based upon the "morality of duty."

Fuller is patently a proponent of a conservative approach to the proliferation of legal mandates in relation to the regulation of human endeavor, especially in those areas which were previously free from the commands of the law. There are ways and means to attain society's ends other than by resort to law, this legal philosopher insists. He claims that the lawmakers must realize this if they are to make the most efficient use

6. An excellent examination of the natural law thinking as to which commands are to be regarded as law appears in CAHN, *THE SENSE OF INJUSTICE* 3-50 (1949).

7. A similar subdivision was made by Edmund Cahn in *THE MORAL DECISION* (1955), wherein Cahn distinguished law and morality in the following manner: Law is a device to enforce the minimum standards of moral behavior which are indispensable for the existence of the community while morality deals with standards which are suitable for the action of an ideal human being. Law, according to Cahn, governs the external conduct of a reasonable or generic man while morality relates to subjective intentions. *Id.* at 38-46.

of the law as an instrumentality in the ordering of our society. Fuller asserts that those who make law should exercise restraint in establishing laws directed at regulating the conduct of individuals. He admonishes the lawgiver not to confuse the "morality of aspiration" with the "morality of duty." In what might be described as a *laissez-faire* attitude, Fuller declares that for the most part law should be directed basically at the "morality of duty" rather than the "morality of aspiration." Excessive emphasis on the latter, he believes, would prevent the proper utilization of the law. Conceding that the "morality of duty" does draw upon the "morality of aspiration," he calls for a constant awareness of the fact that too great a concern with the aspirations of mankind can result in the promulgation of unsatisfactory legal principles.

The author expresses a fear that if too much attention is paid to the "morality of aspiration" society may establish a body of law which will prescribe too many do's and do not's in too many areas of human activity. Such a legal system, he believes, can prevent the individual from developing to the full potential of his capabilities. Too many do not's, he says, can stifle experimentation, prevent a person from exercising his creative talents, and prevent the freedom of action which is necessary to advance the best interests of mankind. Laws which demand too much of the human being can result in a rigidity which in practice can frustrate the attainment of society's sought after goals.

Fuller rejects the positivist approach to the law. Contrary to the thinking of the legal positivists, he asserts that not all mandates of those who possess the power to compel compliance with their directions can rightfully be classified as law. He excludes the requisites of authority to command and the power to force compliance from his thinking as to what in fact constitutes law. In reading Fuller's assertion that the bare existence of a directive of a sovereign is not of itself law since its presence does not insure obedience, one cannot help but think of the anti-gambling statutes, Sunday laws, and other types of prohibitory legislation which in many instances not only are constantly violated by the individuals against whom they are directed but also are constantly being flouted by those persons who are charged with their enforcement. A classical illustration of the proposition that law as prescribed is not in all instances the measure of human conduct is the people's response to the command embodied in the eighteenth amendment to the Constitution.

Having exposed the reader to the concepts of natural law thinking and the existence of a base against which to test the propriety of rules directed at regulating human conduct, Fuller proceeds to a study of the "internal morality of law." For a principle to be acceptable as a law, he

states that it must be measured in terms of the following eight standards:

(1) The principle must be expounded in a manner so that it can be generally applied. A patternless *ad hoc* system of law lacks the desired "internal morality" which legal principles should possess. This proposition is comparable to the often read statement that our government is a government of laws rather than men.

(2) The mandates of the law must be communicated to the people to whom they are directed. Fuller calls this "promulgation."

(3) Newly announced principles of law, except on rare occasions, should be applied only in a prospective manner. Retroactive application of changes in prescribed norms, subject to the presence of compelling extenuating circumstances, should be avoided.

(4) Standards of action and inaction should be clearly stated. Fuller concedes that the lawmaker cannot specify with absolute clarity exactly what is demanded of each individual in every instance when the law may affect him. He does, however, assert that the duty to clarify the law should be delegated to the enforcement bodies only to the extent that such action is required by the environment in which the law must operate.

(5) Arguing that respect for the law calls for consistency, Fuller maintains that the originators of laws should take great pains to see that the body of law is as free as possible from contradictory mandates,

(6) Emphasizing that law is tied to the capabilities of human beings, Fuller insists that those who prescribe the norms required of individuals must refrain from imposing impossible standards of action or inaction. A stated norm which demands an absurd course of action would violate Fuller's idea of the "internal morality of law."

(7) While *stare decisis*, of recent date, has been viewed by some, if not many people, as a barrier on the pathways to needed change, Fuller is of the opinion that abiding by previously announced norms is desirable in and of itself. He finds that frequency of change, by its very nature, tends to have a deleterious impact upon the persons who are subjected to an abrupt alteration of the requirements which the law imposes upon them.

(8) The student of American history is familiar with Andrew Jackson's assertion to the effect that while the Supreme Court might render a judgment, it lacked the means by which it might be implemented. Fuller writes that if the law is to attain its objectives it must satisfy the requirement of "congruence"; that is, consistency between the actions of those called upon to enforce its commands and the verbally prescribed norms. If the proclamation of the lawgiver is not enforced, whether it be due to incompetence or the intention of those charged with the duty of

enforcing the law, then the law in Fuller's opinion lacks "internal morality."

By calling for "internal morality" of our legal system in terms of the foregoing criteria, is Fuller calling for a fundamental change in American jurisprudence? Are these concepts foreign to current legal thinking in the United States? Both of these questions call for a negative response. In setting forth these eight rules Fuller has explained, explored, and clarified what is substantially the practice presently being observed by most of our jurists. There is a great deal of similarity between what Fuller has written and the approach of the Supreme Court of the United States in reference to the procedural requirements demanded by the fifth and fourteenth amendments to the federal constitution.

Traditionally, common-law principles have been couched in general terms. This is brought home to the neophyte student of the law when he first comes in contact with the concept of reasonableness in the law of contracts and torts. Perhaps Fuller is seeking to express his concern over the great proliferation of statutory law which has stressed individual differences rather than similarities. Specification, according to Fuller, if overemphasized, is undesirable. Indicative of the fact that the fundamental technique of our legal system is generality rather than specificity is the Constitutional prohibition relating to bills of attainder.⁸ The "egalitarian drive" manifested by the Supreme Court and of late the Congress is patently an expression of the concept to have, to the greatest degree possible, all persons treated in an equal manner unless there are meaningful differences between them.⁹

Fuller does not state which one of his eight postulates should be given preference over any other. He does not rank them in any order of importance. How, then, should they be applied? He calls for a conscious balancing and the recognition of the need to accommodate each of these objectives which, he admits, at times may conflict with one another. Depending on the circumstances, one or more of the proposed standards might at any one time have to be subordinated to the demands of another if a particular societal goal is to be attained. Fuller asks that the lawmaker consider each of these eight tests in arriving at his determination in the particular factual setting in which he is compelled to operate. Fuller emphasizes that the judge, the legislator, and the executive must appreciate the necessity of making a choice in considering the use of his

8. U.S. CONST. art. I, § 9, prohibits the Congress from enacting bills of attainder and contains a similar prohibition on state activity. U.S. CONST. art. I, § 10.

9. For a discussion of what has been depicted as the "Egalitarian Revolution," see Kurland, *The Supreme Court 1963 Term*, 78 HARV. L. REV. 143 (1964).

stated standards as a means of attaining "internal morality" in our legal system.

Fuller labels each one of his eight standards as a desideratum. Why did he feel the need to set forth the stated desiderata? The answer can be found in his assertion that he regards himself as a "qualified natural law" theorist, rather than an unequivocal adherent to the tenets of the natural law school of legal philosophy. Fuller's brand of natural law omits the concept that there are certain principles which can be traced back to the commands of a Supreme Being by which the propriety of stated rules of human conduct can be measured. He also rejects the concept that there are certain immutable, timeless, and universally correct rules which govern all human conduct. Law, declares Fuller, is "terrestrial" in origin and application. Law is what mankind wants. It is man made. Fuller's approach to natural law and his formulation of eight desiderata may negate the apprehension of those persons who see natural law as nothing more than the subjective opinion of the specific individuals who are called upon by society to establish rules of human conduct. By stating what seems to be a series of objective standards Fuller gives those who refuse to reject traditional natural law in its entirety a calm and friendly harbor where they can cast anchor pending their ultimate decision as to which school of legal philosophy is the most meaningful to them.

Knowing Fuller regards himself as a qualified natural law theorist prepares one for his definition of law as "the enterprise of subjecting human conduct to the governance of rules." By omitting the elements of force and coercion, he rejects in one broad sweep the thinking of Hobbes, Austin, and Kelsen. Fuller would classify as law any rule which has as its objective the ordering of human activity, whether it be a mandate of a university in regard to student activities or the command of a yacht club to its members. Admitting that there are distinctions between what he calls "formal" laws and the directions of those who cannot compel compliance through the machinery of a government sponsored procedure, he maintains that the eight standards he proposes are applicable to both. Fuller finds in all law a unity of purpose, the regulation of human conduct to attain society's objectives. Insisting that all laws have a purpose, he maintains that even among diverse societies there will be a degree of similarity in regard to their laws. Since men are similar, their laws will tend to be alike. On the other hand, and contrary to the natural law theory in its pristine form, he admits that a single and simple uniform set of rules may fail to satisfy his own standards due to the varia-

tions among individuals and cultures which must be taken into account in formulating legal doctrines.

In the final chapter of his book, Fuller throws open the question of the techniques which should be employed in order to evaluate the propriety of substantive rules of law. He asks if substantive rules of law can be neutral, that is, devoid of any relationship to morality. His answer is apparently no. Unfortunately he does not formulate any desiderata for this area of the law. Instead, he writes in terms of fundamental objectives. He states that substantive rules, to be moral (that is, satisfy the demands of "external morality"), must promote the objectives of mankind. He maintains that "external morality" does not preclude change. Law must be sufficiently fluid to adjust to the dynamic nature of the human being. A rule of conduct cannot be moral if it fails to take into consideration the nature of man.

In relation to certain areas of human activity he maintains that the government has no role to play, arguing that other means exist which can more appropriately be utilized to attain desired objectives. Fuller viewed *Baker v. Carr*¹⁰ as a limited intrusion by the law into an area best left to other forms of regulation. He classified representation in the legislative branch of government as an issue too complex for the tools available to the judicial process. He concluded that the Supreme Court would refrain from extending *Baker v. Carr*. In a series of decisions which were delivered in the course of the 1963 term of the Court, the Court took a position diametrically opposed to Fuller's approach to the role of the judiciary in this area.¹¹ By arguing that the nation would best be served by having the people use means other than the law to effect a change in legislative representation, Fuller seems to have underestimated the willingness of the current members of the Supreme Court to apply the judicial process to difficult and controversial spheres of public concern.¹² In terms of the effective use of the law, Fuller's attitude may in time prove to be more acceptable than the present Court's manner of resolving this particular question. For the present, however, the Court has indicated a willingness to use the law to resolve what some may still classify as an essentially political question.

Fuller carries forward his proposition that the lawmaker must distinguish the "morality of duty" from the "morality of aspiration" into the substantive segment of the law. If the law is to play its proper role,

10. 369 U.S. 186 (1962).

11. See *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

12. The Court had previously adopted Fuller's attitude in *Colegrove v. Green*, 328 U.S. 549 (1946).

he argues, it must, so to speak, "know its place." If those who make the law use the machinery of the law to regulate human activity to such an extent that its demands upon the individual are excessive, then the law lacks morality. Societal arrangements when supported by law should have as their prime objective the survival of the human being.

Can a protagonist of a qualified natural law approach to the law accept the thinking of the existentialist school of philosophy? Judging by Fuller's conclusion as to the ultimate objective of substantive law, it appears that he can. Although the term "existentialist" has been ascribed a variety of meanings, for the most part existentialist writers concern themselves with the alienation of man, his inability to communicate with his fellow human beings, and the difficulty of finding a satisfactory explanation for man's existence. Fuller, in his attempt to set forth what he considers to be a fundamental objective of substantive law, neatly intertwines natural law and existentialism, writing:

If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law—Natural Law with capital letters—I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire. On this matter the morality of aspiration offers more good counsel and the challenge of excellence. It here speaks with the imperious voice as we are accustomed to hear from the morality of duty. And if men listen, that voice, unlike that of the morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another.¹³

After having read the foregoing and considered it for a while, one almost inescapably comes to the conclusion that perhaps the most significant contribution made by Fuller in this book is his call to battle for what, for lack of a better term, might be termed the "socializing" of the law. In this context, "socializing" is not intended to mean more government action, but rather the attempt to integrate the society of mankind so that men can live together and talk with one another instead of living in spite of one another and talking at one another. Fuller suggests that the law be used to bring men closer together and assumedly the best interests of all men will thereby be fostered. In the current world environment this proposal is indeed in order.

After having presented his proposals to the reader, Fuller in what is

13. FULLER at 186.

entitled, "Appendix: The Problem of the Grudge Informer," raises a hypothetical problem for which he offers five different solutions. To select which of the alternatives is most appropriate one must decide the extent to which he accepts Fuller's philosophy of law. I would suggest that the reader examine the Appendix before studying the preceding chapters and write down the alternative he views as appropriate. He should also make a brief statement as to why he chose the particular solution rather than any other. Many readers, I believe, will approach the posed problem in a different manner after they have read what precedes it.

One should not feel surprise if having finished reading Fuller's book, he experiences the following two sensations:

(1) He will henceforth pay greater attention to the idea that the law is just one of the means available to mankind to solve its problems. The next time the reader hears someone say: "There ought to be a law," he will have to go through the throes of a personal evaluation of alternative remedies before he answers, "I agree."

(2) He will want to do a great deal of studying in the areas dealing with morality, ethics, natural law, existentialism, and sociology. Action of this nature should enhance the value of the law as a problem solving device whether the reader is a student, a lawyer, a judge, a legislator, an administrator, a member of the executive branch of government, or one of those persons against whom laws are directed.

Fuller has done a great deal of analyzing, rejecting, formulating, and evaluating in the preparation of the material contained in this comparatively thin volume. For the beginner as well as the seasoned student of legal philosophy, *The Morality of Law* contains an excellent assortment of ideas demanding further thought. I suggest that this philosophical offering be examined very soon. The sooner one completes his reading of this book, the sooner he will turn his attention away from thinking exclusively in terms of "what is the law in this case" and will instead ponder: "Is the present legal principle satisfactory; if not, why not; and what are the available alternatives?" The greater the number of people who engage in this kind of thinking, the closer mankind will come to attaining desirable human objectives.

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