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INTRODUCTION TO THE MORALITY OF LAW

By JOHN E. MURRAY, JR.†

THIS INTRODUCTION is designed for the reader who has not read Professor Fuller's book. Absent a skeletal presentation of the ideas in the book, the reader could experience great difficulty in comprehending the papers which follow. Certain *caveats* are in order: (1) There is no substitute for reading the book. This introduction can only alert the reader to certain fundamental concepts found therein. The rich use of analogy and simile should not be and is not duplicated. (2) This effort attempts to report the basic concepts of the work as objectively as possible. To this end, the language of the book itself was used whenever possible. However, as Professor Fuller himself would urge, any such effort must be a report not only of what the book is, but, in some measure, what the reporter thinks it ought to be. (3) Significant portions of the book are not mentioned in this introduction because of space limitations. For this reason and the others mentioned above, it would be unfair to evaluate the book on the basis of this introduction.

CHAPTER I. THE TWO MORALITIES

The principal motivation for the book was the author's dissatisfaction with existing literature concerning the relationship between law and morality. Chapter I deals with one of the reasons for such dissatisfaction, to wit, a failure to clarify the meaning of morality itself.

There is a distinction between the morality of duty and the morality of aspiration. The morality of duty lays down the basic rules without which an ordered society is impossible. Essentially, its language is that of the Ten Commandments, "Thou shalt not." It condemns men for failing to respect the basic requirements of living in society. A failure to fulfill one or more of these requirements would be wrongdoing. On the other hand, the morality of aspiration is the morality of excellence, of the fullest realization of human powers. A failure to realize one or more of these powers would not be wrongdoing, it would be shortcoming or a failure to actualize potential.

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The law cannot compel a man to fulfill his potential. The workable standards of judgment which the law must use can be found only in the morality of duty. A man cannot be compelled to live the life of reason. Only the more obvious manifestations of chance and irrationality can be excluded from his life by the law so as to create the necessary but not the sufficient conditions for a rational human existence.

One significant manifestation of the distinction between the two moralities can be found in our notion of rewards and punishments. An individual is not praised or rewarded for fulfilling the requirements of the morality of duty. Here, we are operating at the lower levels of human achievement and an individual is punished for any failure to fulfill these requirements. At the higher levels of human achievement, however, an individual *is* praised or rewarded for his accomplishment. He is not punished for a failure to accomplish excellence. When dealing with a violation of the morality of duty, the wrongdoing is comparatively clear. Thus, the process of meting out punishments is surrounded with *objective* tests often listed under the heading, "due process." However, when dealing with the morality of aspiration, many difficulties beset any individual or group charged with the responsibility of determining excellence. The deciders must be carefully chosen. It is, perhaps, desirable if the deciders themselves have manifested such excellence at some time because the judgment they render is essentially *subjective* and intuitive. The closer a man comes to the highest reaches of human achievement, the less competent others become in their ability to judge his performance.

One may envision a moral scale which begins at the bottom with the most obvious demands of social living. From this bottom point, the scale ascends with more manifestations of the morality of duty. However, at some point, the morality of duty ends and the higher demands of the morality of aspiration begin. Where should the dividing line be placed to indicate that duty leaves off and the challenge of excellence begins? Controversy over the placement of this dividing line has dominated the whole field of moral argument. The controversy has been needlessly complicated by a confusion of thought. This confusion is based upon the assumption that we cannot know what is bad without knowing the perfectly good, that is, moral duties cannot be discerned absent a comprehensive morality of aspiration. This assumption is shown to be fallacious by elementary human experience. The injunction against killing does not suggest a picture of the perfect life. Yes, we are very much aware that no conceivable morality

of aspiration can be attained if men kill each other. Another example is found in the field of linguistics. While the perfect language has not been realized, we are not prevented from struggling against corruptions of usage which destroy meaningful distinctions. Thus, with social rules and institutions, we can know what is plainly unjust without committing ourselves to declare with finality what perfect justice is.

CHAPTER II. THE MORALITY THAT MAKES LAW POSSIBLE

This chapter begins with a lengthy allegory concerning the unhappy monarch, Rex. The primary concern of Rex was to reform the legal system of his kingdom which his predecessors had badly neglected. Thus, Rex attempted in eight distinct ways to create and maintain a system of legal rules. Each of these efforts contained a serious defect which resulted in failure. There are eight correlative kinds of legal excellence toward which a system of rules may strive: (1) the requirement of generality, that is, there must be general rules; (2) the promulgation of the rules; (3) the prospective application of law; (4) the clarity of laws; (5) avoidance of contradictions in the laws, that is, consistency in laws is necessary; (6) avoidance of laws commanding the impossible; (7) the constancy of law through time, that is, avoidance of too frequent changes in the law; (8) the congruence between official action and declared rule, that is, prevention of discrepancy between the law as declared and the law as actually administered.

These eight principles of legality constitute the inner morality of law, "the morality that makes law possible." They are standards of excellence. They are arrived at not by reference to any external standard of morality or the substantive aims of the law. Rather, since law is the enterprise of subjecting human conduct to the governance of rules, the eight *desiderata* were distilled from a realistic consideration of what is essential for this purposeful activity.

The inner morality of law is affirmative and creative in nature: make the law known, make it coherent and clear, etc. But it is difficult to realize these demands in terms of duty. For example, the notion of subjecting clarity to quantitative measurement presents obvious difficulties. Thus, with the exception of the second principle, promulgation (which does lend itself to formalization), the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.

The eight *desiderata* are not absolute. An occasional departure from one or more of them may be insignificant or, under some circumstances, even necessary.

CHAPTER III. THE CONCEPT OF LAW

To further clarify what has been said, this chapter seeks to place the analysis of Chapter II into its proper relation with prevailing legal theories.

Does the inner morality of law represent some variety of natural law? "The answer is an emphatic though qualified, yes." The eight principles which make up the inner morality of law set forth the natural laws of that human undertaking which is the enterprise of subjecting human conduct to the governance of rules. But they are not "higher" laws; if anything, they are "lower" laws. They have nothing to say about the substantive aims of legislation which involve the external morality of law. A convenient way of describing the distinction is to refer to the inner morality of law as a procedural version of natural law. Thinkers associated with the natural law tradition have treated the inner morality of law (legal morality or legality) in a casual and incidental fashion. They have been preoccupied with substantive natural law, that is, with the proper ends to be achieved through legal rules. They have tended to think of the principles of the inner morality of law as obvious. But these principles can be most difficult to apply. Thus, they must be brought together in an inclusive theory.

In relation to the treatment given legal morality by the positivists, no clear pattern emerges. For example, Austin and Bentham seemed much more concerned than Gray or Somló, who demonstrate extreme indifference toward the demands of legal morality.

There is one exception to the generalization that the principles of legality have received casual and incidental treatment. This is found in the literature of England during the seventeenth century when existing institutions underwent fundamental reappraisal. Herein lies the "natural law foundations" of the American Constitution. The literature was concerned almost entirely with the principles of the inner morality of law — laws impossible to be obeyed, repugnancies, etc. One example of this literature is *Dr. Bonham's* case, which is often regarded as the quintessence of the substantive natural law point of view. Yet, its heavy reliance upon procedures and institutional practices is a significant manifestation of the inner morality of law. The definition of law offered in this book is reiterated at this point:

"Law is the enterprise of subjecting human conduct to the governance of rules." This view treats law as an activity and regards the legal system as the product of a sustained purposive effort. Comparing this notion with other definitions of positive law, one finds that it rejects them. For example, when law is defined as the "existence of public order," there is no indication of what kind of order is meant or how it is brought about. When the distinguishing characteristic of law is said to be "force," there is no recognition that the use or non-use of force does not affect the essential problems of those who make and administer the laws. Other theories which concentrate on the hierarchic structure organizing and directing legal activity do not recognize that the structure itself is the product of the activity it is thought to order.

CHAPTER IV. THE SUBSTANTIVE AIMS OF LAW

The two distinctions which have been insisted upon up to now are the distinction between the moralities of duty and aspiration and the distinction between the internal and external moralities of law. One of the principal tasks of this chapter is to determine how the internal and external moralities of law interact.

Over a wide range of issues, the law's internal morality is indifferent toward the substantive aims of law and will serve a variety of such aims with equal efficacy. However, this should not be taken to mean that *any* substantive aim may be adopted absent a compromise of legal morality. Many writers, typified by H. L. A. Hart, deny any possible interaction between the internal and external moralities of law. This is usually asserted without examples about which some meaningful discussion might turn. Hart's typical view is that problems of legal morality deserve no more than casual and passing consideration. This chapter is concerned with restoring the intellectual channels which should connect the problem of legality with other major issues of legal philosophy.

Implicit in the second chapter of this work wherein the eight principles of inner morality were suggested is the thought that the internal morality of law is not something added to the power of law, but is an essential condition of that power itself. Thus, law is a precondition of good law. A conscientious carpenter might devote himself to building a hang-out for thieves or an orphans' asylum. But it takes a carpenter to build an orphans' asylum and it will be a better asylum if he is a skilled craftsman with good tools. The insistence upon the obvious proposition that some minimum adherence to legal morality

is essential for the practical efficacy of law is due to the fact that it is so often passed over in contexts where it should be made explicit.

One deep affinity between legal morality (legality) and justice has often been suggested even by writers such as H. L. A. Hart. The quality shared by both concepts is that they act by known rule. The internal morality of law demands that there be rules, that they be made known and that they be observed in practice by those charged with their administration. While these demands seem ethically neutral so far as the external morality of law is concerned, just as law is a precondition of good law, acting by known rule is a precondition for any meaningful appraisal of the justice of law.

Another interaction between the internal and external moralities is seen when the simple demand that rules of law be expressed in intelligible terms is applied to a situation where the lawmaker cannot plainly identify the target at which his law is directed. Obviously, he will have difficulty in making his laws clear.

The most significant aspect of the interaction between the demands of legal morality and the substantive aims of law is found in the view of man implicit in the internal morality of law. While legal morality can be neutral over a wide range of ethical issues, it cannot be neutral in its view of man himself. If law is the enterprise of subjecting human conduct to the governance of rules, this necessarily implies that man is a responsible agent, capable of understanding and following rules, and answerable for his defaults. The view typified by B. F. Skinner's writings that man is not a free agent and therefore cannot be told to be good but only conditioned to be good is based on an overreaching of science and a most naive epistemology.

In summation, an acceptance of the internal morality of law is a necessary though insufficient condition for the realization of justice. When an attempt is made to express blind hatreds through legal rules, the internal morality of law is violated. Legal morality articulates a view of man's nature that is indispensable to law and morality alike.

The suggestion made earlier that the internal morality of law presented a kind of natural law was explained by the convenient terminology, "procedural natural law." It was also suggested that, except for promulgation, the principles of legal morality were condemned to remain principles of the morality of aspiration. The final question is whether we can derive from the morality of aspiration itself any proposition of natural law that is substantive, rather than procedural in quality. The one central indisputable element of natural law is found in man's ability to communicate with his fellows. This is what

has enabled man to emerge victoriously in competition with other creatures. Man can acquire and transmit knowledge and deliberately effect a coordination of effort with other human beings. Thus, the one central indisputable principle of substantive natural law is: "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."¹

1. FULLER, *THE MORALITY OF LAW*, 186 (1964).