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The Elusive Morality of Law

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THE ELUSIVE MORALITY OF LAW*

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I.

I WOULD like to begin by retelling Professor Fuller's story of Rex, because the arguments which develop from this lengthy parable seem to me to be the central arguments of his new book.

Initially Rex was a good-natured king who wished to make law for his subjects, but in executing his desire he committed eight discrete mistakes which proved his undoing. (1) He began by determining not to make rules, but to decide cases only *ad hoc;* (2) he then made rules, but kept them secret rather than publishing them; (3) next, he published them, but applied them only to cases arising before their publication; (4) then he published them prospectively, but in language which could not be understood by anyone; (5) next, he published them in clear language, but each rule was inconsistent with at least one other; (6) he then made his rules consistent, but the demands of each rule were such that compliance was literally impossible; (7) then he made compliance possible, but amended each rule so frequently that attempts at compliance were generally frustrated; (8) finally, his published law remained constant, but bore no relation to the standards he actually used as judge.

It will come as no surprise that Rex's administration ended in a kind of debacle. He was succeeded, I take it, by devotees of mechanical jurisprudence.

What conclusions shall we draw from this sorry history? One appropriate conclusion would be that the various canons of administration that Rex violated (the requirement that laws be reasonably clear, prospective, capable of being obeyed, etc.) are requirements not simply

* When I was asked to participate in this symposium I had already completed a manuscript for another law journal entitled "Philosophy, Morality and Law: Observations Prompted by Professor Fuller's Novel Claim." The editors of the symposium were kind enough to allow me to repeat, in capsule form, some of what I had to say in that article, as my formal symposium presentation. That article has since been published in 113 U. PA. L. REV. 668 (1965). There is therefore no need to reprint here my symposium remarks at any length. Instead, I have prepared a condensed summary of these remarks, which follows as Part I of this piece. This summary covers the substance of all my remarks at the symposium, and the principal points of my article, which were directed to Professor Fuller's book.

In Part II following, I have, at my own request, used some of the space thus saved to offer some further observations on Professor Fuller's symposium remarks (printed below) which followed my own. The reader may wish to read Professor Fuller's remarks before reading Part II.

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of making *good* law but of making anything which could be called law at all. In fact, Professor Fuller does draw this conclusion.

A second sensible conclusion would be that these canons are not only criterial, in the sense that some compliance is necessary to make law, but also strategic in the sense that some level of compliance is necessary to achieve whatever governmental purpose a legislator might have in mind.

The difficulty — but also the interest — of Professor Fuller's book stems from his desire to draw some conclusion from the story of Rex beyond these two conclusions. It is not clear what the additional conclusion is, but it is clear that it has something to do with morality. Professor Fuller describes the eight canons Rex violated as canons not merely of definition or strategy, but of "internal morality." Elsewhere (in the title of the key chapter of the book) he describes this "internal morality" as "the morality that makes law possible."

What can he mean by these claims? Of course a ruler or legislator might be morally at fault when he declines to abide by these canons. But this hardly means that any ruler or legislator who makes law has observed some sort of morality. Consider the case not of Rex but of Tex. (I use Tex as an abbreviation of Tyrannosaurus Rex.) Tex, let us suppose, has an evil mind. He is set upon wholly immoral ambitions — he wants, for example, to subjugate and enslave one portion of his population. If Tex made the stupid mistakes that Rex made, he would fail in this endeavor. His black purposes would be thwarted. So Tex, who is not stupid, complies with Professor Fuller's canons, at least to the extent necessary to succeed in his design. What sense can it make to say that he has complied with an "internal morality"? Or that a morality made his vicious law "possible"?

Some critics of Professor Fuller's earlier writing, troubled as I am by this bizarre use of the concept of morality, assume that he is using that concept in a special and generous way. They believe he means by morality nothing more than strategy, so that he would recognize a special morality of building a bridge or making a model airplane or doing anything else that it might come into one's head to do. I have chosen to reject this belittling interpretation of Professor Fuller's book.

Instead I take his argument to be this: The eight canons themselves state moral principles (using "moral" in a perfectly conventional sense). This is illustrated by the fact that some of the most notorious examples of political immorality — in Nazi Germany and South

Africa, for example — involved gross violations of one or more of these canons. We associate with each of these such injustices as retroactive capital offenses, trumped-up charges, and secret penal statutes. So we can conclude that these canons are in themselves moral principles. But we know from the history of Rex (as well as the history of Tex) that no legislator, even a despot, can disregard these canons entirely and succeeed. It follows that some compliance with moral principles is necessary to make law, even bad law.

I am not confident that this is the argument Fuller means to make in support of his claim that there is an "internal morality" which "makes law possible." Unfortunately his argument is not sufficiently clear to allow confidence in any interpretation. This argument is the most conservative and plausible that I can piece together in behalf of the claims he seems to be making. Nevertheless, this argument contains two related mistakes.

The first mistake is to conclude, from examples of political immorality which involve violations of the eight canons, that these canons state moral principles. Our feeling that a moral crime, rather than simply a tactical mistake, has been committed in such cases is based on some feature which makes the act in question not *just* a violation of one of Professor Fuller's canons but something more. If an official singles out a personal enemy, and punishes him on the basis of a law so confused, so vague or so inconsistent that the victim could not have understood the law when it was promulgated, that is immoral. It hardly follows that every time a legislature passes a statute which is inconsistent or vague that it has done anything in the least degree immoral. Indeed, in the case of Tex the moral position of all concerned might have been better had the discriminatory legislation been so inconsistent or vague that its enforcement was hampered. In the normal, everyday cases of poor legislative draftsmanship, no particular immorality is involved, even though a considerable degree of confusion and inefficiency results. Of course, a badly drafted statute might be put to uses having terrible moral implications, but that depends on the uses to which the statute is put, not merely the bad drafting.

Suppose, however, that we agree *arguendo* that Professor Fuller's eight canons do constitute moral principles in themselves. The argument we are considering would involve yet another mistake. For it would not follow from the fact that the canons state moral principles that a ruler like Tex who observed these canons only to the extent necessary to make bad law could be said to be complying with moral principles.

My point is that not every act which in some literal or artificial sense can be said to *coincide* with a moral principle can be regarded as an act in *compliance* with that principle. Some examples may serve to buttress this point. A blackmailer would fail in his dastardly objective unless he made his instructions clear and unambiguous. But even if we regard the canon which requires clarity as a moral principle, we cannot say that the blackmailer is complying with a moral principle in drafting his demands precisely. Consider a different example. It is a moral principle, let us suppose, that one must treat like cases alike. But if a ruler bent on genocide decides for practical reasons to kill all Jews, instead of sparing a few violinists as he was first tempted to do, we could not say that he had complied with a moral principle.

To say that someone has *complied* with a moral principle is to claim more than that his act falls in some mechanical way under such a principle. It is to claim that the moral principle supplies a moral reason counting in favor of (though perhaps not decisively) what he has done. This fact explains why Professor Fuller's claim — that making even bad law requires some compliance with moral principles — sounds like a significant claim. (It would hardly be a significant point if he meant merely that it requires acts which fall under moral principles in the mechanical sense in which correctly answering a spelling test falls under the moral principle that demands telling the truth.) But it also shows why Professor Fuller's claim must be wrong. Tex must, to be sure, frame his discriminatory legislation with some care and some consideration for the physical capacities of his subjects. In so doing he may be said to *comply* with *strategic* principles, but not with any *moral* principles, because Professor Fuller's canons would not offer even a shade of moral argument in favor of what he is doing.

Professor Fuller asked me to discuss one further subject in this symposium, that is, whether I recognize a *prima facie* moral obligation to obey the law. That question cannot be answered helpfully if asked in so ambiguous a form. Let me distinguish two possible views. I do not believe that everyone has even a *prima facie* moral obligation to obey law as such, in the sense in which everyone does have a *prima facie* moral obligation to keep his promise. I do believe, however, that most people in most places (I certainly include myself) have a *prima facie* moral obligation to obey the law of their community. This moral obligation rises not from the nature of law in the abstract but from a variety of different factors which vary in pertinence and force from community to community, sometimes even from situation to situation. The inherent virtue of what the law requires might be one such factor. Another might be obligations of fair play towards other members of

the community who have complied with the law. These seem to me the two principal factors, but others also play some role.

Professor Fuller apparently bases some argument for his claim that morality makes law possible on the citizen's moral obligation to obey the law. I understand that argument to proceed as follows: If citizens did not feel a moral obligation to obey the law, then law could not survive. But citizens could not feel a moral obligation to obey rules created in violation of Professor Fuller's eight canons.[1] Therefore these eight canons must be matters of morality, because compliance therewith is essential to the existence of other persons' moral obligations.

Surely this argument is fallacious. There is first the difficulty that law requires that people *feel* (not *have*) a moral obligation to obey it. And Professor Fuller does not wish to argue that everything is moral that rulers do to make their subjects feel obligated. Perhaps he could meet this objection by arguing that citizens will not feel a moral obligation for any length of time unless it is also the fact that they have such an obligation. But the argument still fails. It does not follow even from the fact that citizens *have* a moral obligation to obey the law that every condition to the existence of that moral obligation is itself a matter of morality. Of course I cannot have a moral obligation to obey today a law that is passed tomorrow. But that is because I cannot have a moral obligation to obey something that is not. I have no moral obligation to obey an order that a military superior gives me unless he has given me an order. That does not mean that he has done anything moral, that he has complied with any set of moral principles, in giving me the orders he has. If a commander or a legislator observes the "internal morality" of his discipline just enough to produce a command or a law, then there need be nothing moral about his act. He may, either out of perceived moral obligations, or for tactical reasons, observe the canons more scrupulously. But such additional care is neither necessary nor sufficient to ground a moral obligation to obey. One can have a moral obligation to obey a law which is just clear enough to be a law.

II.

My concern, both in my article and in the symposium, was with Professor Fuller's claim (as I understand it) that some sort of compliance with an internal morality is necessary to create law, even bad

1. One could not feel a moral obligation today to obey a law adopted tomorrow.

law. I tried to present what still seems to me the best argument that could be made in support of this claim. In his reply Professor Fuller did not (explicitly, in any event) reject my formulation of his claim. He did not reject the argument I proposed in its support, nor (so far as I can tell) did he advance any other argument. I identified two mistakes which I believe that argument involves, either of which, if I am correct, is sufficiently serious to invalidate it. Professor Fuller referred to only one of these alleged mistakes. He contested it, but I believe he misunderstood my point.

The alleged mistake that he contested is this. I suggested that his argument assumed that the eight canons of administration which Rex violated were moral principles. I pointed out that the examples of political immorality which he cited in support of this assumption showed only that sometimes, in certain contexts, violations of these canons are violations also of other principles that are moral principles. I argued that such citations could not support the claim that the eight canons of administration themselves stated moral principles.

Professor Fuller's reply shows that he takes me to be challenging the very idea of a special set of moral duties or ideals binding upon those who accept certain offices or participate in certain enterprises. He thinks I want to recognize only a few across-the-board moral precepts equally applicable to any context and constituting the whole of morality. But that position is not part of my argument. In fact, I think it important to recognize that special duties and ideals do attach to particular offices and institutions. The father, the trustee, the policeman and the ship's captain all assume special obligations which can reasonably be designated moral even though peculiar to these roles.[2]

Presumably Professor Fuller and I could agree on a long list of moral obligations and ideals which we would feel particularly appropriate to legislators, judges, administrators, supervisors, policemen and other participants in a legal or quasi-legal process. Professor Fuller has supplied a number of examples suggesting such obligations. He says, and I agree, that it is immoral for plant foremen or district attorneys to encourage violations of some rule by not enforcing it, so as to be able later to enforce it selectively against particular persons for ulterior purposes. The example supports the claim that there is a

2. It is, of course, another question why we feel entitled to call these obligations moral. In some cases it might be because they do reflect the application of more general moral principles to a particular complex of powers and expectations. In others, it might be because they are regarded by those concerned in that special way we associate with moral requirements. Perhaps in most cases we call these special obligations moral because of some combination of these two features.

moral principle[3] prohibiting deliberate entrapment. Such examples and principles might be multiplied and developed in several directions.

I do not quarrel, then, with the proposition that there is a morality particularly concerned with law and its enforcement. I differ with Professor Fuller *only* in denying that the very abstract canons he has produced (that laws should be clear, public, prospective, enforced as written, etc.) in and of themselves are principles of this morality. My reasons for differing with Professor Fuller on this score are set out in Part I above. But as I said there, this issue is of limited importance. Even if we regard Professor Fuller's eight canons as moral principles, his claim does not follow, because even then he cannot show that acts of legislation necessarily involve anything that can be called *compliance* with moral principles. Professor Fuller's failure to see this is what I called his second mistake, and I refer to my discussion thereof in Part I.[4]

For this reason, it would not improve his argument even if he were to abandon his present eight canons and substitute a set of new canons that did state principles of legal morality.[5] Substituting this new set of canons would simply relocate the same difficulty. His present argument depends on the claim that making law necessarily involves compliance with his canons. That claim is plausible only so long as we regard these canons as strategic and *not* as moral. Rex failed when he made *all* his laws *only* retroactive. This is taken as demonstrating that some compliance with a canon requiring prospective law is necessary. But *that* follows only if any law which is prospective (even one which is also retroactive) represents a compliance with that canon. It does so only if that canon is taken in a strategic sense. It does not, as I have tried to show, if the compliance demanded is what we would call compliance with a moral principle.

If Professor Fuller were to substitute a set of moral principles for his present canons, he would have to abandon his claim that obedience to his canons is necessary to make even bad law. Of course, even a tyrant must make *some* laws prospective, cannot frame *every* law so as to deceive by ambiguity, cannot tempt particular victims by enforcing *no* laws generally. But the cases in which he makes his evil laws prospective and precise, and enforces them relentlessly and without discrimination, simply cannot be regarded as cases in which

3. I have no objection to saying it is a principle particularly appropriate to prosecutorial officials.

4. See text at p. 632 *supra*.

5. Such a new set would include, presumably, a principle prohibiting punishment based on *ex post facto* laws, a principle of prohibiting selective enforcement for ulterior purposes, and a principle prohibiting deliberate entrapment.

he has complied with moral principles condemning *ex post facto* criminal punishment, deception or entrapment. The blackmail and genocide examples used to illustrate this in Part I are equally apposite here.[6]

I conclude that Professor Fuller faces a dilemma. He wants to show that making even bad law requires some compliance with principles of morality. When he produces principles compliance with which is indeed necessary to law, they turn out to be strategic or criterial rather than moral principles. When he insists on considering them moral principles (or substitutes for them principles which are moral) he is no longer able to show that compliance with them is necessary to law.

I have been assuming, of course, that Professor Fuller does want to show that compliance with moral principles is necessary to make even bad law. As I pointed out earlier, I made this assumption apparent and Professor Fuller did not reject it. Some of his remarks during the symposium, however, give me pause. In speaking not about the portion of the book with which I have been concerned, but about another, isolated section in which he discusses the connection between his internal morality and what he calls the substantive morality of law,[7] he remarked that the connection he sees between these two moralities is not a "necessary" connection but merely a "natural affinity." Is it possible that he means also to claim, not, as I have been assuming, that some compliance with internal morality is necessary to legislation, but only that there is a "natural affinity" here also? It is unclear what this last claim would mean — possibly simply that legislators and other legal officers have such moral obligations which they ought to recognize, or that historically most such officers have acknowledged and complied with such moral obligations, or that those who did so produced fairer and more durable legal systems.

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6. See text at p. 634 *supra*.

7. Although I did not discuss this portion of Fuller's book at the symposium, I did make the point, in my article, that Professor Fuller apparently was not arguing for any kind of necessary connection between the two moralities. Dworkin, *op. cit. supra* n.1, at 671–73. I stressed this in noting that Professor Fuller's arguments here were not responsive to Professor Herbert Hart's remark, which Professor Fuller cited, that internal morality is consistent with very great inequity. Professor Fuller has expressed himself as unhappy with the way I summarized one of the arguments he makes in this connection. This is the argument on pages 157–59 of his book, which I summarized as involving the tyrant's fear of publicity. I had thought, from the examples used by Professor Fuller in these paragraphs, that the full paragraph on page 159, which Professor Fuller believes I ignored, expressed a different, additional point: that "even if a man is answerable only to his own conscience he will answer more responsibly if he is compelled to articulate the principles on which he acts." This additional point hardly makes his case against Professor Hart any stronger. I suppose that tyrants are quite often restrained by a fear of outraged public opinion, but it is one of the unpleasant aspects of despotism that the tyrant's conscience is rarely an equally powerful restraint.

I would be reluctant to accept this watered-down interpretation of his position, for it makes nonsense of a good deal of his rhetoric — what then would be the sense of his grand characterization: "the morality that makes law possible"? Furthermore it makes the elaborate and apparently pivotal story of Rex pointless. That kind of imaginary and artificial *reductio* is pertinent to establishing a conceptual claim of the sort I have assumed, but it is beside the point in arguing for the sort of historical or evaluative claim suggested by his concept of "natural affinity."

There is another reason for resisting this watered-down interpretation. If we take him to be arguing merely for some form of "natural affinity" — merely that legal officials have moral obligations, or that most of them recognize such obligations, or that their citizenry is better off if they do — we must take him to be arguing strenuously for a point I can conceive of no one disputing.