



1965

Law, Morality and Purpose

Marshall Cohen

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

Marshall Cohen, *Law, Morality and Purpose*, 10 Vill. L. Rev. 640 (1965).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol10/iss4/4>

This Symposia is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

LAW, MORALITY AND PURPOSE

By MARSHALL COHEN†

THE SYSTEM of jurisprudence espoused by Professor Fuller is dominated by an interest in the conflict between the traditions of natural law and of legal positivism. In Fuller's opinion, positivists grossly misunderstand the relationship between law and morals at both the actual and ideal levels. He argues that the distinctions which positivists see between fact and value, between the law as it is and as it ought to be, are illusory. Whatever its faults, the natural law tradition at least recognizes that these pairs of phenomena "merge." In fact, Fuller's entire constructive effort in jurisprudence may be understood as an attempt to demonstrate the nature of the "interconnections" of law and morals.

In *The Morality of Law* Professor Fuller attempts to supplant the traditional natural law doctrine of a "higher" moral law with his own doctrine of the "inner" morality of law. In this small volume, which contains the most vigorous expression of Fuller's views, he develops the theory that it is impossible even to make law without conforming to certain morally charged "canons". This, however, is only the most recent of Professor Fuller's assaults on positivism. Many of his objections to this school of legal philosophy have been historically inaccurate and logically beside the point. He has tendentiously announced doctrines disputed by no one, and has denounced as misinterpretation all attempts to read his own frequently impenetrable views in a way that would join issue and make sense of his polemics.

It may avoid at least some measure of misunderstanding if I declare at the outset that I not only admit, but wish to emphasize certain relationships between law and morals. Unquestionably, our moral notions influence the law and are to some extent embodied in it. Moral principles are patently involved, for example, in the criticism of law, and frequently they play a crucial role in the resolution of legal disputes. Moral objectives are often relevant to the interpretation of legal rules. Moreover, it frequently happens that certain persons incur moral obligations to obey particular laws. To the extent that positivism is understood to deny any of these "mergings" or "interconnections" it will find

† B.A., 1951, Dartmouth College; M.A., 1953, Harvard University; Senior Fellow in Law, Yale University, 1964-65; Associate Professor of Philosophy, University of Chicago.

no defense in this paper. My main concern will be to defend positivism only insofar as it is understood to hold that there is a logical or conceptual distinction between the law as it is and as it ought to be. I deny at the outset that there is any historical merit, or present relevance, in Fuller's charge that "In its concern to assign the right labels to the things men do, positivism seems to lose all interest in asking whether men are doing the right things."¹ It is true that positivists have traditionally expended greater effort than Professor Fuller deems wise in attaching the proper labels to things; however there is no conflict whatsoever between such a pursuit and a concern for doing the right thing. In fact, many positivists, and most realists, have been legal reformers, and the positivists' desire to maintain the distinction between what the law is and what it ought to be has often been motivated by a reformist urge or a moral interest. Indeed, I should have thought that Bentham's name alone would constitute a sufficient reply to Fuller's allegation.

In Fuller's view the fundamental failures of positivism derive from its alleged metaphysical hostility to the notion of purpose. Law is a purposive activity and he believes it possible to demonstrate that in purposive activities fact and value merge. I would have thought that the prejudice in question was part of the baggage of philosophical materialism, and perhaps of philosophical positivism, but not of legal positivism. In any case, it is useful to observe that the pertinent claims of legal positivism do not depend on any doctrine concerning the nature, or status, of purposes.

Fuller's attempts to demonstrate the untenability of positivism, by appealing to the peculiar nature of legal rules, by indicating the place of moral purposes in interpreting them, and by insisting that one cannot define what law is without understanding what it ought to be, will be examined. I hope to show that these views may be rejected quite independently of any appeal to the alleged prejudice of positivism. If Fuller's assessment of the source of positivist doctrine is false, so is his view of its nastiest consequence.

According to Fuller, positivism is incapable of accounting for our obligation to obey the law. He supposes that we can only understand the nature of this obligation if we comprehend the intimate connection between the law as it is and as it ought to be. I contend that a proper understanding of the matter presupposes the very distinctions that Fuller rejects. Indeed, on this crucial point, one might feel that Fuller has, if anything, proved too much.

1. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 643 (1958). [hereinafter cited as *Positivism*].

In order to demonstrate how fact and value merge in purposive activity Fuller asks us to consider a story *as it is* in its first telling, and to compare that with the story *as it ought to be*.² The story is continually reinterpreted and (as its point or purpose emerges) almost imperceptibly becomes something that it originally was not. According to Fuller, who carries this hypothetical optimism over into his mystic doctrine of the common law working itself pure, the anecdote tends to improve and to be told *as it ought to be* told. The story is not, he argues, simply something that "is", say, the words in which it is first told. It is not a mere "segment of being" or a "chunk of reality" of the sort that positivists are alleged to regard as alone real.³ It is, to use the terminology which natural law scholars have traditionally employed, perpetually "becoming". Fuller has the notion that the story, a fluid entity, cannot be identified with the particular tellings of it, and that the story as it *is* in its first telling cannot be clearly distinguished from the story *as it ought to be*. Of course, Fuller is using the story to provide an analogue for a legal rule.

Immediately, though incidentally, we may note that Fuller assumes that positivists prefer statutory law to judge-made law. This preference is supposed to derive from the fact that it is often difficult to determine whether a judge is announcing a new rule or merely making explicit the assumptions of an old one. Statutes, on the other hand, tend to be plainly individuated. Unlike judge-made rules (and anecdotes) they are sharply etched "chunks of reality" of the sort that positivists acknowledge. The National Labor Relations Act⁴ is one act, and the subsequent Taft-Hartley Act⁵ is another separate law. In contrast, the rule in *Rylands v. Fletcher*,⁶ or the (second branch of the) rule in *Hadley v. Baxendale*,⁷ is in a perpetual state of "becoming". Its development is a fluid process of the sort that positivists are alleged to find unacceptable. The fact is, I think, that certain positivistic writers *have* been prejudiced against judge-made law and have favored a stronger role for legislators. But the prejudice has been political, not metaphysical.⁸ In any case, I cannot believe that the suggested metaphysical or logical distinction between legal rules and statutes is

2. E.g., in his first book, *THE LAW IN QUEST OF ITSELF* (1940) 8 *passim*.

3. In fact, philosophical positivists consider materialism of the sort that Fuller attributes to them as merely another unintelligible metaphysical view.

4. 29 U.S.C. §§ 151-66 (1935).

5. 29 U.S.C. § 141 (1947).

6. [1868] L.R. 3, 3 H.L. 330.

7. 9 Exch. 341 [1854].

8. Unless, of course, one regards the democratic prejudice as metaphysical.

a sound one. The Statute of Frauds and the Statute of Wills behave more like Fuller's rules than his statutes. Whatever the logical characteristics of rules and statutes may be, the important point for present purposes is that Fuller cannot, even by making rules central to his discussion, and even conceding the lessons of the analogy of legal rules to anecdotes or stories, undermine the distinction between what a rule is and what it ought to be.

It is certainly true — and I cannot see why a positivist or anyone else should wish to deny — that we distinguish between a rule and its formulations, even as we distinguish Fuller's anecdote from its several tellings, and the story of Tristan and Iseult from its various versions. If the formulations are discrete "chunks of reality", the rule, as Fuller observes, is not. Furthermore, when the rule is regarded as having a number of possible formulations, say, in different jurisdictions or at different times, it will be considered abstractly, described by mentioning its essential features and its point, and often referred to (evasively) by its proper name. It will not be identified with any single formulation, although it may be true that one of its formulations ought to be adopted as the rule. If, as we are imagining, a range of formulations is comprehended under the rule it may, in marginal cases, be difficult to say whether or not a particular formulation is a formulation of the old rule or the statement of a new one. But I see no reason why the positivist should be unable to acknowledge or tolerate this sort of vagueness in the conception of a rule. It presents no more of a metaphysical problem for him than the fact that it is often difficult to decide whether a person is bald or not bald. Certainly, this sort of vagueness does not, as Fuller seems to think, provide any ground for denying that we can distinguish (even sharply) between what the rule is and what it ought to be. The intelligibility of this distinction does not presuppose that all rules have the clarity which Fuller believes positivists find in statutes and demand of "chunks of reality". At most it requires that it be possible to identify some formulations as clear cases of a rule that is and others as clear cases of a rule that ought to be. This will be possible even when there are difficult borderline formulations. It will present no difficulties at all when the rule that is in fact is far from being the rule that ought to be. Fuller's observation that we sometimes do not know whether we are dealing with an old rule or a new one provides us with no good reason for thinking that we cannot distinguish between the rule that is and the rule that ought to be. The fact that we may have difficulty in ascertaining whether or not someone is bald gives us no

ground for concluding that we cannot distinguish, even sharply, between persons who are bald and those who are not. Can Fuller's error arise from his unwarranted assumption that in the case of common law rules some formulation is always at the borderline between the rule that is and the rule that ought to be? Is this the conservative cash-value of Lord Mansfield's phrase about the common law working itself pure?

There are, of course, other ways to conceive of, and discourse on, rules. Fuller does not examine them, but they are relevant to his theme and may serve his purpose better than the examples he cites. There may be, in a particular jurisdiction, or for the purposes of a particular Restatement, a *correct* statement of a rule, e.g., the rule in *Shelley's Case*⁹ in which event we will incline toward a language of evaluation when speaking of various formulations of the rule. We will speak of incorrect, or deviant, formulations by students in examinations and by judges in opinions; we will speak of attempts to state the rule, and of formulations which are not quite equivalent to the rule. Here the rule is simply to be identified with the rule as it ought to be *formulated*.¹⁰ Fuller asks, "How do we apply the dogma that before we can evaluate we must first define clearly in non-evaluative terms the thing it is we are evaluating?"¹¹ In the kind of case we are imagining it may be very simple to define the rule in non-evaluational terms. Of course, evaluational language comes in when we say that Kent's formulation of the rule in *Shelley's Case* is correct (in a particular jurisdiction), or that the student does not know how the Texas rule ought to be formulated. One cannot know the rule without knowing how to state it *correctly*; one cannot know what the rule is without knowing how it *ought to be formulated*. But these evaluations are not moral evaluations. This *ought* is not a "moral" *ought* just as the "aesthetic" *ought* in Fuller's phrase, "the story as it ought to be", is not a moral *ought*. Indeed, the besetting sin of Fuller's jurisprudential discussions is to confuse any evaluation with moral evaluation, and any use of the term *ought* with a moral use of it. This is inevitably disastrous in an argument designed to establish a connection between law as it is and as it morally ought to be. In the case under discussion there is no moral obligation to tell the story as it (aesthetically) ought to be told, and it does not follow from the fact that the rule in *Shelley's Case* is formu-

9. 1 Co. Rep. 93 [1581].

10. This, however, will take us nowhere near the Thomistic contention that Being and Goodness are One.

11. Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L. F. 91 (1958).

lated the way it ought to be formulated that the rule in *Shelley's Case* ought to be the Texas rule. Many a judge in Texas has formulated the rule as it ought to be formulated, and nevertheless felt that it was an undesirable and perhaps even a morally indefensible rule. It is not when a rule is conceived of vaguely but when it is conceived of precisely that there is likely to be no distinction between the rule and the rule as it ought to be formulated. But it does not follow from this that there is any difficulty in distinguishing the rule *as* it ought to be formulated from the rule *that* ought to be formulated. In other words, there need be no difficulty in distinguishing the rule that is from the rule that ought to be. Surely, this is all the positivist wishes to assert.

In "Human Purpose and Natural Law"¹² Professor Fuller formulates anew his reflections on positivism and purpose. He asserts that we cannot understand, or describe, purposive behavior if we view it, or describe it, simply in terms of physical movements. No list of physical descriptions of a boy raising his arm, poking a clam, or moving about is equivalent to saying that he is engaged in the purposive activity of trying to open a clam. Here again, Fuller argues that the positivist's refusal to see the behavior as purposive prevents him from appreciating that "fact and value merge". Now, there is certainly nothing in the philosophy of legal positivism which requires that human actions be described in purely physical terms.¹³ Professor Fuller rightly rejects the view that, as a matter of fact, the boy has no purposes, that these purposes are "something projected by the observer on the observed." As a matter of fact, the boy does have purposes. However, Fuller seems to think that by admitting this fact one admits that fact and value merge in the boy's behavior. Professor Fuller can only suppose this because by merging of fact and value he means only that some activities are not merely physical but purposive in nature. Yet, none of the conclusions Fuller is seeking to establish follow from the admission that some behavior is purposive in nature. It does not follow from the fact that someone has a purpose that he ought to have that purpose or, certainly, that such a purpose is moral either by aspiration or in nature. Analogously, it does not follow from the fact that one can identify the purpose of a rule of law that the purpose is a good purpose, or that the rule in question

12. 53 JOURNAL OF PHILOSOPHY 697-99 (1953).

13. It may be that some physicalists and behaviorists have insisted that a "factual" description of human behavior must restrict itself to the description of physical movements.

cannot be distinguished from the rule that ought to prevail. And this, again, is all that the positivist wishes to assert.

Sometimes Fuller identifies positivism not with the extreme view that human activities do not in fact have purposes, but with the view that it is unnecessary to appeal to these purposes when interpreting legal rules. Positivism, then, becomes literalism. Again, I can see nothing in the philosophy of legal positivism that requires such a position. Perhaps Fuller supposes this to be Professor Hart's view. If it is, the doctrine should be seen as a dubious application of certain theses of ordinary language philosophy under the pressure of certain peculiarly English habits of construction, and not as a doctrine intrinsic either to logical or legal positivism. If Hart does deny that a consideration of the purposes of legal rules is often required in their interpretation Fuller has made out a successful case against him. But this case will not take Fuller where he seeks to go. He writes, for instance, that when questions of penumbral interpretation are at issue "there is at least an 'intersection' of 'is' and 'ought', since the judge, in deciding what the rule 'is', does so in the light of his notions of what 'it ought to be' in order to carry out its purpose."¹⁴ What "it ought to be" here means nothing more than "how it should be interpreted". And this has no greater moral force than the statement that *King Lear* ought to be interpreted in the way that Dr. Johnson interprets it and not in the way that G. Wilson Knight does. Nor will it help Professor Fuller to make out his case about the connection of law and morals to observe that "We must, in other words, be sufficiently capable of putting ourselves in the position of those who drafted the rule to know what they thought 'ought to be'. It is in the light of this 'ought' that we must decide what the rule 'is'."¹⁵ Leaving aside the hermeneutic assumptions behind these remarks — assumptions inconsistent with some of Fuller's own moralizing dicta on legal interpretation — it is necessary to observe that what those who constructed the rule thought it "ought to be" is ambiguous as between what they intended the rule to be and what they thought the rule (morally) ought to be. But in neither case does this demonstrate any connection between what the rule is and what it ought to be. For, in the former case the rule-makers may have intended a morally neutral, or an evil or unjust law, and in the latter case their idea of what the law morally ought to have been may in fact have diverged violently from what it *in fact* morally ought to have been. Indeed, Fuller

14. *Positivism* 662.

15. *Id.* at 666.

habitually confuses having a purpose with having a moral purpose, and worse, thinking one has a moral purpose with having one. I find it most surprising that a writer so sympathetic to the natural law tradition (and to the Catholic moral tradition)¹⁶ should base so many of his defenses of that tradition on arguments which render meaningless the notion of moral error. In any case, these arguments from the use of the notion of purpose in the interpretation of legal rules will demonstrate no necessary connection between the concepts of what a law is and what it ought to be.

In his new book, *The Morality of Law*, Professor Fuller puts the notion of purpose to work in still another way. He suggests that unless we appeal to the notion of purpose "we lose wholly any standard for defining legality".¹⁷ The standards for defining the term "legal system" are, it appears, the means to the end or purpose of a legal system. And these means are formulated — or suggested, for Fuller never really formulates them — in the eight canons that constitute the internal morality of law. The eight canons, then, provide the materials for a definition. Plainly, this is a new version of Fuller's thesis that there is an "interconnection" between what the law, or a legal system, is and what it ought to be. If, however, it is possible to define the term "legal system" without appealing to, or even knowing, the purpose of a legal system, and without adducing the means to that end or purpose, Fuller's argument must fail, since it will not have shown that there is a necessary connection between what the law is (its defining features) and what it ought to be (its purpose or end). Indeed, Fuller gives no reasons at all to support his claim. He does not show that the law has a single purpose, still less that if something has a purpose it must be defined by mentioning the means of achieving that purpose.

Professor Fuller claims that the purpose of a legal system is the subjection of human actions to the guidance and control of general rules.¹⁸ This might be the purpose of some legal system, but it seems unlikely that the sheer and dubious value of subjecting human actions to rules could be the purpose of all legal systems. More characteristic, I should have thought, would be such purposes as administering justice, facilitating commerce, and preserving the peace. It hardly seems sensible to base one's entire analysis of the nature of a legal system on a proposition so dubious in fact and so easily denied in principle. The fact is, however, that we can define the concept of a

16. *Id.* at 660.

17. FULLER, *THE MORALITY OF LAW* 147 (1964) [hereinafter cited as *MORALITY*].

18. *Id.* at 146.

legal system without knowing the purpose or purposes of any legal systems; such questions may be left to subsequent empirical investigation. Even if Fuller had discovered the universal purpose of legal systems he has not shown that we must define the legal system by discussing the means to that end. *Must* we define such terms as "book", "telephone", "pencil" or "household pet" by mentioning the purpose or purposes that they serve? I think not. Surely, Fuller gives us no reason to believe that this is so.

Fuller's primary reason for thinking that the means to an end must be mentioned in the definition of something that has an end or a purpose is, I surmise, that he confuses the means of bringing something about with the logically necessary (and sufficient) conditions of the presence of that thing. This, however, is fallacious. Intellectual eminence, military glory, and party service may be means of obtaining political office, but none of them need be mentioned in defining the concept of obtaining political office.¹⁹ Fuller's "canons" are not, as he thinks, the "means"²⁰ of achieving his dubious purpose; they are, rather, a tolerable start at producing a set of conditions necessary for the presence of a (modern) legal system.²¹ If an institution did not, to some extent, propose and promulgate general rules, maintain them with relative constancy, formulate them with clarity and without contradiction, and administer them fairly, we should be inclined to deny it the name "legal system". One might argue about the contents of Fuller's list, but there can be no doubt that some list of this sort is correct. Fuller's formulation has by no means been in vain. Positivists will, of course, be as interested as Fuller in discovering the correct list. Furthermore, unless an institution satisfies these conditions, they will not regard it as a legal system. But positivists need not proceed by determining the purpose of a legal system (especially by *a priori* methods) and imagining the means of bringing one into existence. They will lay the question of purpose aside, and determine what features an institution must possess if it is to be regarded as a legal system. Their list may look remarkably like Fuller's, but there is no reason to believe that it will sanction the conclusion that there is a necessary connection between the defining features of a legal system and its purpose. In other words, it need not support the view that there is a necessary connection between what a legal system is and what it ought to be.

19. Means are not logically entailed by ends.

20. MORALITY 104.

21. To be necessary and sufficient conditions they would have to include such features as the presence of courts and the supremacy of coercive power as well.

Professor Fuller misconceives the alternatives to his approach to understanding a legal system. Positivists, he thinks, since they do not regard law as a Purposive Activity have no alternative but to regard it as a Manifested Fact of Social Power. By this he means that positivists must maintain that that which the law-making authority determines to be law is law.²² If this means that the laws decreed by the law-making authority in a given society are such even though they are unjust or evil, positivists do make this claim. But, if he means, as I believe he does, that positivists believe that any actions of a government become laws simply because it calls them such, he is very wide of the mark. Fuller implies that positivists think a government can fail to observe what he (I believe) misleadingly calls the "internal morality of law" and yet make law. According to him positivists may believe that a government governs through a legal system even if it consistently issues commands that lack generality and are kept secret, proclaims rules that are predominantly retroactive, obscure, contradictory, and ephemeral, insists on the impossible, and administers the entire institution incoherently. But, surely, Fuller's analysis is inaccurate. No positivist supposes that any institution of this sort would constitute a legal system. Calling it a legal system would no more make it one than calling a cat a dog would make it a dog. If, as Fuller asserts, the German lawyer was "peculiarly prepared to accept as 'law' anything that called itself by that name, was printed at government expense, and seemed to come '*von oben herab*'" it is not because he has imbibed the lessons of positivism.²³ Substantial compliance with something like Fuller's canons is a necessary condition of the very existence of a legal system; any social institution that failed to comply with them simply would not be a legal system. If the Nazi system substantially failed to satisfy Fuller's canons I cannot see why anyone, out of positivist motives, would disagree with any more than the *way* in which Fuller states a point which he seems to think highly controversial: "To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system."²⁴ There is nothing shocking to positivists, either, in saying that an institution which does not genuinely satisfy the conditions of being a legal system is not a legal system. Positivists, however, wish to state the point in a way that avoids Fuller's misleading tropes, the "morality of order" and

22. MORALITY 148.

23. *Positivism* 659.

24. *Id.* at 660.

the "inner morality of law itself," which are no more than misleading ways of stating an obvious point. Fuller uses these phrases because he wishes to suggest that insofar as the law is not what it ought to be it is not law. Positivists may resist this suggestion without believing that the law is simply a Manifested Fact of Social Power.

Fuller's canons do not merely define ideals toward which legal systems aspire, as he sometimes dangerously suggests; they are conditions that any social institution must meet if it is to constitute a legal order. It is because Fuller thinks of these conditions as moral ideals toward which legal systems aspire that he thinks of various systems as more or less legal systems. He decries the modern heresy of thinking "that a legal system either is there or not there." To Fuller it is a matter of degree.²⁵ This, I take it, in a new phraseology is the opposition between positivistic "chunks of reality" and the "fluid processes" of the dialectical ontologist. The slight plausibility of this claim (like the earlier claim that we could not tell what the rule "is") derives from a misinterpretation of the difficult or borderline case. No doubt, the Nazi system is difficult case. But it does not follow from the fact that there are borderline cases that there are no clear ones. Any system that failed substantially to fulfill Fuller's canons would not be a legal system, and among legal systems we do not say that one which has achieved wider promulgation, greater clarity, fairer administration, is more a legal system. We may say it is a better one. Nevada is as much a state as New York.

Professor Fuller's assertion that the criteria for the existence of a legal system possess some moral quality in themselves derives, in part, from his wish to display one further connection between law and morals, *i.e.*, the moral obligation to obey the law. "The fundamental postulate of positivism — that law must be strictly severed from morality — seems to deny the possibility of any bridge between the obligation to obey the law and other obligations."²⁶ It is doubtful whether positivism is committed to the view that law must be "severed" from morality. And while I would not commit myself, as Fuller does, to the view that one simply has an obligation to obey "the law", I would regard it as obvious that certain persons, in certain circumstances, have a moral obligation to obey certain laws. It is often a duty of fairness or justice. But I cannot see that Fuller's arguments go any part of the way toward proving the existence of the

25. MORALITY 122.

26. *Positivism* 656.

obligations, whose existence I admit, let alone the more sweeping obligations that Fuller discerns.

It is exceptionally difficult to discover from Professor Fuller's text precisely why he thinks the standards of making law are charged with a moral quality; it is even more difficult to discover why the particular moral qualities which these standards are alleged to possess serve to ground the duty of obedience to law. The possible interpretations of Fuller's remarks are infinite. But his chief line of argument seems to derive from his view that certain rules or principles must be followed in conducting any activity if the purposes of that activity are to be realized. These rules or principles constitute the "inner" morality of that activity, and obedience to them is a necessary means to the desired end. The "rules" of morality are, then, analogous to the laws "respected by a carpenter who wants the house he builds to remain standing."²⁷ But it is misleading to think of these principles as constituting a morality — inner or otherwise. Is there an inner morality of carpentry or of murder? Does the carpenter abjure some moral principle when he builds a cabinet larger than the room for which it is meant; is the potential killer morally culpable for failing to heed the rule that a killer ought to load his gun? Surely, we must separate the question of competency from the question of morality. We simply do not praise the carpenter who designs a cabinet of the proper size for adhering to moral principles, or the killer who remembers to load his pistol for complying with the morality that makes murder possible. Is the case improved if the killer falls into the spirit of Fuller's canons and gives notice to his victim, or goes on to accord similar treatment to those similarly situated?²⁸

It does not follow from the fact that one has pursued the means to some end that one has engaged in moral activity of any kind. Even if Fuller's canons were "means to a single end",²⁹ it would not follow that adherence to his canons is a form of morally desirable conduct on the part of law-makers. It might nevertheless be true — even if not for the reasons supposed by Fuller — that there is something morally praiseworthy about adhering to the canons and something morally reprehensible about departing from them. But this is

27. MORALITY 96.

28. Dworkin, *Philosophy, Morality and Law — Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668 (1965). I am indebted in other places also to Professor Dworkin's acute essay. I am also indebted to him for his many searching comments on, and criticisms of, my own views. It will surprise me greatly if it is not he who takes jurisprudence beyond the bounds of its present disputes and, in particular, beyond the dispute between the traditions of positivism and natural law.

29. MORALITY 104.

not so. There is no moral merit in depriving persons of their fundamental rights by laws that are perfectly clear and completely prospective, and Fuller's suggestion that this is not possible is simply incredible. Nor is there anything morally outrageous about passing contradictory laws. This is not to say, of course, that such laws might not be passed for reasons that would make them immoral or that a situation inadvertently created might not be abused in an immoral way. No doubt these are the situations that Fuller has in mind, but they reveal nothing about the intrinsic immorality of what may be a mere legal nullity.

In the case of retroactivity Fuller comes close to giving his case away, if, indeed, he does not do so. For he admits that certain retroactive statutes not only do not impair, but are actually required to support, the "principle of legality".³⁰ This might appear to be a minor concession to the view that there is no necessary moral dereliction in violating the "canons" for we are here protecting the interest of one of the canons (the one against impossibility) at the expense of one of the other canons (the one against retroactivity). But Fuller's concessions go further. He concedes that whenever a judge decides a case for which the standards are unclear he makes law retroactively. This strain of legal realism is unexpected in Fuller, and is not wholly consistent with the spirit of his sound claim that unless the judge decides such cases "he fails in his duty to settle disputes arising out of an existing body of law."³¹ That spirit, I take it, demands that such cases be decided on the basis of existing law. However, if Fuller is correct in describing these decisions as retroactive he seems to admit an indeterminate and (if the legal realists are to be believed) formidable body of retroactive law into the modern legal system. Finally, Fuller points out that retroactivity is a highly ambiguous term. I agree. If retroactivity is understood to cover phenomena like property laws which attach new legal consequences to past actions and events — and something like this is the familiar conception — then a further reach of laws will qualify as retroactive. Since Professor Fuller would not deny that such laws³² are ubiquitous and useful, it is difficult to understand how he can deny that a large number of retroactive laws may be a desirable, as they are a characteristic, feature of modern legal systems. So conceived, retroactivity may be a feature of law, and of

30. *Id.* at 54. Professor Fuller mentions the case of a "curative" statute which validates marriages that would otherwise have been invalid because of the impossibility of obtaining a stamp required for the marriage certificate.

31. MORALITY 56.

32. *E.g.*, laws creating taxes on past income, altering the incidents of property, or stiffening the requirements for entrance into certain professions.

good law at that. Retroactivity, clarity and consistency are, in themselves and apart from the use made of them, morally neutral features of law.

Professor Fuller suggests the possible desirability of a much narrower definition of retroactivity, and his claims concerning the retroactivity canon would certainly be made more plausible if he adopted such a definition or could claim that such a conception is generally received. Such a definition would be in the spirit of the Supreme Court's holding in *Calder v. Bull*,³³ in which the *ex post facto* clause of the Constitution was held to relate only to criminal prosecutions. Professor Fuller speaks of laws that "command"³⁴ that something "have been done" in the past and do not simply attach new consequences to what has been done in the past. Although this viewpoint would be useful, it is not clear how it would cover Fuller's examples of the "curative" statute, or of the performance of judges in unclear cases. In the end, Fuller leaves the issue of the meaning of retroactivity "unresolved".³⁵ But if it is unresolved it is impossible to see how he can make the claims he does for his canon. The discussion of retroactivity, like that of all the other canons is, then, premature, and this prematurity ought to have prevented Fuller from making the claims he does about the moral properties of his canons. If Fuller is to make out any kind of a case for the inner morality of law, he must first expend a great deal more effort in attaching the proper labels to things.

If, however, we grant that it is desirable for the rules of a legal system to satisfy the standards Fuller suggests, the consequences he desires will not follow. To confound the positivist Fuller writes that "moral confusion reaches its height when a court refuses to apply something it admits to be law."³⁶ Unless Professor Fuller wishes to contend that a morally evil or unjust law is not a law it would seem to be he, not the positivist, who has fallen into moral confusion. It is not really clear whether Fuller is willing to embrace this claim of natural law theory directly. He appears to believe, instead, that any enactment of a system of rules satisfying the eight canons cannot be sufficiently evil to justify non-enforcement or disobedience. He appears to believe that there are morally decisive substantive limits on the degree to which a legal system can depart from the legal system that ought to be. In other words, the internal and external moralities of law are interconnected. He then believes that a tyrant will fear

33. 3 Dall. 386 (1798).

34. *MORALITY* 59.

35. *Id.* at 61.

36. *Positivism* 655.

promulgation, and that it is extremely difficult to draft immoral legislation that is not canonically void for vagueness. I would question Fuller's empirical assumptions, but this is ultimately a conceptual and not an empirical question.³⁷ Does Fuller deny that a brazen tyrant or a lucidly evil law is possible in principle? Does he assert that such phenomena are unknown to history? If Fuller is not willing to go that far he must fall back on the naked claim that an unjust law is not a law, or face the possibility that it is he, and not the positivist, who has fallen into moral confusion. Fuller comforts himself by contemplating the Nazi "system" and asserting that since it did not even minimally satisfy the canons, it was no system and its laws no laws. He thinks he has thereby escaped the embarrassing question, would a judge who refused to apply the sterilization laws have been guilty of the height of moral confusion? But a case may be put in which there can be no legitimate doubt that a legal system exists. Is Fuller prepared to say that a judge or citizen who refused to return a slave to its "owner" in accordance with a fugitive slave law was guilty of the height of moral confusion? The very height?

Perhaps Fuller means to assert that a law's satisfaction of the eight canons gives rise only to a *prima facie* moral obligation to enforce or obey it. But is even this claim valid? I cannot see how an obligation to obey the law can possibly arise from the sheer fact that it does not contradict some other law, or that it is a clear law, or that the law does not demand the impossible or from all these. Of course, one may have a very strong obligation to obey the law. But this obligation will be relative to the method of generating law in the community and to the substantive justice of the particular laws. It will not spring from what Fuller calls the internal morality of law, nor should it be confused with any feelings of abhorrence (or fear) which people may have about breaking the law. We may even, on occasion, be morally obliged to disobey the law or frustrate its enforcement. Clearly, any rational account of this fact presupposes the distinction between the law as it is and as it ought to be.

37. Professor Fuller's discussion of "natural affinities" is obscure, and, so far as one can tell, not relevant to the arguments with positivism.