



1965

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John E. Murray Jr.

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Recommended Citation

John E. Murray Jr., *Observations on the Morality of Law*, 10 Vill. L. Rev. 667 (1965).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol10/iss4/6>

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OBSERVATIONS ON THE MORALITY OF LAW

By JOHN E. MURRAY, JR.†

THE ORAL presentations of Professors Cohen and Dworkin on the evening of the symposium were long and involved. At the expense of possible injustice to both, I will deal with their efforts summarily.

The remarks of Professor Cohen seemed to accomplish little in the way of genuine contribution to the rich interchange of ideas that was promised. The greater part of Professor Cohen's effort was a pedestrian defense of positivism followed by what seemed to be a quibble concerning the use of the term "morality" used by Professor Fuller to describe the principles of legality in his book. Professor Dworkin's attack was much more direct, though colored by what must have been very sophisticated humor. The most meaningful part of the Dworkin effort was his attempt to show that Fuller's principles of legality had nothing to do with morality. He attempted to do this by isolating a few of the principles and illustrating that each was compatible with great iniquity. Even this confrontation, however, did not veil the fact that Dworkin and certainly Cohen do not communicate with Professor Fuller.

Thus, when the Cohen-Dworkin attack ceased, the sentimental favorite was Professor Fuller. Rather than winning by default, Fuller proceeded to articulate his defense in a fashion which shed more light on the basic theme of his book. It became clear, at least to this observer, that Fuller was saying more about substantive natural law than a casual reading of his book discloses.

One could come away from the book feeling that Fuller's willingness to identify substantive natural law was relegated to the notion of opening up, maintaining and preserving the channels of communication among men. However, a closer reading of the book and a careful consideration of his remarks at the symposium indicate that Fuller has said much more about the external morality of law.

Orally, Fuller emphasized his contention that the principles of legality have a greater affinity for good than for evil. It is this contention, the conclusion of the author's notion of the interaction between the internal and external moralities of law, which has given rise to the

† B.S., 1955, LaSalle College; LL.B., 1958, Catholic University of America; S.J.D., 1959, University of Wisconsin; Member of the Bar of the State of Wisconsin; Professor of Law, Duquesne University.

most serious attack upon his thesis. Fuller recognizes this attack in the last chapter of his book by quoting from H. L. A. Hart's *The Concept of Law*: ". . . if this is what the necessary connexion of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity."¹ Fuller criticizes this remark in two ways. First, if Hart means that it is possible to conceive of an evil monarch who pursues the most iniquitous ends while preserving a genuine respect for the principles of legality, the observation is not in keeping with the aim of Hart's book. Secondly, if Hart means that there are historical examples of faithful adherence to the internal morality of law combined with a brutal indifference to justice and human welfare, the absence of such examples in the book precludes any meaningful discussion. The minimal inference to be drawn from these criticisms is that Fuller assumes that iniquitous substantive ends are unlikely to be pursued through adherence to the internal morality of law. Thus, if the sovereign power wishes to accomplish evil goals, it is unlikely to make the attempt by promulgating a set of general, clear, prospective, uncontradictory rules which require only what is possible, are not frequently changed and which are administered in accordance with their declaration. The obvious question is, why? If the answer is that the sovereign's effort will be unsuccessful because the evil substantive aims will be unacceptable to the governed, this means that the governed are capable of making a meaningful appraisal of the rule. Professor Fuller recognizes this fact in his book when he notes the deep affinity between legality and justice. Thus, "acting by known rule is a precondition for any meaningful appraisal of the justice of law."² Here, Professor Fuller recognizes the fact that the demands of the internal morality of law are not always ethically neutral though they may seem so at first blush and though they *are* neutral over a wide range of substantive issues.

The most important area in which the demands of legality are not neutral is suggested by Professor Fuller in terms of the nature of man. He insists upon viewing man as a rational, responsible agent capable of understanding and following rules and answering for his defaults. He concludes that "every departure from the law's inner morality is an affront to man's dignity as a responsible agent."³

It occurs to this observer that these important suggestions result in a theory of substantive natural law which is broader than that which

1. HART, *THE CONCEPT OF LAW*, 202 (1961).

2. FULLER, *THE MORALITY OF LAW*, 157 (1964).

3. *Id.* at 162.

the author expressly admits. Not only is he suggesting that "procedural" natural law (the internal morality) gives rise to a certain minimum of substantive morality, but, in addition, he implies that the external morality of law must adhere to the substantive principles which can be derived from his analysis of the nature of man. He makes no attempt to expressly suggest any principles of substantive natural law except one, which he obviously intends only as a substitute for H. L. A. Hart's minimum content.⁴ Neither does he suggest that it is impossible to posit such a substantive theory. He simply implies that he has not undertaken to do so in his book. However, if one agrees with the author's analysis of man's nature, does it not follow that any substantive aim which is not in accordance with that nature is just as much an affront to man's dignity as is a departure from the law's inner morality? If Fuller's answer is that he has considered the nature of man only in relation to the internal morality of law, certainly one would expect that the author would not conclude that man's nature is different if viewed from the standpoint of external morality. While Fuller may contend that he has simply not addressed himself to this question, has he not at least solidly established his basis for inquiry in this area?

The principles of legal morality are consistent with man's nature as viewed by the author. However, his further conclusion is that the principles of legality have a greater affinity for good than for evil. This is not simply because faithful adherence to the internal morality of law will permit a meaningful appraisal of the justice of law according to some unknown standard. Rather, if the lawmaker adheres to the principles of legality, the meaningful appraisal can be made according to the standard suggested by the author himself: the rational, responsible free-will nature of man. The shortcoming evidenced by a failure to accept this basic proposition is unfortunate in two ways. First, it has given rise to the criticism that Fuller has probably abandoned all hope of formulating a substantive natural-law theory,⁵ a proposition which this observer rejects. Secondly, if he had simply indicated the suggested basis for a substantive theory, perhaps no more or even fewer critics would have agreed, but the author would have been less susceptible to attack. If he had enunciated this basic proposition of substantive natural law, no legitimate complaint could have been entered concerning his failure to develop it, since he did not address himself to such a task.

4. *Id.* at 184-86.

5. Savarese, Book Review, 53 *Geo. L. J.* 250, 257 (1964).

What has been said should not detract from the significant contribution which Professor Fuller has made in his book and continued in his oral presentation at the symposium. His emphasis upon the principles of legality will go far in making further explorations of this long neglected area more significant. Perhaps more than anything else, the author's focus upon the subject matter and the insights which he has developed have clearly shown the need for further exploration.