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THOUGHTS ON THE SYMPOSIUM: THE MORALITY OF LAW

By DONALD A. GIANNELLA[†]

PROFESSOR FULLER'S observations on the internal morality of law follow from his definition of law as the enterprise of subjecting human conduct to the governance of rules. It is not too surprising that his views are vigorously rejected by those predisposed to a positivist jurisprudence which defines law as those rules formulated by governmental officials and enforced by the coercive sanctions of the state. Whether we are defining law either to understand it as a social fact, or to understand its relation to morality, Professor Fuller's views seem the more enlightening.

No less a positivist than Professor H. L. A. Hart has warned in his recent book, *The Concept of Law*, against the sterility of viewing law solely in terms of official behavior and forgetting that its main purpose is to provide standards for the guidance of social conduct. Once the directive quality of law is fully appreciated, a satisfactory definition must highlight, as Fuller's does, not only the actions of those governing but also the responsive behavior of those governed. Even if it were possible to imagine a system of law within which the commands of the rulers would automatically or mechanically result in a certain configuration of social conduct, such a system would be at odds with the traditional western conception of law. The notion that rules of law must be backed up by coercive sanctions indicates that we view law as a system for directing the actions of self-determining human beings.

One of the consequences of focusing on the directive quality of law should be a realization that the modes of the law involve moral questions as well as its ends. When Professor Dworkin speaks of "good" laws or "bad" laws he is measuring them solely in terms of their particular social ends. He tends to forget that in order to implement those ends the cooperative action of intelligent, responsible subjects must be enlisted. How that cooperative action is enlisted can be evaluated in moral categories. Surely no one will deny that the nature of the sanction used to secure compliance with a law is subject to moral judgment. Professor Fuller goes further and asks us to con-

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sider in moral terms the manner in which the legislator issues his commands.

It is difficult to see how one can deny that certain utilitarian values inhere in the qualities of certainty and stability in lawmaking, regardless of a given law's social purposes. As far as the individual is concerned, the sense of his personal security is enhanced and an added dimension is given to his personal liberty since he can plan his future with greater certainty. As far as society as a whole is concerned, especially if it is organized along free enterprise lines, it is benefitted by the increased opportunity for socially useful activity that depends on individual or joint planning.

I think it is a serious miscalculation to reduce the qualities of the law, with which Professor Fuller is concerned, to canons for the enterprise of efficacious law-making, as Professor Dworkin would do. They loom too large as important ends in themselves, even though they may be subsidiary to the external ends of the law. I do not think it is too far afield to analogize these qualities as they relate to the direction of human behavior to the quality of truthfulness as it relates to human discourse. Telling the truth, like laws that comply admirably with Fuller's canons, can be put to good or bad uses. This does not mean that we are morally indifferent to whether the truth is spoken or not. When the truth is spoken to advance the virtue of friendliness, it seems the act can be commended for possessing two moral qualities. It is a *better* act than when a lie is spoken to further the same ends. Similarly a prospective law cast in clear terms to achieve a laudable social end is morally *better* than a retroactive, unclear one seeking the same objectives.

If we stop to consider why telling the truth is considered an important end in itself, it may shed some light on the moral nature of Fuller's canons. Truthfulness is prized for itself because of the respect it shows for the intelligence and responsibility of the listener and for the integrity of the process of communication. Law is, of course, a form of communication involving the giving and following of directions, or commands. In giving his commands therefore, the lawgiver should respect the intelligence and responsibility of his subjects and the integrity of this process of communication. It does not seem untoward to urge, as Professor Fuller does, that the meaningful use of language in lawmaking is a moral ideal, particularly when so much is usually at stake in this form of communication.

Significantly, Professor Dworkin uses the example of a law authorizing genocide to illustrate that Professor Fuller's canons of legal

morality presumably do not make sense as such. In Dworkin's opinion genocide is thoroughly bad and laws providing for it are not morally improved by being made prospective, perfectly clear, or in any way conformable to Fuller's canons. This example is hardly designed to illustrate the strengths of the Fuller analysis. It is particularly inapposite since the private citizen affected by the genocide law is a passive victim of governmental action. This is far removed from the standard case in which the private citizen must take an active part in the implementation of the law's social purposes.

A more instructive case is the one in which the behavior of private citizens is directed toward a socially desirable result by a law which is seriously deficient according to one of Fuller's canons. Suppose a law is passed providing for the fine and imprisonment of an innkeeper who refuses to provide food or lodging to members of the colored races. If the law is made retroactive, it can be criticized as "unfair", "bad" or "unjust" without doing violence to the accepted meanings of these terms.

It can be argued that the immorality of an *ex post facto* criminal law has nothing to do with canons of legality. It can be urged that such a law is bad since the retroactivity involved will not deter future conduct and therefore causes unjustified suffering. But I doubt that this somewhat sophisticated analysis explains why the man in the street is immediately repelled by retroactive penal laws. He recognizes in them the "brutal absurdity" — to borrow a phrase used by Fuller to characterize such laws — of requiring a man to follow commands before they have been enunciated. Such legislation violates notions about human responsibility basic to our conception of law.

We are indebted to Professor Fuller for emphasizing and elaborating on a fundamental aspect of law that can be so easily overlooked. The legislator engaged in social engineering is working with the raw material of human beings and their relationships. The manner in which he uses such raw material is of great moral importance, and this should not be ignored because of our primary moral concern with the ends towards which he works.