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REGARDING THE SYMPOSIUM ON LAW AND MORALITY

By E. Russell Naughton†

It seems to me that the basic question faced in this symposium is whether or not there is some objective foundation for the acceptance or non-acceptance of a given law or set of laws as a source of obligation or as ground for legal coercion.

Both Professors Cohen and Dworkin seem to have answered this question in the negative, while Professor Fuller, both in his book and his remarks, has given an affirmative reply. The difficulty, as I see it, is that the negative viewpoint turned out to be not quite so negative, and the affirmative view was not so clear in its affirmations. Perhaps the blame for this confusion might justly be laid upon the shoulders of Professor Fuller because of the approach he took in his discourse.

If I judge him correctly, Professor Fuller accepts what many would call a "Natural Law" philosophy, but is unwilling to accept the ultimate implications of such a view. Thus, he believes that law is a natural necessity for man which, in some way, reflects the higher aspects of man's nature; yet he does not seem to consider law to be an expression of a more basic order in which man merely participates (a view commonly held by "Natural Law" philosophers).

The effect of Fuller's having relied heavily on Piaget and the sociology of games in his presentation is that he limited the development of his views in a rather positivistic manner and yet demanded more of his audience than a positivistic theory of law. It was at this level that Cohen and Dworkin realistically tied him to the limitations of his approach and demonstrated that he had not effectively repudiated the positivism he had challenged.

Much of the discussion centered upon the function that the purpose of a law has in the evaluation of the law. Here Cohen ruled out a meaningful role for purpose pursuant to the positivistic approach to the problem of evaluation. Yet Cohen himself attributed motives to Fuller and made his criticisms in the light of those adjudged motives. His distinction between psychological and teleological motives notwithstanding, he in fact utilized the same device for the evaluation that he was negating. The problem here seems to stem from the fact, not discussed in the session, that laws can have one evaluation in

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terms of their purposes and another in terms of the laws themselves. Thus a law enacted for a good purpose may turn out to be unjust. This distinction was implied throughout the discussion in that the two sides took opposite bases for their evaluations, but the fact that the distinction was not formally made was a source of further ambiguity.

Professor Dworkin brought us no closer to a solution despite his "Story of Tex" and his discourse on morality. While it must be conceded that any segment of human culture tends to establish its own morality, it may be denied that conventional moralities have to be accepted as the ultimate basis for the evaluation of law. This leads me to a conclusion quite the opposite of Dworkin's. He expressed the view that there was no *prima facie* obligation to obey law as such, but there would be such an obligation at certain times and under certain conditions. On the other hand, my view is that there is a *prima facie* obligation to obey law as such, but certain conditions might well relieve one of that obligation at certain times but only in terms of a particular law (or a particular set of laws), and not laws in general. It seems to me that Dworkin has overlooked the basic element of political life: the obligation to accept the authority of the group as being relatively, though not absolutely, of a higher order.

In his rebuttal, Professor Fuller seems to have identified the society-citizen relationship with the parent-child relationship; this interfered with his analysis of the citizen situation. The very concept of a democratic government carries with it a host of problems of authority and obligation which are absent in a monarchy or dictatorship. The function of the lawmaker is simply not the same in both types of political order. Paternalism is presumed in a monarchy; it is rejected in a democracy. The self-governing aspect of a democracy lends its own unique dimension to matters of political obligation and this is what we must try to measure and outline. By ignoring these differences, the participants have only added to the growing confusion we now face in the United States over the questions of rights, laws, and political order.