

PHILOSOPHY, MORALITY, AND LAW—  
OBSERVATIONS PROMPTED BY  
PROFESSOR FULLER'S  
NOVEL CLAIM

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Professor Lon L. Fuller has done more than any other American philosopher of law to retain for jurisprudence the job of finding connections and interdependencies between law and morals. But for the example of his dissatisfaction, others would have been content with the positivist's truism that the validity of law is one thing and its morality another. We stand indebted to him on many counts of being made to think when we thought we knew.

I take Fuller's recent book, *The Morality of Law*,<sup>1</sup> to be an unsuccessful attempt to establish a novel claim about law and morality. I shall consider in the first part of this article the nature of this claim and why Fuller fails to establish it. In the second part I shall examine certain contentions which I believe underlie this claim, and which, properly articulated, are in fact of considerable importance for legal and ethical philosophy.

I. THE INTERNAL MORALITY OF LAW

The central argument of *The Morality of Law* develops from a long parable,<sup>2</sup> the history of an initially good-natured king (Rex) who wishes to make law for his subjects, but is unable to do so because he commits, successively and discretely, eight serious errors of legal administration: (1) Rex begins by deciding not to make rules, but to decide cases only *ad hoc*; (2) he makes rules, but keeps them secret rather than publishing them; (3) he publishes them, but applies them only to cases arising before their publication; (4) he publishes them prospectively, but in language which cannot be understood by anyone; (5) he publishes them in clear language, but each rule is inconsistent with at least one other; (6) he makes his rules consistent, but the demands of each rule are such that compliance is literally impossible; (7) he makes compliance possible, but amends each rule so frequently

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<sup>1</sup> FULLER, *THE MORALITY OF LAW* (1964) [hereinafter cited as *MORALITY*].

<sup>2</sup> *Id.* at 33-41.

that attempts at compliance are generally frustrated; (8) his published law remains constant, but it bears no relation to the standards he actually uses as judge.

Fuller, surveying the wreckage of Rex's administration, concludes that "a total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."<sup>3</sup> He invites us to regard Rex's failures as failures to comply with eight distinct canons of proper legal procedure and these eight canons as depicting eight legal virtues which together characterize what he calls law's "internal morality."

If the central point of the canons, taken together, is that standards must have received a certain character and level of publicity *as standards* before they can count as reasons in legal argument or decision,<sup>4</sup> then I accept Fuller's conclusion that some degree of compliance with his eight canons of law is necessary to produce (or equally as important, to apply) any law, even bad law. But what does all this have to do with *morality*? A substantial portion of the book is devoted to clarifying these eight canons as matters of *strategy* which those who wish to produce "even bad law" must observe minimally and which those who aim at more effective law must follow more faithfully. Elsewhere the canons are treated as *definitional*, stipulating minimal conditions for the use of the word "law."<sup>5</sup> These two points are frosted, at various places throughout the book, with a layer of moral language. The book opens by expressing "a dissatisfaction with the existing literature concerning law and morality,"<sup>6</sup> presumably promising pertinence to that literature. Compliance with the eight canons is said to give law an "inner morality"<sup>7</sup> or "internal morality,"<sup>8</sup> and this internal morality is in turn characterized as "The Morality that Makes Law Possible."<sup>9</sup> The canons are spoken of as imposing a "moral duty" on legislators,<sup>10</sup> and an effort is made to distinguish within them a "morality of aspiration" and a "morality of duty."<sup>11</sup> And there is, after all, the title of the book itself.

<sup>3</sup> *Id.* at 39.

<sup>4</sup> His formulation of these canons, and particularly his identification of each as separate from the others, may be open to quibble.

<sup>5</sup> As quoted in the text accompanying note 3 *supra*.

<sup>6</sup> MORALITY 3.

<sup>7</sup> *Id.* at 42 *passim*.

<sup>8</sup> *Id.* at 44 *passim*.

<sup>9</sup> *Id.* at 33 (title of Chapter II).

<sup>10</sup> *Id.* at 43.

<sup>11</sup> *Id.* at 42-44.

It is difficult to see how the argument from Rex justifies these moral characterizations and designations: it is difficult, indeed, to see what they mean. Fuller seems not even to recognize that such terms present difficulties of interpretation—he moves from the language of strategy to the language of morals without the slightest caesura of transition.<sup>12</sup> We are left on our own to work out and identify the claims latent in the terms he uses.

He cannot mean, by speaking of an “internal morality” without which even bad law would not be possible, that a tyrant who curbs his instincts for iniquity only to the extent necessary to maintain a legal system has done anything morally praiseworthy. I have concluded that his principal point is this: such a tyrant, if he is to create and maintain law, must *comply with* or *observe* principles expressing moral duties and ideals, must *behave morally* in that sense.<sup>13</sup> I shall assume, in any event, that this is his point, for I believe it to state the most conservative significant position consistent with the language of morality he employs.<sup>14</sup>

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<sup>12</sup> Ironically, Fuller opens the book by chiding earlier students of his problem for being unclear as to what is meant by “morality.” His only explicit contribution to its clarification, however, is to remind the reader of the familiar distinction between moral duties and moral ideals (Chapter I), a distinction of almost no utility in meeting his own problem of showing that compliance with the canons of law as such has any particular moral character of any sort. I should add, nevertheless, that in what follows I have taken into account his statement that “the inner morality of law is condemned to remain largely a morality of aspiration and not of duty,” MORALITY 43, and that when I refer to “complying with (or violating) moral principles” I mean to include “living up to (or disregarding) moral ideals” as well as “obeying (or disobeying) moral rules.”

<sup>13</sup> Possibly Fuller would put the point a different way. He might limit his claim, in effect, to the assertion that no legal system is possible unless its officials abstain from certain immoral acts, thus acting in a way which *coincides with* moral principles. To the extent to which there is a difference between this and the claim set out in the text, *viz.* that officials must comply with some moral principles and in this sense must behave morally, it is a trivial and misleading claim. See p. 676 *infra*, where I attempt to show why this is so.

<sup>14</sup> I have rejected two interpretations of Fuller’s use of “morality,” each very different from the position set out in the text. These are:

(a) It is conceivable that Fuller, in using the phrase “internal morality,” means merely to repeat his strategic claims in different language, *i.e.*, that he uses the phrase simply to mean “conducive to the purposes of the enterprise at hand whatever they might be.” Others have so interpreted him. See SHUMAN, *LEGAL POSITIVISM* 89-93 (1963). I reject this because Fuller’s use of moral language would then be too bizarre to be credited, because his point would then be a trivial one, and because he would not then regard his book as a contribution to “the existing literature concerning law and morality.” See note 6 *supra*.

(b) Having made the four arguments for a connection between “internal” and “substantive” or “external” morality which I discuss, see pp. 671-73 *infra*, Fuller remarks, “So far in this chapter I have attempted to show that the internal morality of law does indeed deserve to be called a ‘morality.’” MORALITY 168. This might suggest that he understands the “morality” of internal morality to be solely derivative, to consist entirely in the fact that there is a connection between it and the substantive moral value of the law which embodies it. But this interpretation must also be rejected. Throughout the book Fuller’s language suggests that his eight canons in themselves have a moral quality and not merely a derivative or reflective morality. Moreover, the connection which Fuller in fact shows between his “internal” and

It is, nevertheless, a striking position. One would have supposed that the authors of at least some kinds of legislation—laws providing for the enslavement of a minority, for example—were not entitled to claim compliance with *any* moral principles, not entitled to claim that they had in *any* respect behaved morally, simply on the ground that their legislation amply fulfilled the demands of Fuller's eight canons of law. I shall argue that this common-sense supposition is correct, that it *is* inconsistent with Fuller's claim, and that Fuller's claim accordingly fails. But first a detour is necessary.

Readers made curious by Fuller's advertisement of a necessary connection between law and morals may be disappointed by the claim I have set out as his. They may have assumed that his argument would be directed against the legal positivist who holds that the morality or immorality of a law is a matter conceptually distinct from its validity. The argument from Rex does seem to leave this prototypical position untouched, for those who have argued for the separation of law and morals in this sense have had in mind what Fuller once refers to as "substantive" or "external" morality<sup>15</sup> and not the formal or procedural matters which seem to compose his "internal" morality. In answer to a similar argument in one of Fuller's earlier papers,<sup>16</sup> Professor H. L. A. Hart observed, of this internal morality, that "it is unfortunately compatible with very great iniquity."<sup>17</sup>

Fuller takes the present occasion to reply to Hart with arguments designed to show how "the internal moralities of law interact."<sup>18</sup> We must consider these arguments before concluding that classical legal positivism is untouched by Fuller's claims about internal morality. They run roughly as follows: (1) law is a precondition of good law, so one cannot have good law without observing internal morality;<sup>19</sup> (2) internal morality requires publication, and this restrains a tyrant who fears publicity from pursuing evil by legislation;<sup>20</sup> (3) internal morality demands some precision, and it is hard to be precise in

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"external" moralities would not justify the claim of any derivative morality in the former, for his argument would then be like the argument that the rules of grammar possess moral quality simply because it is generally easier and safer to tell the truth than to lie. See p. 672 *infra*.

Although I admit that there is warrant in the book for either of these interpretations, (a) or (b), I regard each as debasing the point which I believe Fuller wants to make (and which I, in any event, want to explore): that his eight canons of law have a connection with morals independent of their strategic importance and their impact on the substantive morality of law.

<sup>15</sup> MORALITY 153.

<sup>16</sup> Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-48 (1958).

<sup>17</sup> HART, THE CONCEPT OF LAW 202 (1961).

<sup>18</sup> MORALITY 153.

<sup>19</sup> *Id.* at 155.

<sup>20</sup> *Id.* at 157-59.

legislating iniquity;<sup>21</sup> and (4) internal morality assumes a view of man as a "responsible agent," and a legislator holding this view will not seek to affront "man's dignity as a responsible agent" with outrageous law.<sup>22</sup>

These arguments are made in answer to Hart's charge, but they do not confront it. Hart denies any *necessary* or *conceptual* connection between law and substantive morality; Fuller's arguments assert, at best, that it is easier and politically less dangerous to make or enforce good law than bad law. His first argument, that one must have law to have good law, is no more than an observation of uncertain pertinence; but his second, concerning the tyrant's fear of publicity, clearly illustrates this failure to join issue. His other arguments are more complicated.

The third argument, that rules dedicated to evil purposes are vaguer than rules advancing good ones, does at first seem to rest on some conceptual claim of a necessary association between clarity and morality. Indeed Fuller once put such a claim in expressly epistemological (and entirely mysterious) terms.<sup>23</sup> But the example and discussion he now offers (centering on the alleged vagueness of laws which provide for injurious legal, political, and social discrimination against members of the "Negro race") confine the argument's force to the claim that it is often difficult to interpret accurately rules offensive to one's own moral code.

There is a point to this, though not one in conflict with legal positivism. Good purposes are not intrinsically easier to describe than bad ones, and a perfectly evil statute can be drafted with exquisite precision. But a law whose point can be seen and whose purposes can be appreciated by the officials and citizenry to whom it is addressed usually *needs* less precision. For those who would enforce or obey it bring to this task not only a developed sense of the statute's aims, but also an ability to supplement its language with auxiliary principles of fairness and justice. A law profoundly antagonistic to our own sense of morality, set out in only normal specificity, would thus disable us in two ways. Since its fundamental purpose would be obnoxious to us, we could not turn to or trust our own attitudes as guides to the boundaries of this purpose; since its rules would seem immoral in any application, we could gain no help from our sense of fairness in making discriminations under it. We might locate these perceptions by calling the bad rule vague, but it would be more accurate to call it naked.

<sup>21</sup> *Id.* at 159-62.

<sup>22</sup> *Id.* at 162-67.

<sup>23</sup> Fuller, *supra* note 16, at 636.

This analysis of the appeal in Fuller's argument is confirmed by his example. We think it difficult, in enforcing laws discriminating against persons of the Negro race, to classify persons of mixed racial background into "Negro" and "non-Negro" groups. But our difficulty arises in part because we possess no accurate sense of the purposes of the discrimination and, in part, because we find it hard to imagine one case of such discrimination being fairer or less fair than another. A policy which provided special consideration for Negro applicants for admission to a university might strike many of us as much less vague.

The last of Fuller's arguments, based on the respect for human dignity associated with internal morality, may also appear at first to claim a necessary connection between law and substantive morality. But the claim of anything like a necessary connection here must rest on a proposition Fuller has already shown to be false, namely that the *only* reason which might lead a legislator to embrace internal morality is his respect for those he governs. The history of Rex is supposed to show, on the contrary, that a ruler may be driven to internal morality, at least to that minimum level necessary to create law, out of no consideration for the governed beyond a desire to rule them. (This last argument must be distinguished from the argument that observing internal morality is in itself to behave morally towards them. This latter point is part of Fuller's central claim, and not part of his ancillary arguments in reply to Hart's observation.)

Our tentative conclusion thus holds that Fuller's present claims do not involve any assertion of a necessary connection between law and substantive morality, and do not conflict with the classic or prototypical positivist position that law and morals are conceptually distinct. It would be foolish and wasteful, however, to assume that because Fuller has not confronted some historical antagonist directly, his claims have no philosophical or legal interest. On the contrary the novelty which removes these claims from some assigned position on a traditional field makes it more, not less, important to appreciate them. The principal of these claims, that making law necessarily requires compliance with some set of moral principles, must now be considered in its own right.

It is important to see that this claim goes beyond more familiar points which could easily be accepted. Of course we have had and can imagine many examples of immoral political behavior involving retroactive legislation, or high-handed interpretation, or some other violation of one of Fuller's canons. Some of these acts (disposing of political enemies through retroactive criminal legislation, for example) would be immoral even if done without any color of legal

process. Others are made improper by the pretense of adjudication, when they might not be without it. (We would find it unfair to "convict" someone of the "crime" of having a congenital disease, but permissible to segregate him from society, if necessary, without such a "conviction.") Our experience also includes, however, examples of official acts in defiance of the canons which do not involve moral fault. (Fuller's example of retroactive legislation to cure defects in marriage ceremonies is one; a court's disingenuous misinterpretation of an old statute to meet a pressing social problem might be another.) Some of these latter examples (the disingenuous misinterpretation, perhaps) are cases in which the legal act might be thought *legally* wrong or improper because it contradicts the canons, but not in a way which makes the fault a *moral* one.

We should agree, therefore, that an official who violates one of the canons may be acting unfairly or immorally. Some would even say (wrongly, I think) that serious violations of the canons are *generally* or *usually* immoral. But even this falls far short of claiming, as I take Fuller to claim, that the canons state moral principles such that compliance with them carries automatically some moral quality, or that a legal system which meets the canons only to the degree necessary to be a legal system displays on that account anything which could be called a morality, even an "internal morality."

The most plausible argument, it seems to me, which could be mounted in support of these claims is this: (1) violation of the canons is generally a moral wrong, just as breaking promises is generally a moral wrong; hence the canons, like rules about promise-keeping, state moral principles; (2) law cannot be established and maintained, as the history of Rex shows, without at least a minimal observance of these canons; (3) therefore law cannot be established and maintained without a minimal observance of moral principles, without a minimum of moral behavior in the sense in which promise-keeping, as such, is moral behavior.<sup>24</sup>

There are two errors in this argument. The first lies in concluding from real and imagined cases of official wrongdoing that the canons themselves express moral principles. It *is* morally wrong for an official to harm a citizen groundlessly, to insult him unfairly, or to accuse him unjustly. Those occasions of defying the canons which

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<sup>24</sup> This argument compares the canons to principles stating moral *duties* like promise-keeping. I chose this comparison because I believe that when a violation of the canons is immoral, it is because it offends such moral duties. I am aware that Fuller regards his canons as chiefly stating moral ideals. See note 12 *supra*. The same argument, involving the same mistakes, can be made comparing the canons to moral ideals, like friendship or charity, instead of promise-keeping, and substituting "disregard" for "violation."

involve such acts are occasions of moral wrongdoing, but they are so because they have these consequences and not because the canons are themselves moral standards. When failure to meet the canons does not involve such consequences, it has no moral flavor at all.

A legislature adopts a statute with an overlooked inconsistency so fundamental as to make the statute an empty form, leaving the law as it was before. Where is the immorality, or lapse of moral ideal? Failure to produce a law is not in itself a moral fault (the statute, without the negating inconsistency, might have been wholly beneficial, but it also might have been wicked).

Indeed, the more serious is the flaw in the procedure, the more clearly the attempt at legislation will be seen to have failed, and the less chance there is that any particular social consequences will follow. If the inconsistency mars the law, but does not destroy it, the resulting confusion will be greater; but even so the mistake need not involve morality any more than any other legislative error.

The second error in the argument is more illuminating. Even if we accept Fuller's canons as expressing moral principles in the sense that a clear-cut violation is as such a morally wrong act, and even if we agree, as I do, that lawmaking requires some minimal compliance with these canons, it does not follow that lawmaking requires compliance with moral principles. One can, of course, comply with a principle for good or bad reasons. People who keep promises because of fear of the person promised rather than respect for the promise-keeping principle are still complying with that principle. But not every act which in some literal sense falls under a principle is a case of observing it. Correctly answering a spelling quiz is not (observing the moral requirement of) telling the truth. Making a contract at bridge is not (complying with moral standards of) promise-keeping. Sending a carefully worded ransom note to a kidnap victim's parents is not (adhering to a moral code of) giving fair warning.

This is not the place to attempt a full exposition of the circumstances under which behavior that *coincides with* a principle can be regarded as in compliance with it. Broadly, however, such behavior does not constitute compliance with a moral principle when that principle would not, if offered, constitute a moral reason counting *in favor* of the behavior. When we report that a person has observed a moral principle, we make a moral *claim* about what he has done, although we do not necessarily claim—this depends on other factors—that he acted out of respect for the principle, or that he deserves any praise for having done it, or even (since *other* moral principles may count against his act) that he ought to have done it.



This fact about the vocabulary and logic of our appeals to principles shows, I think, why the claim that making law requires some minimal observance of moral principles seems such an *important* claim. It also shows why it is false. A tyrant who legislates to enslave some minority must make his laws clear and capable of performance, but in doing so he is not observing moral principles of fairness or decency, because such principles do not offer even a shred of moral argument in favor of what he is doing.

It is possible, as I suggested earlier,<sup>25</sup> that Fuller does not intend his statements about internal morality to be understood in this way. He may indeed mean to point out only the limited connection just dismissed, that is, that making even bad law requires acts literally falling under (alleged) moral principles. But his point would then be inconsequential and misleading, for the same can be said of blackmail or genocide. If we change "rules" to "commands" in the eight canons, a would-be blackmailer would founder by neglecting any one of them just as surely as Rex did, and no genocide could succeed without following, in this sense, the moral principle that like cases should be treated alike. Would it not be misleading to speak, because of this, of the "internal morality" of blackmail? Or of "the morality that makes genocide possible"?

This leaves us, of course, with the problem of explaining why so eminent a legal philosopher as Fuller has been led to make a claim we find unsupportable. Unless we can explain the appeal of the claim to him, we cannot profit from his efforts. *Part* of the explanation, surely, lies in his desire to make a second point which he appears to believe follows from it. This second claim asserts that to the *extent* to which lawmaking is subject to internal immorality of the sort common under tyrannies like Nazi Germany, it fails, and its product is to this extent less law.

Fuller has toiled in this vineyard before. He shares with many an obsessive ambition to lessen the horror of tyranny by arguing it into anarchy, or at least partial anarchy. His present argument is built upon the contention that law is always a matter of degree, measured by the lawmakers' degree of compliance with the eight canons of law. If he can make this contention good, any piece of official immorality which is also a violation of one or more of these canons must result in a pro tanto reduction in the degree of law achieved.

But if his contention that law is always a matter of degree fails, his second claim must also fail. For although we should certainly agree that some political outrages involving secret legislation, or retro-

<sup>25</sup> See note 13 *supra*.

activity, or whatever, are also cases in which an attempt to produce or apply law may be said to abort, it would not follow that every such outrage, or even most such outrages, have some effect on legality. Nor would it follow that there is any connection between the gravity of the moral wrong and the extent of the legal impairment involved.

His case that law is always a matter of degree to be measured by the canons comes to this: different societies have achieved differing degrees of success in the enterprise of "subjecting human conduct to the governance of rules," which enterprise Fuller takes to constitute law.<sup>26</sup> Rex failed entirely; he created no law at all. We in the United States, and in other advanced and cultivated nations, have succeeded to a considerable extent, although our performance has not been perfect as is evident from the degree of vagueness and retroactivity which our own law exhibits. Between Rex and us lie assorted halfway-houses, uncovered by archeology, history, and contemporary experience, in which internal morality is observed to that minimum necessary to the primitive purposes of some ruling group, but not in the abundance consistent with the dignity of their subjects. These halfway-houses force us to acknowledge a *continuum* of law, and to recognize the Nazi legal system as occupying on this continuum a station which marks it as less of a legal system than our own.

The mistake is an apparent one. It is true, of course, that the tests we must use for determining whether a technique of social order constitutes a legal system, or whether the dictates it produces represent laws, are inexact and therefore yield close cases. These we might describe as "quasi" legal systems or laws to mark the fact that they are in significant ways both like and unlike standard cases of these concepts. Of two such "quasi" systems or laws, we might say that one was *more* like the standard case, *more*, that is, a legal system or a law than the other. It does not follow that we can say of two clear examples of a legal system that one is more so than the other because it meets the tests more abundantly. Some concepts are almost always matters of degree (baldness is an example), but others are so only at their unclear edges. Of two very large streams, the larger may be more a river than the smaller, but the Mississippi is not more a river than the Monongahela.

Our tests for law do include, for example, a requirement of some degree of clarity. This does not, however, establish an ideal of pre-

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<sup>26</sup> The phrase and variants thereof are used several times. *E.g.*, MORALITY 122. Fuller believes that his view of law as an enterprise or activity is a characterization competitive with other analyses of the concept of law. It seems to me more a characterization of something else, namely the activity of making and administering law. I suppose this issue depends on whether one can here tell the dancing from the dance.

cision from which all other cases slide off by degrees, but rather contemplates a rough and shifting minimum. Rules framed in terms of "reasonable notice" or "substantial ownership," which could be made more specific, are not less laws than much more precise regulations. Nor do they require any special justification. Above this threshold those who make law are of course responsible for choosing, to the extent they have a choice, the degree of detail and articulation suitable for the business at hand. We can criticize the choice, but the critique must be in terms of that calculation. There is available no shortcut of the sort Fuller assumes.

Of course the virtues of clarity and precision are ideals normally fulfilled only to a degree. (Fuller, who as we have seen regards them as moral virtues, classifies them as belonging to the morality of "aspiration" rather than of "duty.") But it does not follow from *this* that law is always a matter of degree. To draw this conclusion is like arguing that whether something is a novel, or a room, or an army is always a question of degree, because size is one of the criteria of each.

An apparatus of government dressed in legal forms and vocabulary may so far fail to meet Fuller's canons that it falls below the threshold of our concept of law. Perhaps the Nazi governmental system is a case in point; perhaps it was not only immoral, but also not quite law. One cannot prove this by showing that it differed from our own in the dimensions these canons present. To prove it one would have to refine and to some extent calibrate the concept of law formed by the canons and then document the application of this concept to Nazi history. I doubt that the game would be worth the candle, or that this calculation serves any important purpose. I regard most arguments as to whether the Nazi system was "law" as having little point. But the conclusion that it was *less* law than ours, on the basis of Fuller's argument that because it had more retroactivity it must have been, is in addition illogical.

## II. LAW AND MORALS—A DIFFERENT CONNECTION

Fuller fails to establish his principal contention that lawmaking necessarily involves some minimal compliance with certain moral standards. Nevertheless some sound and important perceptions underlie this mistaken claim. The so-called formal features of law, bound up in the very meaning of the term and worked out by jurisprudential exercises, are indeed of normative as well as linguistic or strategic importance. Attention to these features does indeed illuminate simi-

larities between law and morals. I shall elaborate upon each of these contentions in the two sections which follow.

### *A. The Critical Force of Law's Vocabulary*

Jurisprudence of the "analytic" or "linguistic" schools attempts to provide information as to the "meaning" or "concept" of "law" and its complementary words and phrases, information, that is, as to the standards we use for applying or withholding these terms. Such information is often belittled; it is said to be "merely linguistic," incapable of any legitimate role in evaluating legal acts and decisions. This assessment is misguided. The story of Rex, in revealing information about the correct way to describe certain official acts, reveals information about the correct way to perform them. I shall take the present section to expand and defend this contention. I do so because it is of importance in appreciating the special character of legal standards like Fuller's canons, and, as I hope to show in the sections that follow, in recognizing and capitalizing upon the important connections between law and morals which these canons do signal.

The vocabulary and institutions of law are neutral or "formal" only in the sense that they are pervasive and like the rules of a game are placed beyond challenge in the ordinary contexts of their employment. Is it part of the very concept of law that it be general? That it proceed through standards? That these standards be public? If so, then the argument that a court of law should decide a particular case by particular edict, or by the flip of a coin, or on the basis of the secret thoughts of some sovereign body is placed in a special category as marking not merely an unusual and eccentric contention to be tested within our legal institutions, but a proposal that these institutions be abandoned. This means not that the proposal is senseless, or worthless, or immoral, but simply that it is ruled out of order by the ground rules of *some* contexts in which it might be raised, namely, those contexts which *presume* (or, better, those contexts which *constitute*) the operation of that institution.

The nature and force of these ground rules can be clarified by imagining and contrasting different reactions to some eccentric judicial behavior. Suppose a court finds itself faced in a particular case with two inconsistent lines of authority, one favoring the plaintiff and one the defendant. After study and reflection the two lines appear almost equally persuasive and sound. The court, hard pressed to decide which to adopt, resolves its dilemma by awarding the plaintiff *half* of the damages to which he would have been entitled had his arguments prevailed.

Such a solution might be attacked in different ways with different effect. It could be challenged as *novel* (in that no earlier decision following such a procedure can be found) or *unfair* (in that each party litigated on the assumption that the court would continue its labor until satisfied that one side had slightly the better argument) or *unwise* (in that it will discourage other parties from litigating murky areas of the law, fearing that other judges might use this appealing escape) or *institutionally uneconomical* (in that it transfers the burden of articulating the law in such cases to the legislature which does not have the time and is in any event less well equipped to handle it).

Each of these challenges appeals to some standard of fairness or strategy widely accepted as pertinent to judicial decision. Each challenge might be met in defense of the decision by an outright rejection of the standard offered—"lack of precedent is never a good reason for refusing a new step"; "judges should decide the case before them and not worry about its impact on other cases." Or the standard might be accepted in principle, but rejected for the particular occasion because of other circumstances—"here the unfairness of surprise is less than the unfairness of wholly defeating either party." "The gain in fairness here is sufficiently great to offset these side-effects, provided that this procedure is used only in very difficult cases."

Consider now a different form of objection: the decision is wrong because it is a *compromise* rather than an *adjudication*. It is not a decision "of law," and hence it is an improper result for a *court of law*, constituted and seized of the matter as such, to reach. These are jurisprudential contentions; they involve claims about the nature of the law and its related words and concepts. Of course, they might be unsound jurisprudential contentions. But if we assume that the decision *can* be shown to be a compromise and therefore *not* a decision "of law," what sort of rebuttal can now be made?

A defender of the decision now faces not simply a principle or a policy which he might reject, or against which he might produce countervailing principles or policies in the light of particular circumstances. He faces instead a set of rules defining a pertinent institution and thus structuring the background against which his argument is being made. So long as he perceives himself, and wishes others to take him, as participating in or criticizing the workings of *that* institution (as distinguished from some other which it might have been or might become), he cannot step outside those rules.<sup>27</sup>

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<sup>27</sup> It goes without saying, I assume, that he cannot accept these rules as "merely linguistic," and avoid them by choosing other words to describe the procedures he wishes to commend.

Of course, he can propose and argue that the conceptual frame of the institution be broken and rearranged, so that bodies otherwise constituted like courts may compromise some arguments instead of adjudicating them. But he would labor under some distinct burdens in urging this. First, one feature of his position (indeed, one way of describing his position) is that the other participants will normally be excused by the logic of the context from acknowledging and responding to his argument—it will be, in this sense, *out of order*. Second, his argument must acknowledge and accommodate the fact that any recognizable conceptual change must entail vast, possibly incalculable ramifications. We cannot alter, for particular cases only, conceptual notions of what a court is and should do. Third, he is likely (depending on how closely his proposals touch the core of the concepts involved) to have a special sort of difficulty in finding principles or policies of wide appeal in the community which support his proposal. What principles, for example, would support the argument that tribunals of compulsory jurisdiction should be allowed to dictate compromises in ordinary law suits? The likely candidates (principles of political justice, or of good public order, for example) cannot easily be made to serve. For these principles each *include* or *reflect* our concept of law—we cannot use them without importing the practice to be tested into the standards used to test it. So these principles, far from aiding the attack on the concept of law, must be indicted, at least in part, along with it. The more deeply the ground rule in point is set into the concept of law, the greater becomes the Archimedean predicament of being unable to find a point to stand and a fulcrum for the lever.

In these ways and to this extent standards entering into and forming the concept of law operate differently from, and independently of, the standards of fairness, policy, or strategy more often used in criticism of the legal process. Once they are perceived as in point, in the absence of pertinent and successful challenge of the sort imagined in the last paragraph, these conceptual standards function as reasons in their own right and not simply as signals that the particular decisions they indict are unfair or unwise.<sup>28</sup> Justification of particular features

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<sup>28</sup> In one passage Fuller asks why laws which "not one man in a hundred" would read must nevertheless be published before they are applied. He answers with a series of moral and practical considerations: (a) even if only one in a hundred wishes to read the law, he is entitled to do so; (b) those who do not read will nevertheless follow the example of those who do; (c) if esoteric laws were not published they could not be publicly criticized; (d) nor could their enforcement be publicly checked; and (e) those most concerned *will* read them, anyway. MORALITY 50-51. These are all good reasons, to be sure. But they are the sort of reasons which officials might well feel justified in setting aside on occasion because of more compelling considerations (if, for example, publication of the law before it had to be applied might cause

of the concept of law can, of course, be cast in terms of moral or policy considerations, but any broad attempt at justification, like any broad attempt at criticism, encounters the Archimedean version of circularity.

An important qualification is now in order. So far I have been assuming that the standards locked in the concept of law are crisp, precise rules, the limits of their authority clear-cut and evident, and I have discussed their logic and their force on that assumption. But, of course, this is a false picture: these standards are matters of degree over some range of their application, are to some extent controversial, and are continually redefined in small and imprecise ways by the operations of institution and language which they regulate. In this way they are quite unlike the relatively precise and unmalleable rules of ordinary games.

This qualification makes it more difficult, but also more important, to appreciate their special role in legal argument and reasoning. If the concept of law were as clear and uncontroversial as, for example, the concept of a move in chess or a play in bridge, we would not expect by analyzing it to improve our understanding of, or influence on, legal argument, because anything in the concept pertinent to that process would already be obvious to all its participants. There would then be point to the criticism that analysis of legal concepts cannot yield legal arguments, for appeals to the concept of law would be too obvious or too trivial to count as such.

Controversies over the meaning of law are significant only because the strands making up the concept of law are difficult to isolate and require judgment to apply. This significance is not exhibited by the pages of *The Morality of Law* which speculate on the slapstick of Rex or the Nazi Grand Guignol, for in each of these cases the disregard for legality is so blatant as to indicate that the participants, for different reasons, did not perceive the context as calling for law at all. Much more pertinent are those pages<sup>29</sup> exposing examples in our own legal tradition of what Fuller regards as *invasions* of legality.

A statute is passed in terms so ambiguous as to leave extensive doubt about its proper application. A court adopts and applies a novel rule of law flatly inconsistent with another rule recently pro-

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an economic panic with predictable serious consequences to the entire community). The reason why a law must be published even on such an occasion is that a decision by the members of a legislature to adopt some rules, but keep them secret until an occasion arises for applying them, would not amount to the production of a law. This is a different *kind* of reason from the five Fuller gives, but it is nevertheless a sufficient reason for the publication of law even on occasions on which his explanations do not suffice. That something *cannot* be done, without breaking the conceptual boundaries of the institutions and conventions being employed, is itself a *reason* for not doing it (for not moving the rook on the diagonal in chess, for example).

<sup>29</sup> MORALITY 46-94 *passim*.

mulgated, with no recognition of the contradiction. Price ceilings are established retroactively, making illegal sales which have already taken place. These are the shadow cases in which the institutional and conceptual commitments of the law's vocabulary are ranged against policies and purposes, noble or ignoble, best served by their breach. The pull of these commitments is felt, but the extent of the invasion is not so marked that they must prevail, not so definite that any recognizable shift in the geometry of our concepts takes place if from time to time they do not. Here the erosion, accretion, and invisible redefinition of which I spoke takes place. As the fact of a challenge to a conceptual commitment becomes clearer, of course, so does its force, until a case—like the imaginary decision splitting the difference—is reached in which considerations of fairness or strategy opposing the commitment become irrelevant.

These shadow cases in part explain why the business of arguing about the concept of law and other central terms of the legal vocabulary thrives and turns up in outpockets all over the legal terrain, despite lawyers' supposed sophistication in avoiding "verbal" arguments. There are at stake, in each academic confrontation about the meaning of law, groups of choices and decisions whose number and even whose nature is largely unforeseeable, but which will swing one way or the other depending upon which priority, which emphasis, which modulation now predominates.

### B. *The Counterpart Canons of Morality*

The law and the morality of a society are different, though overlapping, collections of standards for the criticism of conduct. Both collections contain a variety of sorts of principles, rules, and policies. Some of these are standards stipulating what conduct is illegal or immoral. Others are standards determining what shall count as legal or moral, as opposed to nonlegal or nonmoral, reasons, arguments, or phenomena. These latter standards are *criterial*. They serve to test whether an act of a legislative body counts as a law, whether an act of a judicial body qualifies as a decision, or whether an argument advanced in favor of a course of action constitutes a moral argument.

Fuller's eight canons of law are criterial standards. They are addressed chiefly to persons who *deal in* law. They are concerned with success or failure in some aspect of a legal enterprise; they are directed to whether what some official has done is legal as opposed to *nonlegal* rather than legal as opposed to *illegal*. Of course they are *pertinent* to determining whether an act is legal or illegal. They are invariably



pertinent in the sense that whether an act is illegal depends upon whether some standard or set of standards count as law. But they are often pertinent in other ways. Sometimes, for example, whether an official has behaved illegally and is personally liable on that account will depend not only on whether the statute under which he acted is law, but also, if it is not, on the degree and respect in which it fails. Such connections between the canons and questions of legality or illegality are reminiscent of those we saw between the canons and questions of morality or immorality of official action. An official act is not illegal, any more than it is immoral, just because it involves even a serious failure to observe these canons.

Some of the criterial standards of law—the rule that a congressional enactment must pass both houses, for example—are peculiarly legal and have no counterpart in morality. Other criterial standards of law do have moral counterparts, suggesting and reflecting common features of the two disciplines. Fuller's canons, taken together, are also legal standards of this latter sort.

This can be seen, I think, by considering another imaginary history modeled on Rex's. Suppose a playwright sets out to create a society with a system of morality very different from our own. His characters constantly and bitterly charge each other with immorality. Reasons given in support of these charges consist of appeals to so-called moral rules which are in gibberish, or are self-contradictory, or demand acts humanly impossible, or take positions never before expressed, acknowledged, or even contemplated as standards of behavior. Because of these defects, the characters are systematically unable to perceive these "rules" as standards against which they are acting, or to comply with them if they do so perceive them. Yet this fact strikes no one as disturbing, and strikes no one as excusing, or mitigating, or even pertinent to guilt. Our playwright would not have succeeded in creating a bizarre morality. He would have gone too far and created no morality at all.

As this exercise illustrates, our concept of social morality does contain standards which recall the canons of law. The two sets of standards are not by any means identical. They differ in ways reflecting important differences between law and morals. A moral principle, for example, cannot be established by deliberate act, as some sorts of law can.<sup>30</sup> Hence, while the canons of morality (as I shall call these counterpart standards) play a role in teaching us how to

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<sup>30</sup> For an elaboration of this difference and an excellent account of the distinctions between law and morality which revolve around it, see HART, *op. cit. supra* note 17, at 171-73.

recognize a moral principle or criticize a moral judgment quite comparable to the role of Fuller's canons on the legal side, they have no function analogous to the use of the latter as a guide to legislation. There is thus no place in the canons of morality for a separate principle like the legal canon prohibiting retroactivity.

Nevertheless, allowing for such differences, we can recognize two sets of standards roughly and generally analogous to each other. This is hardly surprising. Each of the two departments of criticism presupposes human conduct carried out against a background of standards by whose terms it is to be judged, and each is constructed around common concepts of responsibility, obligation, entitlement, and the other apparatus of judgment. The counterpart canons serve to enforce these common concepts and also to modify and accommodate them to the differing institutional and structural features of the two domains.

The canons of morality, of course, are criterial standards; they are addressed to those who make moral judgments or arguments and govern their success or failure. Like the canons of law, they may also be pertinent to the question of whether someone has behaved morally or immorally. If I harm you in some way, claiming myself justified because you broke some alleged moral rule which I invoke, then the fact that this "rule" is self-contradictory or impossible to observe might count as a step in showing that what *I* had done was morally improper. But a failure to comply with the canons of morality is not, as such and for that reason, a moral fault.

The considerations supply what might be an additional facet of the argument that lawmakers must behave morally to succeed. We sometimes appeal to the canons of morality, or principles closely related to them, in moral contexts. We generally count it a mistake, for example, to censure someone morally for failing to follow a standard he could not have known *was* a standard or which could not have functioned for him *as* a standard.<sup>31</sup> Perhaps Fuller, perceiving the similarities between these principles and the canons of law disclosed by his own analysis, bases his claim that these canons of law are moral principles on these similarities, rather than on the examples of official immorality discussed earlier.<sup>32</sup>

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<sup>31</sup> This is hopelessly over-simple as an account of the relationship between moral blame and the availability of moral standards. My present purpose is only to remind the reader that there is such a relationship, and that it may account for some of the plausibility and appeal in Fuller's claims about the internal morality of law. It would be intriguing to pursue the question, suggested by this point, of how closely the traditional legal and moral excuses based on ignorance can be shown to be related to the criterial canons of law and morality.

<sup>32</sup> There is no reason to believe that either of these lines of thought is entirely responsible for Fuller's position. That a perception of criterial canons of morality played at least some role in his thinking is suggested by his statement: "Certainly

If so, he is guilty of two confusions. First, and less important, he confuses related but not identical legal and moral standards. Second, and more important, he confuses criterial standards directed at determining whether some act has succeeded in producing a moral criticism, or a moral argument, with standards stipulating whether some act is moral or immoral, praiseworthy or blameworthy in character. If he is to establish his claim that compliance with the canons constitutes moral behavior, he must show his canons of law to be moral standards of the latter sort, instead of or as well as the former sort.

Nevertheless, the fact that *The Morality of Law* forces us to attend first to the criterial standards locked into law's vocabulary, and secondly to analogous features of our morality, must be counted as strong virtues of the book. I shall try, in the remaining pages, to present some of the benefit to legal philosophy such attention might yield.

We should expect, given the rough similarities between the two sets of criterial canons, that students of legal philosophy pursuing the concept of law would draw heavily upon the work of philosophers of ethics, and vice versa. In fact, at least in the American literature, each of these guilds affects an almost studied ignorance of the other. This disabling isolation should be outlawed; jurisprudence and ethics would each benefit from absorbing the insights and appreciating the failures of the other. But the connection between the two should go beyond the search by each in the inventories of the other. Problems common to both should be identified and attacked jointly *sub nomine* "a more general theory of obligation," or "public standards," or "the criticism of human conduct," or some other sufficiently commodious title.

Certain important failures of legal philosophy seem to me attributable to a concentration on legal institutions alone. An extraordinary amount of jurisprudential talent has been spent in attempting to describe the manner in which acknowledged rules, policies, or principles of law, which may be vague, incomplete, or inconsistent, determine legal conclusions when applied to particular groupings of facts. A consensus has now formed supporting the following solution to this problem: principles of law generally limit the solutions to particular legal problems which are acceptable, but do not dictate any one solution as uniquely correct. In easy cases only one answer may be

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there can be no rational ground for asserting that a man can have a *moral* obligation to obey a legal rule that does not exist, or is kept secret from him, or that comes into existence only after he acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute." MORALITY 39. (Emphasis added.)

possible, but in hard cases no one answer is necessarily correct on the basis of the pertinent principles and precedents alone. Before any one answer can be justified, there must be some fresh choice among acceptable solutions by some authorized official.

I have elsewhere given my reasons for finding this an unacceptable account of the logic of legal standards.<sup>33</sup> It seems to me to derive its plausibility from the fact that we take, as the model of all legal reasoning, the proceedings of courts and other formal tribunals. These proceedings feature an official, or series of officials, whose statement of legal conclusions is dispositive of the controversy at hand and especially influential with respect to similar controversies in the future. We are thus tempted, in cases in which we cannot with confidence declare one solution more justifiable than others on the basis of prior established standards alone, to focus our attention on the acts of these officials. We speak of their choice (or discretion, or fiat, or interstitial legislation, or whatever) as bridging the gap we otherwise despair of closing. So thoroughly have we yielded to this temptation that we have settled for a theory which leads us to look at all statements drawing highly controversial or debatable legal conclusions, whether made across a lawyer's desk or a teacher's classroom, as disguised predictions or guesses as to what some hypothetical official would do.

It would benefit legal philosophers to ask themselves what account they would give of the parallel problems of moral reasoning. Like legal principles, moral principles can be vague, or incomplete, or inconsistent in the sense of pointing in different directions in response to particular facts. I have promised to do something for you, and you have relied upon that promise. But I discover that to do so will cause undeserved pain to another. Shall we say that there is "no right answer" to my dilemma since both keeping my promise and not keeping it are "acceptable" solutions? Or that I (for no one else can play here the role the judge plays on the legal side) must choose by "fiat" or "legislate" an answer for myself?

This way of describing the situation seems to miss the point of reasoning in morals; it seems entirely to bypass the difficult analysis needed to give an adequate account of this process. Some readers will disagree, but many, I believe, who accept an analogous account of legal reasoning will not. Yet no difference between the two departments of criticism explains why we should tolerate radically different theories accounting for strikingly parallel phenomena. The absence of an institutional decision-maker as to moral questions shows not that

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<sup>33</sup> Dworkin, *Judicial Discretion*, 40 J. PHILOSOPHY 624 (1963).

legal obligation differs from moral obligation in some respect here pertinent, but that an account of how particular obligations follow from general standards must be found which does not depend upon the capacity for fiat of such officials.

I do not suggest that moral philosophers have developed some insight into reasoning from moral principles to particular cases which is applicable to law. By and large (the utilitarians are perhaps the most notable exception) philosophers of ethics have not been much concerned with the problem. They have had nothing like the business of studying, predicting, criticizing, and producing judicial opinions to force it upon them. One important benefit of requiring students of obligation to consider law and morals together would be realized if these experts were thereby attracted to a problem legal philosophers have for the most part faced on their own.

There is another area of legal concern which would benefit, in a different way, from the joint study of features common to law and morality: this is the phenomenon called "conventional morality." It has been the stepchild of traditional ethical theory. Philosophers who believe that moral judgments may be "true" or "valid" are anxious to distinguish a true or valid judgment from one which merely reports the popular morality of the times. Those who believe moral judgments to have no empirical content, or otherwise to be "neither true nor false," also distinguish mere reports of community beliefs and practices as being ordinary empirical statements about what people believe and do. Neither group has thought it necessary to state more carefully *which* beliefs and acts of *whom* constitute the conventional morality of a community, or whether anything other than such beliefs and acts goes into making it up.

Lawyers have been forced to ask questions like these. Particular statutes, regulations, and rules of law include direct references to moral standards (the United States citizenship and deportation regulations, for example)<sup>34</sup> and other principles of law (like the "cruel and unusual punishment" and "due process" clauses of the Constitution) are widely regarded as implicitly embodying such standards. Judges and lawyers have taken these references to call for the application not of some official's view, if he has any, of transcendental moral truth, but of the moral standards of the community at large. In turn they have perceived this conventional morality, as philosophers have taught them to do, as a simple compound of the attitudes of the bulk of the citizens.

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<sup>34</sup> See Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838 (1951) (discussion of the naturalization cases and of the problem of conventional morality in general).

This approach has been attractive because it appears to rest on democratic grounds the use of moral standards in law. Nevertheless, it leaves an irritating deposit of difficulties.

These are legion and obvious. They begin with evidentiary problems: even if we mean, by conventional morality, only the consistent replies which a high majority of the persons in the area concerned would give to a question posing a moral issue, any opinion a court or critic may have as to what these replies would be can be only supposition in the absence of prohibitively expensive polls.

Beyond the evidentiary lie the conceptual uncertainties. We would expect, for example, a greater consensus in favor of some very abstract moral proposition (say, that persons should be treated with equal respect unless some demonstrated difference personal to an individual and for which he is responsible justifies his different treatment) than in favor of a more specific proposition which *we* believe follows from it (that social discrimination against Negroes is morally wrong, for example). Are we entitled to conclude that the *specific* proposition represents the application of conventional morality, in the form of the abstract proposition, to the issue of racial discrimination? At what level of abstraction, in other words, should conventional morality be read? We believe that one who holds the abstract opinion but denies the more specific one holds inconsistent opinions. Does that entitle us, in computing the conventional morality, to disregard one of them? Which one? At least in part, our disagreement with those who do not think the specific proposition follows from the abstract one may be a disagreement of fact. Is a court entitled to find the pertinent facts in its usual style and disregard opinion based on a contrary perception of the truth?

Still other difficulties flow from the accurate cliché that a community's moral standards are often honored in the breach. If we distinguish a man's critical behavior (meaning his acts of criticizing or commending others and supplying reasons and arguments therefor) from the rest of his behavior, we shall find many cases in which the latter is inconsistent with the former. Shall we say, if this inconsistency is sufficiently widespread with respect to certain principles, that these principles are therefore hypocritical and not to be counted as live standards of the community? Or shall we say that the notion of conventional morality is *addressed* to the critical behavior of a community's members, and, therefore, includes these standards so long, at least, as the inconsistent behavior does not entirely erode their critical force? Even if we tie conventional morality to critical behavior, we cannot count all critical behavior, for we often criticize others on

standards neither we nor they would recognize as moral. Can we supply the necessary techniques for distinguishing moral from other sorts of standards?

A competent analysis of the concept of conventional morality is needed. It can be achieved, it seems to me, only by pooling the moral philosopher's sensitivity to normative language and argument and the legal philosopher's concern with the way in which community standards are generated and introduced into the legal process.

Some may feel that the difficulties I have raised should be met not by exploring the concept of conventional morality but by dropping it, at least for legal purposes. This would perhaps be more expensive than they realize. We have mentioned some recognized examples of explicit and implicit reference to moral standards in statutory and constitutional law. More routine, and therefore less heralded, appeals to such standards so thoroughly permeate the legal process that it can scarcely be supposed that it could function without them. We have already noticed, as a sample, the importance of morality in the interpretation and enforcement of statutes. The administration of even so structured a legal event as a trial or an argument at law, to take a wholly different example, requires constant appeal beyond a code of procedures to community standards of fair play.

The concept of a conventional morality serves the function of *qualifying* moral standards for all these uses, by placing them beside more traditional law in the background of public standards against which the community conducts its affairs. If we abandon the concept we buy relief from its perplexities, but at the cost of having to explain and justify without it the uses of morality in law.