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A Reply to Professors Cohen and Dworkin

Lon L. Fuller

A REPLY TO PROFESSORS COHEN AND DWORKIN*

By LON L. FULLER†

ONE OF THE embarrassments about a debate like this is that it becomes apparent at an early point that many of the differences derive from tacit assumptions that are made on both sides.

I suggest that any kind of human knowledge is made possible by certain tacit exclusions, certain standards of relevance that define the subject matter we seek to understand. These standards of relevance are generally applied intuitively and without any conscious realization that an alternative is offered. In Michael Polanyi's words, inquiry begins with "an area of focal awareness."[1] We do not have time to review all the strands of reality that might lead into the object of

* The designation of my contribution to this written exchange as "A Reply to Professors Cohen and Dworkin" may mislead the reader who attempts to discern a point-by-point correlation between my contribution and that of my critics. It may, therefore, be useful to indicate briefly in what respects this title is inappropriate.

In the first place, the "reply" I offer here represents the written statement I took with me to the symposium on April 2nd in a virtually unchanged form. The contributions of Dworkin and Cohen, on the other hand, are not the statements to which I was at that time responding. Professor Cohen's statement has in some respects been revised; in my opinion the revisions introduced do not suggest any alteration of my reply, though in my resolution to stick by my original statement I must confess I have given that question no close scrutiny. As for Professor Dworkin's contribution, it should be said that when I prepared myself for the oral symposium he suggested that I rely for his views on the already published review of my book, *Philosophy, Morality and Law — Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668 (1965). His oral statement on April 2nd in general represented a condensed version of this 23-page review-article; the written statement which he now presents to his readers is a still more condensed version of the same statement, supplemented by a "rebuttal" that was no part of the oral symposium at all. In deciding to preserve my "reply" in its original form I have made no changes to accommodate my arguments to the altered form of Dworkin's presentation or to the "rebuttal" which he has now appended to his criticism of my book.

I offer these clarifications with no desire at all to complain about the modifications that Professors Dworkin and Cohen have introduced into their critical commentaries, but simply to make it clear that I have not attempted to accommodate my "reply" to these modifications.

I have been compelled to leave unanswered a good many issues raised by Professor Cohen's criticism, both as originally delivered and as now revised for this issue of the REVIEW. His is less a criticism of the book under discussion than of my whole life as a scholar. This is hardly the place or the occasion for me to defend myself against the charge that everything I have written (including the book under discussion) has been devoted to a single objective, that of discrediting "positivism" and upholding "natural law." As to the epistemological issue of the wisdom and necessity of attempting an interpretation of purposive actions and institutions as if they were non-purposive, I refer the reader to the exchange between myself and Professor Ernest Nagel in 3 NATURAL L. F. 68 (1958) and 4 NATURAL L. F. 26 (1959). As some indication from other thinkers that my position on this issue is not wholly lacking in intellectual respectability, I cite MICHAEL POLANYI, THE LOGIC OF LIBERTY (1951), PERSONAL KNOWLEDGE (1958); and CHARLES TAYLOR, THE EXPLANATION OF BEHAVIOR (1964).

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1. POLANYI, PERSONAL KNOWLEDGE 55-57 *passim* (1958).

our immediate interest. If we attempted to do this, a whole lifetime would not suffice for an investigation of the simplest problem. We are saved from this futility by habits of thought and by ingrained standards of relevance that put us to work on the problem in which we are interested, at the price, naturally, of excluding points of view that might change our whole attitude if they were to rise to consciousness.

In no field are these remarks more applicable than in that of morality. We say, "Why, obviously here is a moral problem"; or, "But that has nothing to do with morals"; and it is indeed uncommon for anyone making such remarks to spell out in detail just what standards of exclusion he adopts in defining the area of morality. Even the proposition on which both Professors Cohen and Dworkin seem in such complete agreement, "moral standards are never enacted," must rest on an elaborate set of standards of relevance that are not, and cannot be, spelled out in a so seemingly innocent statement.

Let me say at once that I am not claiming that in this book, or in anything I have written, that I can always pinpoint exactly what assumptions I have made in arriving at certain conclusions. I am indebted to critics for making me aware of assumptions that have slipped into my thinking without having presented any credentials to that small part of my brain that engages in conscious and deliberate acts of rejection and acceptance.

With this somewhat labored apology, let me suggest that underlying the dispute between the gentlemen from New Haven and myself is, perhaps, a *single* point of disagreement: I embrace and accept what may be called the concept of an institutional or procedural morality; they reject it. They agree with the view expressed by H. L. A. Hart in his review of my book, that to treat the principles of legality as a kind of morality is "to blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned."[2] Is it true that I cannot act morally in a given context unless I am in a position to pass some *final* judgment on the implications and ultimate consequences of my act? I do not think so, and it is perhaps precisely at this point that most of the differences between myself and my critics arise.

These differences seem to crystalize around the first of our points of difference, that touching my use of the conception of an "internal morality of the law." It is charged that in advancing this notion I have

2. Hart, Book Review, 78 HARV. L. REV. 1281, 1286 (1965).

confused the conceptions of morality and of efficacy. Morality is concerned with ends, not with means; a means, such as a system of law, can be used for both good and evil ends. It therefore lacks any moral quality in and of itself. Let me, then, address myself to this allegedly fundamental distinction between means and ends in moral discourse.

First, I should be willing to concede that what I have sometimes called "the principles of legality" may be regarded simply as means for achieving a certain kind of order, provided this admission is qualified in two ways: (1) that we realize that we are talking, not about control or power over people generally, but about a particular kind of control or power, that obtained through subjecting people's conduct to the guidance of general rules by which they may themselves orient their behavior; (2) that once such a system is attained, it commands a moral force in the lives of men that is subject to abuse. To put the last point in the simplest terms: once you create a legal order that purports to rest on a system directing human conduct by rules, the law-giver or law-enforcer is subject to a constant temptation to cheat on the system, and to exercise a ruleless power under the guise of upholding a system of rules.

The ordinary citizen has a certain deference for law; he does not like to break the law. This attitude on his part is subject to exploitation by the legislator or policeman who, acting in the name of law (that is, in the name of an impersonal regime of general rules), may exercise a power that does not respect those conditions essential for the achievement of a regime of general rules.

It is generally accepted that the citizen has, under ordinary circumstances and subject to exceptions, a moral duty to obey the law. Does not this moral duty of the citizen impose on the legislator a correlative moral responsibility not to frustrate or undermine the citizen's duty toward the law? Does it not mean that he ought not, for example, to enact vague or self-contradictory laws?

Professor Dworkin sees no problem here. If a law is so vague as to be meaningless, or is self-contradictory, it is, in Dworkin's view, simply a blank cartridge and the citizen can safely and in good conscience disregard its loud but empty bang. In his own words:

> A legislature adopts a statute with an overlooked inconsistency so fundamental as to make the statute an empty form, leaving the law as before. Where is the immorality, or lapse of moral ideal?[3]

3. Dworkin, *Philosophy, Morality and Law — Observations Prompted by Professor Fuller's Novel Claim,* 113 U. PA. L. REV. 668, 675 (1965).

Well, I would like to see this statute that the citizen just looks at and says, "Why, this isn't law at all!" I have seen some that tempted me to say that, but the courts always managed to rescue them in ways I could never have predicted.

It is sometimes useful, and refreshing, to turn away from the doctrine-haunted field of legal philosophy, where ideas are judged, not on their own merits, but by smelling them out to see if they may not have some taint of positivism or of natural law about them. In this spirit I turn to child psychology and to the famous work of Piaget, *The Moral Judgment of the Child.*[4]

In that work Piaget views the parent as a law-giver and the child as the legal subject. He points out that most parents are very bad law-givers indeed. With them, criminal liability tends to be independent of fault or intent; the plate broken through clumsiness by a child trying to help with the dishes is apt to call down a more severe punishment than some trifling but deliberate act of destruction. Parents do not trouble about such distinctions[5] (my canon of legality No. 6), and they commonly ". . . issue contradictory commands and are inconsistent in the punishment they inflict . . ."[6] (my canons Nos. 5 and 8).

Piaget speaks of the dismal picture presented by the average parent "especially on Sunday evenings after a day's outing." He speaks of "the psychological inanity of what goes on," and then says:

> the "average parent" is like an unintelligent government that is content to accumulate laws in spite of the contradictions and the ever-increasing mental confusion this accumulation leads to.[7]

Viewing this depressing scene, one realizes, according to Piaget, "how immoral it can be to believe too much in morality," as when the parent demands obedience of the child in the name of morality, while his own ill-temper and indifference to his proper role undermine the meaning of that morality.

Let me turn to another field. There is a common expression, "political morality." (Incidentally, there is also a not uncommon expression, "legal morality," of which I thought my book gave some expansion and explication.) Is this a meaningless phrase? Does it misdescribe as "morality" what are really rules of efficacy, rules you

4. The English translation, published in 1932, does not give the date of the French original.
5. PIAGET, THE MORAL JUDGMENT OF THE CHILD 132 (1932).
6. PIAGET, *op. cit. supra* note 5, at 134.
7. PIAGET, *op. cit. supra* note 5, at 190.

must follow in order to get elected or to establish an effective government?

It may be said of "political morality" that this is an innocent enough diversion of the word "morality" since it merely comprehends in the political arena things that would be immoral in any arena. It is immoral to make promises and then to break them without sufficient justification. This is so in business, in affairs of the heart, in relations between contributors and law reviews, and it is equally so, but no more so, in the area of politics.

This is, in effect, the tack taken by Professor Dworkin in showing how superfluous the notion of legal morality is. You can, he says, hound a man to death by means of a retrospective, criminal statute, but this is immoral because it is a wrongful killing, not because of the means used. It is no more, nor any less, immoral because he was killed with a statute than if the job had been done with an axe.

But let us examine this mode of reasoning as applied to what is called political morality. The equivalent of Dworkin's argument is this: Political morality says a man shouldn't break promises. But this is nothing peculiar to politics; it is wrong to break promises made in any context.

Now surely, to reason this way is to miss the point. As lawyers know, it is not easy to know exactly what a promise is. How do you tell a promise from a confident prediction, or from an assurance of right intentions, or from a way of disclosing a common interest. Plainly, questions like these have to be answered in context.

Words dropped into one arena of human expectations and interactions may have a very different meaning from the same words used in a different context. There is, therefore, sense in the notion of a special morality of politics. It is not just a restatement of moral principles that pervade all of human life, but a special application of them.

Exactly the same thing may be said of legal morality. Professor Dworkin's insistence that this morality involves no new principles, that it is not directed toward any special or peculiar kinds of abuse, that it is simply an exemplification of general moral principles applicable anywhere, involves the same kind of abstraction from context that would be involved if we insisted there is no such thing as political morality.

Let me, at this point, turn to another area that is unplagued by the slogans that infect legal philosophy. My illustration is taken from what may be called the sociology of organization, and more

particularly from a study made of rule-making as it affects the internal organization of a federal agency. I am speaking not of any rules laid down by the agency for the public, but of the internal organization of the agency itself insofar as that organization was brought about by formal rules.

> The toleration of illicit practices actually enhances the controlling power of superiors, paradoxical as it may seem. [This is my canon No. 8, again.] The following incident illustrates this: An order posted in the washroom — signed, like all orders, by the district commissioner — prohibited the use of more than one paper towel. There seemed to be no attempt to enforce this petty rule, especially since superior officials as well as agents habitually violated it. However, when an agent who had had conflicts with superiors used more than one towel in the presence of an administrative official, he was reprimanded for ignoring the order. An unenforced rule that is regularly violated extends the discretionary power of superiors, because it furnishes them with occasions to use legitimate [better, legitimated] sanctions whenever they see fit. This was implied when an agent described the supervisor as 'a guy who tries to get something on everybody. He doesn't use it. He doesn't care if you take an hour for lunch . . . as long as you help him out.'[8]

Do we not have many examples of similar abuses in the administration and enactment of laws? Blau himself points out that an anti-noise ordinance that is generally left unenforced may be used by the administration of a city to interfere with the political campaign of a candidate of the opposition party. And indeed this is no imaginary case.

And what of the merchants who band together to put through a resale price maintenance law, not with the idea that it will be enforced — they don't want that, for they want to be free to cut prices for their friends and best customers — but with the idea that it will enlist the moral force of law, and the fear of legal trouble as a brake on economic forces of competition. And as we know they frequently get the connivance of the law-maker in this abusive exploitation of the law's moral force.

So when I speak of legal morality, I mean just that. I mean that special morality that attaches to the office of law-giver and law-applier, that keeps the occupant of that office, not from murdering people, but from undermining the integrity of the law itself. And that undermining can come about in many ways, through conscious abuse,

8. BLAU, THE DYNAMICS OF BUREAUCRACY 215 (2d ed. 1963). (The bracketed insertion is mine.)

through sloth and indifference, and even through reading books on jurisprudence that depict law as a one-way projection of power downward and overlook the man at the bottom.

In concluding this discussion of the internal morality of law, let me now return to Piaget who observed the growing moral sense of the child as it develops in the playing of games. He chose the game of marbles for study as it is played in Switzerland according to very complicated rules, which seem to vary from generation to generation, and from canton to canton. As he interpreted the results of his interviews and observations, the child reaches moral maturity as he comes to see that sticking by the rules is an essential part of the game itself. The insight he thus gains from playing marbles carries over to the larger affairs of society.

At this point Piaget raises a possible objection to his conclusions that is a precise parallel to that raised by Professors Dworkin and Cohen. It may be argued, he says, that the child's acceptance of rules has nothing to do with morality. He simply sees that the game is impossible without rules. He enjoys the game, and, therefore, he submits to its rules. This submission is a matter of efficacy, not of morality; it is the price of admission he has to pay to reach the enjoyment of the game.

This might be true if there were an adult there to lay down the law, to interpret the rules, to decide on alleged infractions and to determine whether the marble was really knocked out of the circle when it landed ambiguously on the line scratched in the soil. But the children are law-makers, law-interpreters and players bound by the rules, all at once. It is with a sense of reciprocal dependence, or interaction, that the moral sense develops.[9]

So I suggest that all we need do to accept the idea of an internal morality of the law is to see the law, not as a one-way projection of power downward, but as lying in an interaction between law-giver and law-subject, in which each has responsibilities toward the other.

Now let me turn to the second main issue, mainly, the questions raised by my suggestion that a respect for the internal morality of law will incline the legislator toward the making of laws that are just in their substantive aims.

Initially, I want to observe that this point is severable from the first I have discussed. One can accept the notion of an internal morality of law with my assurance that he is not being trapped into

9. PIAGET, *op. cit. supra* note 5, at 91-93.

going further and admitting that all I say in my final chapter is true and sound.

Second, let me say frankly that it is with respect to this part of my book that I am most unhappy about the way Professor Dworkin summarizes my views. Let me quote from his extended review of my book. He says that I support the argument that legality has a greater affinity for justice than for evil in part by an argument which he summarizes thus: "[I]nternal morality requires publication, and this restrains a tyrant who fears publicity from pursuing evil by legislation. . . . ." Later he says this argument concerns "the tyrant's fear of publicity. . . ."[10] This sounds as if I were speaking about a peculiar type of tyrant who wanted to regularize his iniquities by putting them in a statute, but didn't want the public to know about them so he kept his statute secret. A most remarkable fellow!

Let me quote from the passage in the book which these statements of Dworkin's purport to summarize:

> One deep affinity between legality and justice has often been remarked. . . . This lies in a quality shared by both, namely, that they act by known rule. The internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration. These demands may seem ethically neutral so far as the external aims of law are concerned. Yet, just as law is a precondition for good law, so acting by known rule is a precondition for any meaningful appraisal of the justice of law. "A lawless unlimited power" expressing itself solely in unpredictable and patternless interventions in human affairs could be said to be unjust only in the sense that it does not act by known rule. It would be hard to call it unjust in any more specific sense until one discovered what hidden principle, if any, guided its interventions. It is the virtue of a legal order conscientiously constructed and administered that it exposes to public scrutiny the rules by which it acts.[11]

To summarize the words just quoted by saying that they refer to a monarch who passes mean and wicked statutes and then doesn't let people know what they say, is certainly a simplification of my thought, though it perhaps does not go beyond the tolerances of polemic exchange. The same generous judgment cannot be passed, however, when we consider the continuation of that discussion:

> So far I have spoken as if the affinity between legality and justice consisted simply in the fact that a rule articulated and made

10. Dworkin, *supra* note 3, at 671-72.
11. FULLER, THE MORALITY OF LAW 157-58 (1964).

known permits the public to judge of its fairness. The affinity has, however, deeper roots. Even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts. Many persons occupying positions of power betray in their relations with subordinates uniformities of behavior that may be said to constitute unwritten rules. It is not always clear that those who express these rules in their actions are themselves aware of them. It has been said that most of the world's injustices are inflicted, not with the fists, but with the elbows. When we use our fists we use them for a definite purpose and we are answerable to others and to ourselves for that purpose. Our elbows, we may comfortably suppose, trace a random pattern for which we are not responsible, even though our neighbor may be painfully aware that he is being systematically pushed from his seat. A strong commitment to the principles of legality compels a ruler to answer to himself, not only for his fists, but for his elbows as well.[12]

These last remarks — which are lost in Dworkin's summary — have a special relevance to the office of prosecutor. It is, in the nature of things, impossible for the prosecutor to institute a criminal charge whenever any complaint is brought to him. Many complaints are ill-founded or trivial. Furthermore, the prosecutor commands only limited resources, which he is compelled to husband for their most effective use. There arises here one of those inevitable compromises with which I deal at length in my book. The pattern of enforcement inevitably rewrites the criminal code to some extent. The conscientious prosecutor will ask himself at least two questions: There is a discrepancy between the criminal law as it is enforced by my office and the pattern one would discern if one sat down and read the statutes. Is this discrepancy larger than it should be; have I drifted into the habit of revising the criminal law carelessly and thoughtlessly? Or, worse yet, with deliberate intent? This is a question of the internal morality of law. A second question arises also: Since, in effect, some revision of the criminal law is inevitable in the process of enforcing it, is the revision I have made one that I can defend? Does it display a pattern that no just legislator would enact explicitly as law? This is a question of the external morality of law, that is, of the substantive aims of the law in action as compared with the law in books. (Obviously, external and internal moralities in this case, as they so often do, overlap.)

12. FULLER, *op. cit. supra* note 11, at 159.

As one point of possible clarification, let me say that in a debate of this sort we must distinguish between logical consistency and what may be called motivational affinity or compatibility in the pursuit of similar ends.

Suppose I am told that there is a primary grade teacher who loves to teach, and who likes equally well to teach both bright and dull students. The one exception is that he does not like to teach students who are cripples. Now this is certainly a puzzling set of dispositions; we would ordinarily expect such a teacher to take a special delight in helping a handicapped child to achieve a richer and deeper understanding of the world about him. But there is no logical contradiction here; one could punch out an I.B.M. card for this teacher that would not burn out any transistors in a computing machine.

I have never asserted that there is any logical contradiction in the notion of achieving evil, at least some kinds of evil, through means that fully respect all the demands of legality. On the contrary I recognize "that it is possible, by stretching the imagination, to conceive the case of an evil monarch who pursues the most iniquitous ends but at all times preserves a genuine respect for the principles of legality."[13]

Not only that, but if I were writing a horror story about the immorality of law, that is precisely the kind of legislator I would choose. Crafty, intelligent evil is always more interesting than brute, clumsy destructiveness. It was no accident that Sherlock Holmes' counterpart, Moriarty, was almost as smart as Holmes himself. If he had been a numbskull no one would have bought A. Conan Doyle's books, at least not those dealing with the running battle between Holmes and Moriarty. But we are not interested here in telling a good tale, but in examining the prosaic facts of human life. When we do this we may agree with the implication of the subtitle of Hannah Arendt's book on the Eichmann case, that it is "a report on the banality of evil." Most evil, I am afraid, is terribly uninteresting.

Let me summarise the position I am now trying to defend in the terms I used in my first exchange with H. L. A. Hart, terms which Professor Dworkin describes as "epistemological, and entirely mysterous."[14] My language was to the effect that I believe "that coherence and goodness have more affinity than coherence and evil."[15] If Professor Dworkin found this declaration of an affinity between rationality

13. FULLER, *op. cit. supra* note 11, at 154.
14. Dworkin, *supra* note 3, at 672.
15. FULLER, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

and morality "mysterious" he will scarcely be pleased with the starting place of the argument I shall now present in support of this affinity.

First, life itself depends upon an ordered arrangement of matter. Entropy is death. At a minimum, morality is designed to protect and promote life and this in turn requires that it protect and promote order.

Second, human beings, in contrast with most living creatures, have the capacity to extend and magnify the order of their nerves and muscles by making rules for themselves, by subjecting themselves to an order of their own deliberate creation. This created order represents an extension of the possibilities open to human beings, an enrichment of their existence. Language itself is the most pervasive expression of this projected order. Neither morals nor law would be possible without this capacity to create and project order.

In making a third point let me once more invoke the now familiar figure of Dr. Piaget. Piaget found that in the child moral and intellectual capacities develop along parallel lines, and take place more or less contemporaneously. Both demand of the child a faculty for detachment, a capacity to stand off and look, an ability to suspend the emotional involvement in an immediate situation that is so characteristic of the child at an earlier stage.[16] This view, to say the least, suggests an affinity between order and rationality, on the one hand, and moral behavior, on the other.

Fourth, all the ordering forms by which human beings are united — language, conceptual thought, law, morals, custom, the rules of games — work most effectively when there is mutual respect. Language is a social product, but it receives its forms in an interaction between communicating individuals. Each of us has his own special ways of using the forms of language. If we are to communicate successfully, we must be able to conform our minds to the ways others have of expressing themselves. If we understand them in the sense we would have intended had we used their language, misunderstanding is inevitable. Understanding depends on respect and a capacity for transcending self. So in law and morals, we cannot project our views upon others without giving them some opportunity to understand those views — we cannot condemn them for violating rules that are left unpublished or could not be known to them, nor punish them for occurrences that came about without their fault or intent. There is, therefore, in an ordered system of law, formulated and administered conscientiously, a certain built-in respect for human dignity, and I think

16. PIAGET, *op. cit. supra* note 5, at 105-07.

it is reasonable to suppose that this respect will tend to carry over into the substantive ends of law.

Finally, I would remind you that psychoanalysis is the only therapeutic technique directed toward psychological and "moral" ills that involves a real interaction between healer and patient. The physician who subjects a patient to shock treatment acts *on* the patient; the analyst acts *with* the patient. If I am right in placing the emphasis I do on interaction in law and in morals, then psychoanalysis presents a close analogue to law and morals. Indeed, it depends upon a contract between analyst and patient to which both must be faithful. In the opinion of Anna Freud the usual form of psychoanalytic technique cannot be applied to young children because they cannot make, and certainly cannot be expected to keep, a contract.[17] As applied to adults, psychoanalytical treatment presupposes a relation of reciprocity between patient and healer, in which each collaborates with the other in trying to achieve a greater degree of clarity (if you will, of "coherence and order") in the patient's conception of himself. With the aid of this increased clarity it is hoped that the patient will be able to rescue himself from dark and destructive impulses.

So, in conclusion, I return to the thought Professor Dworkin found so epistemological and so mysterious:

> I believe that order, coherence, and clarity have an affinity with goodness and moral behavior.

More than this I have never said; less than this I have no intention of saying.

17. FREUD, THE PSYCHOANALYTIC TREATMENT OF CHILDREN (1964).