BOOK REVIEWS

The Morality of Law, by Lon L. Fuller, New Haven and London, Yale University Press, 1964. viii and 202 pp. (£1/17/6 in Australia).

The author of this work is described on its title page simply as Lon L. Fuller, obviously on the justifiable assumption that he needs no introduction to the reader in those countries where the book was published. In this country a reviewer may, however, be forgiven some elaboration. A Harvard Law School professor distinguished especially in the fields of jurisprudence and contract, the author of a number of books before the present one in the field of jurisprudence,[1] and the author of a number of articles on the subject in legal[2] and philosophical[3] journals, Lon L. Fuller has, in a free-lance fashion, carried in the twentieth century the banner of natural law jurisprudence. He has in this capacity maintained an untiring pursuit of positivists wherever they are to be found and in whatever version, traditionalist or realist. This has involved in recent years a number of clashes with H. L. A. Hart,[4] on whom, since the publication in 1961 of *The Concept of Law*, the mantle which once belonged to John Austin as England's positivist theorist, has most distinctly fallen. The battle is continuing at the time of preparation of this review.[5]

Fuller himself has not at this point of time produced a comprehensive formulation of his position, though such is obviously to be anticipated. Meanwhile the work at present under review adds to our picture of what the final formulation will be in a number of directions. This book begins with an account of morality in which the view is taken that there are two moralities, that of aspiration and that of duty.[6] The two are, however, presented as being continuous with one another, the one dealing with upper reaches of human achievement and the other starting at the bottom, laying down "the basic rules without which an ordered society is impossible".[7] It is the latter which is most closely implicated with law, Fuller saying that "our hypothetical legislator of morals could shift his role to that of lawmaker without any drastic change in his methods of judgment".[8] On the other hand the former morality has indirectly pervasive implications for law, since the latter

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[1] *The Law in Quest of Itself* (1940); *The Problems of Jurisprudence* (Temporary Edition 1949).

[2] See especially "Reason and Fiat in Case Law" (1946) 59 *Harvard L.R.* 376; "American Legal Philosophy at Mid-Century" (1954) 6 *Journal of Legal Education* 457; "Freedom, A Suggested Analysis" (1955) 68 *Harvard L.R.* 1305; "Positivism and Fidelity to Law" (1958) 71 *Harvard L.R.* 630.

[3] See "Human Purpose and Natural Law" (1956) 53 *Journal of Philosophy* 697 reprinted in (1958) 3 *Natural Law Forum* 68.

[4] See, e.g. "Positivism and Fidelity to Law" *supra* n. 2 and *The Morality of Law* 133-45.

[5] Hart's review of *The Morality of Law* in the *Harvard L.R.* being on its way through the press.

[6] At 4.

[7] At 5.

[8] At 7.

represents "a complex of rules designed to rescue man from the blind play of chance and to put him safely on the road to purposeful and creative activity".[9] Fuller observes, however, that we find it easier to assess radical departures from goodness than we do lesser ones and on this we build our institutions,[10] fixing an "imaginary pointer"[11] on the scale of achievement below which we demand conformity to legal or moral rules, above which we merely hold out encouragement or reward. In this respect he finds a parallel between law and economics, the higher-reach problems of economising requiring calculations in terms of a vague standard of utility[12] which can hardly be reduced to rules or institutions, while on the other hand in "exchange" economics as distinct from "marginal utility" economics we find, to a degree, fixed institutions of property and contract[13] which represent rules to be followed. In the upper reaches of economics, as in the upper reaches of morality, we can only lay down in advance for our guidance the notion—not the rule—that we should observe a balance.[14] In the lower reaches of economics, in the market, not only do we have to contend to a degree with fixed rules, but there is a general parallel to the notion of duty to which we resort in law and morality, for both moral or legal duties and markets involve the general notion of reciprocity.[15] Of the notion of reciprocity in duty Fuller observes that "at times it is obvious to those affected by it; at others it traces a more subtle and obscure course through the institutions and practices of society".[16] Fuller approves the notion that in a market we use others as means and they use us as means and suggests that this same idea, in one way or another, gives legal duties their moral force.

The parallel between law-morality and economics leads Fuller finally to what may be considered the broadest theme of the present work, that of the problem of placing the "imaginary pointer", not only in these two fields, but generally in society:

> A pervasive problem of social design is therefore that of maintaining a balance between supporting structure and adaptive fluidity. This problem is shared by morals, law, economics, aesthetics, and—as Michael Polanyi has shown—also by science. The nature of this problem is not adequately perceived when we think of it in trite terms as opposition between security and freedom, for we are concerned not merely with the question whether individuals are or feel free or secure, but with attaining a harmony and balance among the processes—often anonymous—of society as a whole.[17]

In his second chapter Fuller proceeds to discuss the morality which makes law possible—the "inner (or internal) morality of law".[18] His answer is that law is impossible unless to a minimum extent the lawgiver discharges the onus of laying down rules, making them public, avoiding retrospectivity, making the rules intelligible, avoiding contradiction, keeping the actions demanded within the realm of the possible, avoiding too frequent amendment, and keeping administration in accordance with legislation.[19] The observance

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[9] At 9.
[10] At 11-12.
[11] At 28.
[12] At 17.
[13] At 28.
[14] At 18.
[15] At 19-27.
[16] At 22.
[17] At 29.
[18] At 42.
[19] At 39.

in minimum degree of these requirements is demanded of the lawgiver by his obligation of reciprocity with the citizen out of which the duty of the citizen arises,[20] or to put it in another way, out of which the obligation of "fidelity to law"[21] of the citizen arises. As these *desiderata* are observed in higher degree they become increasingly challenging to human capacity.[22] "To know how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver."[23]

In the light of the above, Fuller points out, to describe the "law" of Nazi Germany by that word is completely at odds with the correct view.[24] A legal system is the product of a certain direction of human effort, the subjection of human conduct to the governance of rules.[25] At a later stage he also makes a point in terms of the theory he has outlined relevant to the position of the Nazi judges. The ethos of the judge's office demands that he should remain neutral regarding the substantive aims of a statute he is called on to apply, but with regard to the law's "internal morality"—the morality that makes law possible—he must not remain neutral.[26]

In his final chapter Fuller turns from the "procedural" morality of law to discuss its substantive aims. The main points made here are, perhaps, that the viewing of law as the enterprise of reducing human conduct to the governance of rules implies that the law must view man as a responsible agent or as capable of becoming such,[27] and that, if we have to state an indisputable principle of substantive Natural Law we could find it in this proposition: "Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire."[28] In this same chapter there is a return to the problems suggested by his discussion of the character of the various social enterprises he has had occasion to discuss—law, morality, economics, science—namely, the problem of "institutional design".[29] Here he warns against the lawyer's inclination to "judicialize" every function of government—to treat it as a proper subject for rule-making when it may not be so.[30] On the other hand, Fuller warns those who may imagine that a use of the machinery of governmental power as distinct from judicial methods will be the proper institutional solution to every problem.[31] The matter is one of delicate adjustment having regard especially to the degree to which the problem may call for *ad hoc* calculation which cannot be routinised,[32] and having regard also to the degree of acceptability which the institution being considered for a certain task is likely to command.[33]

In the above summary the reviewer has sought to concentrate on those parts of the work which express the main outlines of Fuller's own views, omitting the detailed consideration of the various facets of the internal morality of law, and omitting also those frequent jousts with the positivists which Fuller finds so beneficial in the direction of liberating his intellectual energy. In the summary one has sought to convey the impression that the

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[20] At 39-40.
[21] At 41.
[22] *Ibid.*
[23] At 94.
[24] At 107.
[25] At 106.
[26] At 131-32.
[27] At 162.
[28] At 186.
[29] At 168 *et seq.*
[30] At 176.
[31] At 181.
[32] At 171.
[33] At 181.

work creates of a sketch of society, in which law appears as one of a number of human enterprises, with parallels existing between these enterprises so that a broad survey of them together throws light on the problems of each, but of law in particular. Fuller's notion of an "enterprise" appears to be that of an effort to impose rationality in some way on disorder, so that law is the effort of subjecting conduct to rules,[34] economics takes scattered resources and organizes them in accordance with utility[35] or through the market,[36] science, though not expressly defined, appears to be regarded as the effort to reduce nature to a state of controllability and predictability,[37] and on the same model we might imagine that aesthetics, the other social enterprise mentioned,[38] could be regarded as the reduction of its materials to a harmony of some kind. Running through each enterprise are the common problems of social or institutional design.

Viewed in this light, the work under review represents a sketch on so large a canvas that it is impractical to make an assessment in the course of a brief review which will do justice to the importance of the issues. In brief, the criticisms which the present reviewer would wish to make centre around the book's treatment of the relations of fact and value, a type of criticism with which Fuller is by now wearisomely familiar,[39] which attests the deep roots of the issues between Fuller and other schools of jurisprudential thought at the present time. The very notion of an enterprise, especially now that Fuller has emphasized by his dissection of the internal morality of law that a certain degree of success in the operations of the enterprise is to be regarded as essential before its existence can be recognized, performs an inspirational function at the same time as it defines a field of study. This is quite deliberate since Fuller believes that this kind of approach will liberate human energy and contribute to the success of the enterprise in question.[40] But obviously most people, including this reviewer, would want to argue that the projection of the theorist's own demands into the material he is studying is calculated to cause confusion. Nor does it seem that it is calculated to liberate human energy. For example, Fuller's effort to establish that certain goals for humanity to which Fuller attaches great importance are a necessary part of the law enterprise absorbs a great deal of his time and energy, but in the long run it is questionable whether what emerges represents anything more than a vast definitional exercise. In the end, the "internal morality of law" consists of Fuller's specifications of desirable attitudes to the task of legislation and legal administration. These specifications might have been set forth with a good deal more economy, it is submitted, if Fuller did not feel obliged to demonstrate, often it seems to this reviewer unconvincingly or obscurely, that these goals necessarily emerge from the material being studied.

However, one does not establish these criticisms merely by making them, and the reviewer does not ask the reader to agree with them without a close consideration of the work. If we lightly discard this kind of approach, we are also lightly discarding an important tradition of Western thought, and

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[34] *Supra* n. 25.
[35] At 17 *et seq.*
[36] At 19 *et seq.*
[37] This can be inferred from the nature of Fuller's criticism of the view that "science exists when men have the ability to predict and control the phenomena of nature". See 119.
[38] At 29.
[39] See, e.g., the article referred to *supra* n. 3.
[40] This has been a constant theme since, at any rate, the publication of *The Law in Quest of Itself* in 1940. In that work he says: "Surely the man who conceives his task as that of reducing the relations of men to a reasoned harmony will be a different kind of lawyer from one who regards his task as that of charting the behaviour sequences of certain elderly state officials" (3-4).

confessing to an emptiness in much of the efforts of the civilization of which we are all in some degree products. Moreover, the future will decide whether Fuller is to have, in a sense, the last laugh on his critics. Very tentatively and guardedly Fuller in the present work suggests at least by implication[41] that the internal morality of law operates to a degree as an extra-constitutional "due process" clause, which would necessarily operate universally, not only in countries like Australia with rigid constitutions but whose constitutions contain no "due process" clause, but also in countries like England with no rigid constitution at all.[42] We in Australia should not be in the least surprised if a court was to refuse to apply a legislative enactment on the ground that it was obscure, because we would not think of this as a striking down of the statute or as raising a problem of the law's morality.[43] But if a New South Wales court were to proceed from here to strike down the Damage by Aircraft Act[44] on the ground that because it imposed a strict liability it was commanding the impossible,[45] this would be cataclysmic. If this sort of development, kept within even the most modest bounds, were actually to occur Fuller's work would have carried out exactly the function which he considers the highest achievement of the law professor: the making of an incremental contribution to the development of the law enterprise by detecting and confirming the direction of a strand in its quest for a better achievement of its dimly descried goals.[46] One finds it exceedingly difficult to envisage the possibility of such a development. This would greatly increase one's discomfiture if it actually occurred, more particularly if the court were to deny the sharply innovatory character of such a holding by arguments from necessity of the kind which appear in *The Morality of Law.*

W. L. MORISON.*

Selected Essays on the Conflict of Laws, by Brainerd Currie, Professor of Law, Duke University, Durham, N.C., Duke University Press, 1963. x and 761 pp. ($15.00).

The Center for Advanced Study in the Behavioral Sciences at Palo Alto is an institution that excites envy in the mind of every Australian academic. University teachers may spend some time there, with insignificant teaching obligations, among selected, stimulating colleagues and with ample opportunity for reflection. Naturally enough, the work of those who have had the opportunity to work there bears eloquent testimony to the value of the programme.

The reviewer met Brainerd Currie at the University of Chicago imme-

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[41] See, e.g., the comparison between legislation which fails to measure up to the minimum standards of the internal morality of law and void contracts in *The Morality of Law*, 39. There is, however, a warning in his statement that courts can be expected to do no more in this matter than "save us from the abyss" (44).

[42] See Fuller's caustic criticism of A. V. Dicey's views of parliamentary sovereignty in England at 115-17.

[43] *Contra* Fuller, who would regard this as a failure of the legislature in its reciprocating duty to the citizens. Consider 64.

[44] No. 46 of 1952 (N.S.W.).

[45] Fuller considers the difficulties which laws imposing strict liability raise for the internal morality of law at 70-79.

[46] See *The Law in Quest of Itself* (1940), e.g., the comparison between the growth of the law and the telling and retelling of a story at many hands (7-10). Of the legal scholar he says, "Is it his duty to anticipate the future by giving legal form to emergent ethical values, or is he only a kind of intellectual scavenger whose function it is to clean up the conceptual debris?" (14).

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