FULLER

BOOK REVIEWS

THE MORALITY OF LAW. By Lon L. Fuller.[1] New Haven: Yale University Press. 1964. Pp. viii, 202. $5.00.

This imaginative, original, and thought-provoking book is richly stocked with a variety of themes, many of which deserve a much fuller treatment than the author accords to them. During several rereadings of the book, my interest never for a moment waned, and I am certain that I shall return to it to ponder its wisdom and to spur my ever-flagging efforts at self-criticism. But I have found and shall find rereading necessary for other reasons. For though the main positions which the author wishes to defend are clearly and frequently stated, and though they are often illustrated with suggestive examples and analogies drawn from science or economics, it is nonetheless often difficult amid the author's firm and clear assertions of what is right and wrong in jurisprudence to identify any equally firm and clear argument in support of these assertions. Yet in saying this I am haunted by the fear that our starting points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work. So it may be that where I find the author's thought obscure it is really profound and out of my reach. I wish that I dare hope that where he finds my thought misguided it is really, or even merely, clear.

The central theme of the book is the unique virtue of conceiving of law and even of defining "law" as "the [purposive] enterprise of subjecting human conduct to the governance of rules." This large conception of law, admittedly and unashamedly, includes the rules of clubs, churches, schools "and a hundred and one other forms of human association." The outer boundaries of this wide conception cannot be determined from this book with any precision, since the author does not give us any account of what "rules" are, but speaks throughout as if the notion of a rule were unambiguous and otherwise unproblematic. Indeed, it is clear that the author would think it of little importance to determine with any greater precision the boundaries of what is for him "law." One boundary is, however, suggested by the author when he draws attention to the word "enterprise" and tells us that for what it is worth an intelligible, though not precise or important, line between morals and law is that in the latter case, but not in the former, the enterprise of subjecting human conduct to the governance of rules is made the sphere of "explicit responsibility."

The development of a number of important issues opened by the conception of law as the purposive enterprise of subjecting men to the guidance of rules is, then, the book's main constructive theme. Its polemical theme is the inadequacies, indeed the vices, of traditional efforts to distinguish law from other forms of social control by reference to its provision for sanctions or the hierarchical structure of its rules

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or by reference to the notion of formal sources. Approaches such as these, associated as they are with the names of Austin or Kelsen, are not credited even with the virtue of partial insights. Nor is there in this book any concession made to the view that investigations into the structure of legal systems and inquiries (such as the author's) designed to draw out the implications of law as a form of purposive activity are not rivals but complementary forms of jurisprudence. So short work is made in this short book of some very long books.

Such then in crudest outline are the author's constructive and destructive themes. What follows here is my estimate of some only of his leading contentions.

I. The Morality of Duty and the Morality of Aspiration

The book opens with a contribution to moral philosophy which certainly deserves to be assessed as such and not merely as a casual by-product of jurisprudential thought; for the first chapter is a protest against thinking of morality as a simple unitary concept, and makes a detailed plea for the discrimination within morality of different, though related, dimensions of assessment of human conduct. The distinction upon which the author most insists is that between a morality of duty and a morality of "aspiration" or, as we might say, of ideals. When we judge conduct by reference to the former we apply to it definite, easily formulable rules: we speak in imperative or quasi-imperative forms ("thou shalt not," or its modern equivalents) and though deviation from the rules attracts accusations and censure, conformity with them is not usually a matter for praise. We have to do not with the heights of moral excellence but rather with a moral minimum. By contrast, when we consider human conduct from the point of view of the morality of aspiration we bring to bear on it not mandatory rules but conceptions of the "Good Life," of "what beseems a human being functioning at his best" or "is unbefitting a being with human capacities." Here we praise for attainments but do not condemn or accuse, though we may show disdain, for shortcomings.

The author makes many interesting comparisons between this divided conception of morality and economics and law. The morality of aspiration is compared to marginal utility economics, and the morality of duty, with its hallmark of reciprocity, to the economics of exchange. It is true that this laudable effort to break up excessively monolithic conceptions of the nature of morality is, as the author notes, not new. Indeed, it could hardly be missed by anyone willing to attend to the contrast between the common use of black and white rule-determined words such as "right" and "wrong," and the use of comparative scale-determined words like "good," "better," "best." But even if the author has not discovered, he has certainly advanced this more realistic conception of morality as comprising distinct dimensions of assessment.

Nonetheless, there is much in this first chapter which must puzzle any moral philosopher worth his salt. First and foremost there is this: the author's initial characterization of duty ties it very closely to what is "rationally discoverable" and objective, as contrasted with the morality

of aspiration to the higher reaches of which he finds "subjectivism appropriate." Indeed, he pours scorn on those who, failing to grasp the distinction between these two moralities, speak as if "obvious" duties rested on "some essentially ineffable preference." Yet this clear initial picture of duty as rationally discoverable and objective is difficult to fit with other things the author says about duty. Though for him the morality of duty lays down the basic rules without which an ordered society is impossible, this does not exhaust its role; for he notes that moralists may differ as to what range of conduct should fall within the respective spheres of duty and the morality of aspiration, and he has some fine observations on those moralists who forever try to expand the area of duty instead of inviting us to join them in realizing some ideal of human nature. But it is not clear how, given these divergent conceptions of the range of duty, the author would apply to it his initial characterization of rationally discoverable and nonsubjective. Furthermore, it is surprising, given this initial characterization, to find the author speaking not only of many possible moralities of aspiration but also of alternative moralities of duty. Some of these, he says, are "tinctured by an appeal to self-interest," others "rest on the lofty demands of the Categorical Imperative."

Similar difficulties arise from the hints (they are no more) of the author's epistemology of morals, *i.e.*, his views as to how we know or settle what is our duty, or "befits beings with human capacities." Here he says some mysterious things: "When we are passing a judgment of moral duty, it seems absurd to say that such a duty can in some way flow directly from knowledge of a situation of fact." This is contrasted with the situation when we apply to conduct a morality of aspiration. The contrast is explained by the author as due to the fact that before we conclude "that a duty ought to exist," however well we may understand the facts, there will still seem to intervene an act of legislative judgment. I think I have some glimmer of what the author means by the close connection between understanding a person's ideals and our approval and disapproval. But I am most perplexed by his references to duty as involving "legislation." Does this mean that duties, in spite of their initial characterization as rationally discoverable, and as obvious, are after all a matter of choice, even if not of "ineffable preference?" Presumably not, since when we pass a moral judgment of duty the author speaks of us as concluding that it "ought" to exist. But does this "ought" come from the morality of duty or the morality of aspiration, or neither?

I hope that in subsequent editions of this book the author may deal with these unclarities since they cloud a perceptive approach to morality.[2]

II. Inner and External Moralities of Law

The author deploys his talents for the fashioning of instructive allegories in order to introduce a legislator, Rex, who fails in eight carefully

[2] In addition to the distinction between duty and aspiration, it is necessary to distinguish between the accepted morality of a social group and the personal or critical morality of individuals. "Duty" may appear in all of these. See Strawson, *Social Morality and Individual Ideal*, 36 Philosophy 1 (1961).

distinguished ways to produce rules apt for the guidance of his subjects. Corresponding to these eight forms of failure the author then identifies eight "demands of the inner morality of law" which a system of rules should strive to satisfy. Rules should be (1) general; (2) made known or available to the affected party (promulgation); (3) prospective, not retroactive; (4) clear and understandable; (5) free from contradictions; and they should not (6) require what is impossible; (7) be too frequently changed; finally (8) there should be congruence between the law and official action.

These eight principles for carrying out the purposive activity of subjecting human conduct to rules are designated by the author "the inner morality of law"; his other names for them include "the morality that makes law possible," "the special morality of law," "procedural natural law," and "the principles of legality." I shall adopt the last, most conventional, designation because, as I shall argue later, the classification of these eight principles as a form of morality breeds confusion. It should be noted that the force of the word "inner" in the author's favored designation is to stress the fact that these forms of legal excellence are derived, not from principles of justice or other "external" moral principles relating to the law's substantive aims or content, but are reached solely through a realistic consideration of what is necessary for the efficient execution of the purpose of guiding human conduct by rules. We see what they are by occupying the position of the conscientious legislator bent on this purpose, and they are essentially principles of good craftsmanship. Indeed, they are compared by the author to principles (he says, "natural laws") of carpentry. They are independent of the law's substantive aims just as the principles of carpentry are independent of whether the carpenter is making hospital beds or torturers' racks.

In the detailed discussion of these eight principles of legality, the author says some novel and important things. Whereas the principle requiring promulgation of the law is, for him, a peremptory requirement which can be made the subject of definite, easily formulable rules, the remaining requirements cannot be thus formalized since their satisfaction is very often a matter of degree varying from situation to situation: exceptions are necessary and so are many compromises and adjustments. The author's account of these adjustments (or "antinomies" as he calls them) fill what are in my opinion the best pages of the book, presenting some old issues in a welcome new light. He shows, for example, how exceptions may have to be made to the principle forbidding retrospective legislation in order to cure or counter violations of other principles, as when a law is passed to validate retrospectively marriages which are invalid because of a failure to comply with formalities required by a statute which was itself insufficiently promulgated or which specified formal requirements with which it was not possible to comply at the time of the marriage. His general discussion of retroactivity discloses the vague borderlines of this concept. If ex post facto criminal statutes clearly violate this principle of legality, is it equally clear that tax laws violate it by imposing taxes on earnings received before the date of

their enactment? The author shows how even the demand for clarity in the sense of the requirement that rules should be understandable by those who are affected by them may conflict with the need for those technical systematic elements in a legal system which enable courts to make consistent applications of the law, and which lend to the system its predictability. He also shows how the requirements that law should be free from self-contradiction needs to be given content over and above the logician's bare veto of rules commanding subjects to do both "A" and "not-A"; and how this content can be given by constant recourse to the consideration that rules should afford the citizen an intelligible guide as to what to do. In the discussions of the need for congruence between enacted laws and judicial or other official action the author develops a theory of interpretation of statute which makes interesting comparisons between the task of interpretation and that of completing an incomplete invention. He exhibits the cooperative nature of the task of maintaining the principles of legality in a critique of fundamentally unsound forms of legislation such as paragraph five of section four of the Statute of Frauds which, by wrongly supposing that there was some definite relationship between the time required to perform a contract and the time when a witness would be called to testify, was to produce puzzles with no possible solutions.[3]

In general, the author considers that far greater use could and should be made by courts of the principles of legality as a relatively objective undisputed part of "the inner logic" of law. Thus, his theme at some points resembles Professor Wechsler's plea for "neutral principles" of decision,[4] and he argues that instead of excursions into the debatable area of "substantive justice," the Supreme Court might well have disposed of cases by reference to the law's "inner morality." It was a mistake in the author's view for the Court in *Robinson v. California*[5] to have held that a statute making the state or condition of being a drug addict a crime punishable by six months' imprisonment violated the eighth amendment by imposing "a cruel and unusual punishment." Instead, the Court should have brought the decision within the confines of due process on the footing that the criminal law ought to be presented to the citizen in such a form that he could mold his conduct by it.

So far so good. But the author's insistence on classifying these principles of legality as a "morality" is a source of confusion both for him and his readers. The objection that the description of these principles as "the

[3] The author's discussion of strict liability is less felicitous. He attempts to show that strict liability in criminal law offends against the principle that laws, since their purpose is to guide the conduct of men, should not require what is impossible. But if strict liability laws are known to those to whom they apply, they can guide their conduct just as effectively as laws which make liability to punishment dependent on "fault." It is strange that though the author treats strict liability in tort as a justifiable way of attaching a special surcharge of legal responsibility to certain types of conduct, *e.g.*, blasting operations, he seems to treat all strict liability in criminal law as "commanding the impossible." But why should it not sometimes serve to "guide" men away from those enterprises to which it is attached if they cannot be sure of their ability to comply with "strict" regulations?

[4] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[5] 370 U.S. 660 (1962).

special morality of law" is misleading because they are applicable not only to what lawyers think of as law but equally applicable to any rule-guided activity such as games (or at least those games which possess rule-making and rule-applying authorities) would no doubt be rejected by the author: he would simply appeal to his wide conception of law as including the rules of games. But the crucial objection to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification "inner," is that it perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply 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.

It is important to observe that this criticism of the author's designation of his eight principles as a morality is not merely a verbal criticism; for his insistence upon it causes him to misapply to these principles the distinction worked out in his first chapter between a morality of duty and a morality of aspiration, and this has grotesque results. A morality of aspiration, it will be recalled, is one by which we bring to bear on human conduct not definite rules of what must and must not be done, but a conception of the Good Life and the best development of human capacities. When we criticize human conduct by reference to such a morality, we do not condemn or blame but show disdain. But the author having called the principles of legality a morality finds himself bound to discuss the question whether they constitute a morality of aspiration or of duty; he decides that, except for the peremptory principle that laws must be promulgated, the morality of law is "largely condemned" to remain a morality of aspiration and not of duty.

But surely both the discussion of this question and the decision reached are absurd. It is perfectly true with any principles of craftsmanship that some may be formulated as peremptory rules (in the case of the poisoner's craft, "See that the poison is not too big to swallow") while others may be only advanced in terms of an indication of a direction of effort ("See that the poison is not too costly"). But this distinction between peremptory rules and merely indicative principles has surely nothing to do with the distinction between a morality of duty, carrying with it accusation and blame, and a morality of aspiration, carrying with it praise and disdain. If the legislator wantonly uses retrospective laws to terrify his subjects has he only violated a morality of aspiration? Can we not accuse him of a violation of moral duty? Yet the author says that whereas a moral duty with respect to publication is readily imaginable, the primary appeal of the inner morality of law is to "the pride of the craftsman." These conclusions are strange indeed, and the root of the trouble is surely the confusion of principles

guiding any form of purposive activity with morality. What makes a morality of aspiration into a morality is not the mere fact that it is guided by nonperemptory indicative principles towards a given end, but that the end is some ideal development of human capacities which is taken to be of ultimate value in the conduct of life. Only if the purpose of subjecting human conduct to the governance of rules, no matter what their content, were itself such an ultimate value, would there be any case for classing the principles of rulemaking as a morality, and discussing whether it was a morality of duty or aspiration.

I do not think the author would have fallen into this ditch of his own digging but for his conviction that there are important, if not necessary, connections between "external" morality concerned with human justice and welfare, and what he terms the "inner morality of law." Indeed, he says in a later chapter that the demonstration of this connection justifies his terming these eight principles a morality. He takes me seriously to task for having said that respect for the principles of legality is unfortunately "compatible with very great iniquity"; but I cannot find any cogent argument in support of his claim that these principles are not neutral as between good and evil substantive aims. Indeed, his chief argument to this effect appears to me to be patently fallacious. He claims that the simple demand of the inner morality of law that it should be expressed in intelligible terms is not, as it might appear, "ethically neutral." And he cites the example of racially discriminatory legislation in South Africa. This legislation, according to the author, was a gross departure from the inner morality of law because, in the absence of any uniform or scientific basis of racial classification, statutes attaching legal consequences to race necessarily gave rise to insoluble difficulties in interpretation. But this shows nothing to the author's purpose: it shows only that the principle that laws must be clearly and intelligibly framed is incompatible with the pursuit of vaguely defined substantive aims, whether they are morally good or evil. In particular, it does not show what the author asserts — that clear rules are not "ethically neutral" between good and evil substantive aims. There is therefore no special incompatibility between clear laws and evil. Clear laws are therefore ethically neutral though they are not equally compatible with vague and well-defined aims.

One feature in the author's exposition of this argument is truly surprising. He actually makes reference to what he terms "the bitter irony" that the Israeli High Court has experienced well-nigh insoluble problems in applying the Law of the Return which grants Israeli nationality to immigrant Jews. Surely this law might be credited with a morally good substantive aim even though it is too vague to be achieved through clear rules. Do not the South African and Israeli statutes taken together show the ethical neutrality both of clarity and unclarity? Indeed, in order to purge the author's argument of its fallacy, we need the additional premise that good ends are essentially or peculiarly determinate and bad ends are essentially vague and indefinable and so cannot be achieved by clear laws. I do not know whether the author would subscribe to this view, but I do not.

It may be that the author's argument proceeds as it does because he has treated my modest remark that the inner morality of law is "compatible with very great iniquity" as if I had said that it was compatible with every sort of iniquitous aim, vague or specific.[6] I did not say this, because, of course, it is false; just as it is false that clear laws are compatible with every sort of good aim, vague or specific. It is of course perfectly true, as the author stresses throughout the book, that, for example, the Nazi government in pursuit of monstrous aims often violated the principles of legality, notably in order to pass secret enactments designed to give retrospective cover to vast illegalities. It is also quite generally true that a regime bent on monstrous policies will often want the cover of secrecy and vague, indefinable laws if it is not certain of general support for its policies or finds it necessary to conciliate external opinion. But this is a matter of the varying popularity and strength of governments, not of any necessary incompatibility between government according to the principles of legality and wicked ends.

III. Polemics

The author has harsh words for those writers whose theories do not centrally focus, as his does, on the purposes of those who make and administer the law. But in some cases (though not in my own) the writers whom he attacks are but his own men of straw, so it is not surprising that he knocks them down with a mere puff of wind. In particular, he treats most unfairly the theory (which is no favorite of mine) that law is most usefully distinguished from other forms of social control by its organized provision for the enforcement of its rules by sanctions. The author writes as if the only excuse for putting forward this theory were the trite facts that legal systems since they seek to control violence must be prepared to meet it with violence, and that the administration of the criminal law which is most directly concerned with physical sanctions is closely identified with legal ritual and solemn forms. But the selection of the provision for sanctions as a distinguishing mark of law by writers like Austin [7] or Kelsen [8] was plainly independent of these considerations: they were motivated by the conviction that the introduction of organized sanctions explains the peculiarly imperative character of legal as distinguished from other types of social norm, and brings with it a number of associated differences. This is why not only dry, analytical jurists but legal sociologists of the stature of Max Weber and Karl Renner, who were concerned to discriminate in order to understand diverse forms of social processes, also took the provision for sanctions as a distinguishing mark of law. But, in the author's account, this theory of law is caricatured before it is butchered: no one reading this book could possibly imagine that the theory could have been of the slightest use to anybody. For in an extended section on "The Concept of

[6] H. L. A. Hart, The Concept of Law 202 (1961). He says my words are an "explicit denial of *any possible interaction* between the internal and external moralities of law." (emphasis added).

[7] See Austin, The Province of Jurisprudence Determined 1–30 (5th ed. 1885).

[8] See Kelsen, General Theory of Law and State 61 (1945).

Science," the author compares this theory of law to the patently absurd definition of science as simply "the use of certain kinds of instruments" or (in another version) "the use of apparatus for measuring and testing." This absurdity is said to be the counterpart of the theory that treats use of force as the identifying characteristic of law. But in fact the parallel to this absurd definition of science would be a theory that defined law simply as the use of force: both Austin and Kelsen are innocent of this and no "positivist" of whom I know is guilty of it. These writers treat the provision for sanctions not as the identifying mark of law but as the feature which distinguishes legal rules from other social rules. The counterpart to this in the case of science is not the justly ridiculed characterization of science as simply the use of measurment, but its characterization as the search for uniformities of nature distinguished from other such searches by the use of measurement and testing. And this, even if not adequate, is not absurd.

The author attacks the theory which treats the hierarchical or pyramidal structure of rules as a defining feature of law. The attack is in such general terms that it is hard to see which of the many varieties of this theory he has in mind. But he attributes it simply to obsession with one desideratum of the inner morality of law, the need for a final resolution of conflicts within a legal system. Yet in the case of the most famous exponent of such theories, Kelsen, surely obsession with this single issue plays little part. Kelsen's theory of the basic norm, however unsatisfactory it may be in detail, is developed in the effort to provide a satisfactory analysis of a range of ideas that constitute the framework of legal thought: among these are the concept of a legal *system*, the idea of validity, the idea of delegation, and a critique of the conventional distinction between public and private law. That the author, preoccupied with his study of legal purpose, should be uninterested in the analysis of the structural framework within which these purposes are pursued is quite understandable; but it is regrettable that this preoccupation should blind him so completely to the character and aims of the theories which he attacks.

It is, I think, also regrettable that the author should, no doubt without realizing it, have revived an ancient libel on positivist thinkers by imputing to them a view of moral obligation to obey law which is not theirs. He does this in a passage where he criticizes those who, unlike himself, will not see that legal systems can "half exist" and that the existence of law is a matter of the degree to which rules satisfy the inner morality of law. Here he asserts that "legal scholars" who make the contrary assumption were not only committed to the view that the laws made by the Nazis in breach of the principles of legality were fully laws: they were ("as a grotesque outcropping of this conviction") also committed to the notion that "the moral obligation of the decent German citizen to obey these laws was in no way affected by the fact that they were in part kept from his knowledge, that some of them retroactively 'cured' wholesale murder . . . ." But if one inquires what "legal scholars" so conceived the moral obligation to obey law, the only answer discoverable in this book is the references to an earlier page concerning the post-

war German trials of informers. Here we are told that the postwar German courts treated the judgments of the Nazi courts as nullities not on the ground that the Nazi statutes which they applied were void but on the ground that the Nazi courts had misinterpreted them. Dr. Pappe is censured by the author for making too much of this distinction since "with statutes of the kind involved, filled as they were with vague phrases and unrestricted delegations of power, it seems a little out of place to strain questions of their proper interpretation." But how does this show that "legal scholars" share the notion that "the moral obligation" of the decent German citizen to obey the law was in no way affected by the Nazi Government's wicked deviations from the principles of legality? The question in issue before the postwar German courts was whether a grudge informer who had procured the condemnation and imprisonment of his victim by the Nazi courts for the breach of Nazi statutes could rely on those statutes in order to plead before the postwar German courts that his action was not *illegal* at the time when it was done. Some of the German postwar courts held that he could not so rely, not because the statutes were void, but because they were misinterpreted by the Nazi courts. How does the anxiety of "legal scholars" to make this distinction betray the belief that the decent German citizen had a moral obligation to obey Nazi statutes with all their iniquities of form and content? At the most it implies the belief that those who relied on such statutes were *legally* entitled to do so.

The author devotes some pages to my book, *The Concept of Law*, and to the most important of his criticisms I make what answer I can below. But there is one general condemnation in which I am involved together with all the other writers he attacks. He claims that we are all guilty of the same fundamental mistake of viewing law as "a manifested fact of social power" (or, in other versions, "of social authority or power") and as a "datum of nature" in opposition to the "right" view of it as a purposeful enterprise. The author is aware that at this point his readers may find his argument difficult and may think that in his ascription of "purpose" not only to particular laws but to law as a whole "the spirit of Hegel rides again." To me the difficulties of Hegel seem child's play compared with those presented by the author's demonstration that a "falsification of reality" is involved in the views which he attacks and that his own view, because "it corresponds most faithfully to reality," is the right view. But one thing is clear: the author attributes without justification his own high intolerance of other approaches to jurisprudence to those whom he criticizes, and this is in fact part, if not the whole, of his demonstration that they are wrong. Because he attributes this exclusive view that there is one right way in which law may be studied he says, astonishingly, that if we are consistent with our premises, though "we may bemoan some kinds of retroactive laws, . . . we cannot even explain what would be wrong with a system of laws that were wholly retroactive," and that we cannot give any adequate explanation of why normally legal rules are general.

What can such accusations mean? Why, to take the simplest instances, could not writers like Bentham and Austin, who defined law as

commands, have objected to a system of laws that were wholly retroactive on the ground that it could make no contribution to human happiness and so far as it resulted in punishments would inflict useless misery? Why should not Kelsen or I, myself, who think law may be profitably viewed as a system of rules, not also explain that the normal generality of law is desirable not only for reasons of economy but because it will enable individuals to predict the future and that this is a powerful contribution to human liberty and happiness? Why are such writers in giving these sorts of explanation inconsistent with their analytical theories or guilty of "falsifying reality"?

In fact, the principles of legality which the author terms "the inner morality of law" were urged by Bentham on his contemporaries in the name of utility: Bentham devoted many pages to the discussion of the evils of obscurity and retroactivity in the law.[9] Neither he nor any of the writers of his tradition thought that their definitions of law in terms of what the author calls "a manifested fact of social power" in any way rendered illegitimate consideration of the law from a sociological, functional, or critical standpoint. Bentham not only permitted these approaches but named and practiced them as his terms "expository" and "censorial" jurisprudence show.[10] The author says of those he criticizes that they "can neither formulate nor answer the problems to which . . . [his discussion of the principles of legality] was devoted." This is surely wrong. The difference between the author and those he criticizes in this matter is that the activity of controlling men by rules and the principles designed to maximize its efficiency are not valued by the latter for their own sake, and are not dignified by them with the title of "a morality." They are valued so far only as they contribute to human happiness or other substantive moral aims of the law.

IV. The Concept of Law

The author does me the compliment of taking from my book, *The Concept of Law*, the title for his most polemical chapter. The compliment is not wholly canceled by his inclusion at the head of this chapter of the following quotation from Nietzsche: "Das Vergessen der Absichten ist die häufigste Dummheit, die gemacht wird." ("Forgetting purposes is the commonest form of stupidity.") Much of his criticism of my book accordingly consists of details of the charge that I was guilty in it of the *Dummheit* of "forgetting purpose." So far as this charge rests on the imputation to me of the view that inquiries into law's purposes are illegitimate or unimportant, I perhaps need only say that I regarded my aim in *The Concept of Law* as complementary to and in no way exclusive of the author's investigation of "purposes." For in my book I tried to present improved ways of describing and a clearer view of the legal structure within which these "purposes" are pursued. So I sought to clarify in my book many things which in his the author simply takes for granted. Among these things is the notion of a *rule*

[9] See Bentham, *Principles of Morals and Legislation*, in 1 Works 1, 144–45, 146 (Bowring ed. 1859) (ch. XIX, 11th, 14th paras.).

[10] See *id.* at 148 (ch. XIX, 21st–22d paras.).

which is left unanalyzed by the author, but which I found to be in need of the same kind of discrimination, subdivision, and analysis as the author in his first chapter finds needed in the case of "morality." Though neither I nor any other jurist have yet produced an adequate taxonomy of the different types of legal rule and of the different ways in which rules guide or otherwise relate to conduct, I made one major distinction (itself susceptible of much refinement) between rules which impose legal obligations or duties and rules which confer legal powers. The chief examples of the latter are the rules which confer upon judges their jurisdiction and on legislators their authority to legislate and those rules which enable private persons to effect changes in the legal position of themselves and others. I claimed that in the union of these two sorts of rules we had an effective tool for the analysis of much that constitutes the framework of legal thought.

My distinction between these two sorts of rules was not new: continental jurists have long distinguished "rules of competence" from rules that impose legal duties, and others have distinguished between "enabling rules" and "restrictive rules." But perhaps my claim that this distinction could throw light on many dark places in jurisprudence was novel. The author certainly professes himself skeptical of this claim. Yet I find in the author's book dark places which could be illumined by just this form of analysis. Thus he accuses me of not seeing that "the structure of authority, so often glibly thought of as organizing law, is itself a product of law" or (in another version) that "the established authority which tells us what is law is itself the product of law." But the difference between the author and me is not that I do not see or agree with this point, but that whereas I attempt some analysis of what these quoted phrases mean and of how it can be the case that, as Kelsen says, "law regulates its own creation," the author gives us no such explanation. In my book I insisted that behind every legislative authority (even the supreme legislature of a legal system) there must be rules specifying the identity and qualification of the legislators and what they must do in order to make laws. By contrast the author's only contribution to this problem is to use again his much repeated nostrum ("a parliament's ability to enact law is itself an achievement of purposive effort") and to warn us that what we have here is "not simply a datum of nature." Surely this last phrase merely darkens counsel. What is a "datum" and what makes it one "of nature" or not? The author's use of this opaque philosophical phrase suggests that those who, like myself, attempt to analyze the notion of legislative powers in terms of rules are committed to eliminating from their analysis any reference to anything but the inanimate.

The most important of the author's criticisms concern my discussion of what I called in my book "the rule of recognition," and my slumbers would indeed be dogmatic if I were not stirred from them by what the author says here. I used the expression "the rule of recognition" in expounding my version of the common theory that a municipal legal system is a structure of "open-textured" rules which has at its foundation a rule which is legally ultimate in the sense that it provides

a set of criteria by which in the last resort the validity of subordinate rules of the system is assessed. This rule itself is not to be characterized as either legally valid or invalid — though it may be the subject of moral criticism, historical or sociological explanation, and other forms of inquiry. The existence of such a rule is manifested in the acknowledgement and use of the same set of criteria of legal validity by the law-making, law-applying, and law-enforcing officials and in the general conformity to law so identified.

Some theorists prefer to call this phenomenon a political fact: to treat it as the fact that a constitution exists not as so much writing on paper but as part of the life of the community living under a legal system. In my book, I offered reasons for saying that the propriety of this latter description did not exclude the classification of this phenomenon as an ultimate legal rule providing criteria for the identification of the subordinate rules of the legal system. It is, however, certainly of the first importance that anyone who like myself wishes to speak at this point of "rules" and in particular of "*a* rule" should enter the plainest caveats showing how such a legally ultimate rule differs both from the ordinary subordinate rules of the legal system and from ordinary social conventions or customs. To this end I insisted in my book that the rule of recognition was both complex and open-textured. It is complex because in modern legal systems not one criterion but several criteria of legal validity are used. Thus even in a "unitary" system such as English law, the law is identified both by reference to judicial precedent and by reference to the enactments of Parliament. These are distinct criteria ranked in order of relative subordination and primacy: precedent is subordinate to statute in the sense that common law rules may be deprived of their status as law by statute, though their status as law is not derived from statute. The reason for still speaking of "*a* rule" at this point is that, notwithstanding their multiplicity, these distinct criteria are unified by their hierarchical arrangement. I drew attention to the fact that the feature of open-texture which affects all rules is present also in the case of the rule of recognition. This, too, has its "penumbral" area as well as its firm, well-settled "core." Hence it is that there are always questions about the criteria or official sources of law to which at any given moment there is no uniquely correct answer to be given until a court has ruled upon the question. And when the courts so rule they modify or develop this most fundamental rule of the legal system.

I considered in my book whether or not to insist on the terminology of rules to describe something so complex, vague, and fluid was mistaken and I decided that it was not. The author plainly thinks I was wrong and he accuses me of supplying "neat juristic answers to questions which are essentially questions of sociological fact." By this phrase he means, I think, that there is no coherent conception of a rule which could be used at this point without distorting the facts. This is indeed an important question, but the issue is not to be disposed of without a patient examination of the similarities and differences between what would ordinarily be called the existence of a rule and the ways in which

the validity of legal rules is assessed. The author's only alternative to my possibly mistaken form of analysis is to say that a legal system "derives its ultimate support from a sense of its being 'right' " and that this sense "deriving as it does from tacit expectations and acceptances, simply cannot be expressed in such terms as obligations and capacities." Is it really not possible, without weaving fictions, to be more specific than this?

On some points of detail[11] with which I will not weary the reader the author has misunderstood me. But on one major topic his criticism is I think misdirected because in a sense it is not fundamental enough. Thus he says that I suppose that as "a necessity of logical thinking" my rule of recognition must be unconditional and the authority of a legislature *cannot* be the subject of an explicit or implicit provision for revocation "for abuses." There is, however, nothing in my theory which leads to this result. There is, for me, no logical restriction on the content of the rule of recognition: so far as "logic" goes it could provide explicitly or implicitly that the criteria determining validity of subordinate laws should cease to be regarded as such if the laws identified in accordance with them proved to be morally objectionable. So a constitution could include in its restrictions on the legislative power even of its supreme legislature not only conformity with due process but a completely general provision that its legal power should lapse if its enactments ever conflicted with principles of morality and justice. The objection to this extraordinary arrangement would not be "logic" but the gross indeterminacy of such criteria of legal validity. Constitutions do not invite trouble by taking this form. So normally the questions, "Is this a valid law?" and "Is it so morally iniquitous that I must withdraw my recognition of the authority of those who made it?" are distinct. But there is nothing in my book to suggest that the latter question is not of the greatest importance. Here, if I may say so, the author's target should have been my claim that it is both intelligible and important to distinguish the general acceptance of the legally ultimate rule of a system of law which specifies the criteria of legal validity from whatever moral principles or rules individuals act upon in deciding whether and to what extent they are morally bound to obey the law. Again, I may have been wrong in making this distinction, and the author may be right in thinking that any recognition of legal authority contains implicitly moral limitations. But if this was my error it stands in need both of a more frontal and detailed attack than the author mounts here.

Finally, the author claims that "the basic error" of my methods is shown by the incompetence of my theory to explain how it is that even after a revolution often a great mass of private law enacted under the old regime still continues to be regarded as law under the new regime. In my book I discussed what I there called "the persistence of law." But I did not deal with this phenomenon of revolution because my con-

[11] Thus he says, mistakenly, that in my view "the rule of recognition that ascribes legal sovereignty to the Queen in Parliament can . . . summarize and absorb all the little rules that enable lawyers to recognize law." This neglects the account of the complexity even in England of the rule of recognition given in my book and explained on page 1293 *supra*.

cern was to exhibit the inadequacies of the Austinian theory that law was the command of the sovereign "habitually obeyed." I argued that this could not explain how the commands of a dead sovereign no longer habitually obeyed could still be law. I claimed that this phenomenon of the persistence of law could be explained easily enough if we think in terms not of habits of obedience but in terms of a rule of recognition, pointing generally to the office of legislator and not individually to its present occupant. On this view of the matter the legislation of a past legislator is accepted as law because it is identified as such by the presently accepted rule of recognition. This, however, does not deal with the possibility of a revolutionary break such as the author invents: Rex II succeeds Rex I under presently accepted rules of succession and then Brutus without title and in violation of these rules seizes the throne. Here, too, a mass of private law enacted under the old regime continues to be recognized as law.

Though I did not deal with this case in my book I do not think there is any great difficulty in analyzing such situations in terms of a rule of recognition. My explanation will be very much the same as that given by Kelsen in his *General Theory of Law and State*.[12] After a revolutionary break such as the author has imagined it must always be uncertain for some time what criteria the courts will eventually use to ascertain the law. Some time must elapse before a sufficient uniformity in practice of courts, legislators, and other officials develops to enable an answer to be given to this question. But when things settle down it may be apparent that as well as accepting "enactment by Brutus" as a mark of valid law, the courts will also recognize a mass of private law enacted under the old regime. In any full description of the criteria used by the courts after the revolutionary break in ascertaining the law, the old legislation would have to be specifically mentioned *eo nomine*. Had there been no revolution, it would have been identified by reference to the general provision qualifying the unbroken succession of legislators. After the revolution, therefore, the validity of the old legislation comes to rest on a different rule of recognition from before.

V. Conclusion

There is much in this small book which I have not considered here. It ends with some admirable pages on what the author terms "the problems of institutional design." Here he considers the appropriateness to different types of issue of different decision-procedures, among them adjudication and majority vote. He illuminatingly shows the restrictions to which the use of these methods are "naturally" subject and the problems of coordinating different procedures in a single system. In an appendix there is a splendid example of the author's mythopoetic powers, where the problem of "the grudge informer" and retroactive legislation are discussed by five deputies. This has all the charm and revealing power of the author's famous *Case of the Speluncean Explorers*.[13] In conclusion I would say this: the virtues and vices of this

[12] Kelsen, *op. cit. supra* note 8, at 117–18.
[13] 62 Harv. L. Rev. 616 (1949).

book seem to me to spring from the same single source. The author has all his life been in love with the notion of purpose and this passion, like any other, can both inspire and blind a man. I have tried to show how it has done both to the author. The inspiration is so considerable that I would not wish him to terminate his longstanding union with this *idée maîtresse*. But I wish that the high romance would settle down to some cooler form of regard. When this happens, the author's many readers will feel the drop in temperature; but they will be amply compensated by an increase in light.

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FEDERAL COURTS. By Charles Alan Wright.[1] St. Paul: West Publishing Co. 1963. Pp. xvi, 496, 138 (appendix). $10.00.

This excellent little book covers a great deal of important ground in procedure and does so in a thoughtful and probing way. The first half of the book is concerned with problems of federal jurisdiction which the author seeks to consider, in acknowledged response to the scholarship of Professors Hart and Wechsler, "in terms of their effect on our system of federalism, rather than as purely technical exercises . . ." (p. ix).[2] Most of the second half treats the procedure in the federal district courts.[3] The book ends with three rather short chapters (11, 12 & 13) on the appellate jurisdiction of the courts of appeals and the Supreme Court, and the original jurisdiction of the latter.

The plan of this book may sacrifice something of unity; it certainly calls for a shift of emphasis at midpoint. The peculiar problems of judicial administration injected by the federal nature of our system are not the same as those perennial problems which *any* procedural system (with a heritage of adversary proceeding and jury trial) must face. Nor do they involve altogether the same aims and values — at least the emphasis is quite different. The problems of federalism concern primarily the adjustment of competing claims of state and nation under our order of dual sovereignty; the perennial problems of procedure concern the claims of individuals to have their cases decided on the merits, and the adjustment between such claims and those of administrative efficiency and procedural fairness to the adversary. Problems of the latter type would exist under a unitary form of government — they do not spring from federalism. Perhaps this difference in the nature of the problems justifies treating federal jurisdiction in a separate law school course and concentrating on the perennial problems in the basic

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[2] The nine chapter headings in the first half of the book are: "The Federal Judicial System," "The Judicial Power of the United States," "Federal Question," "Diversity of Citizenship," "Jurisdictional Amount," "Removal Jurisdiction and Procedure," "Venue," "The Relations of State and Federal Courts," and "The Law Applied by the Federal Courts."

[3] Chapter 10, entitled "Procedure in the District Courts," comprises about 40% of the text. Chapter 11, "The Appellate Jurisdiction of the Courts of Appeals," contains little that bears on the peculiar problems of federalism.