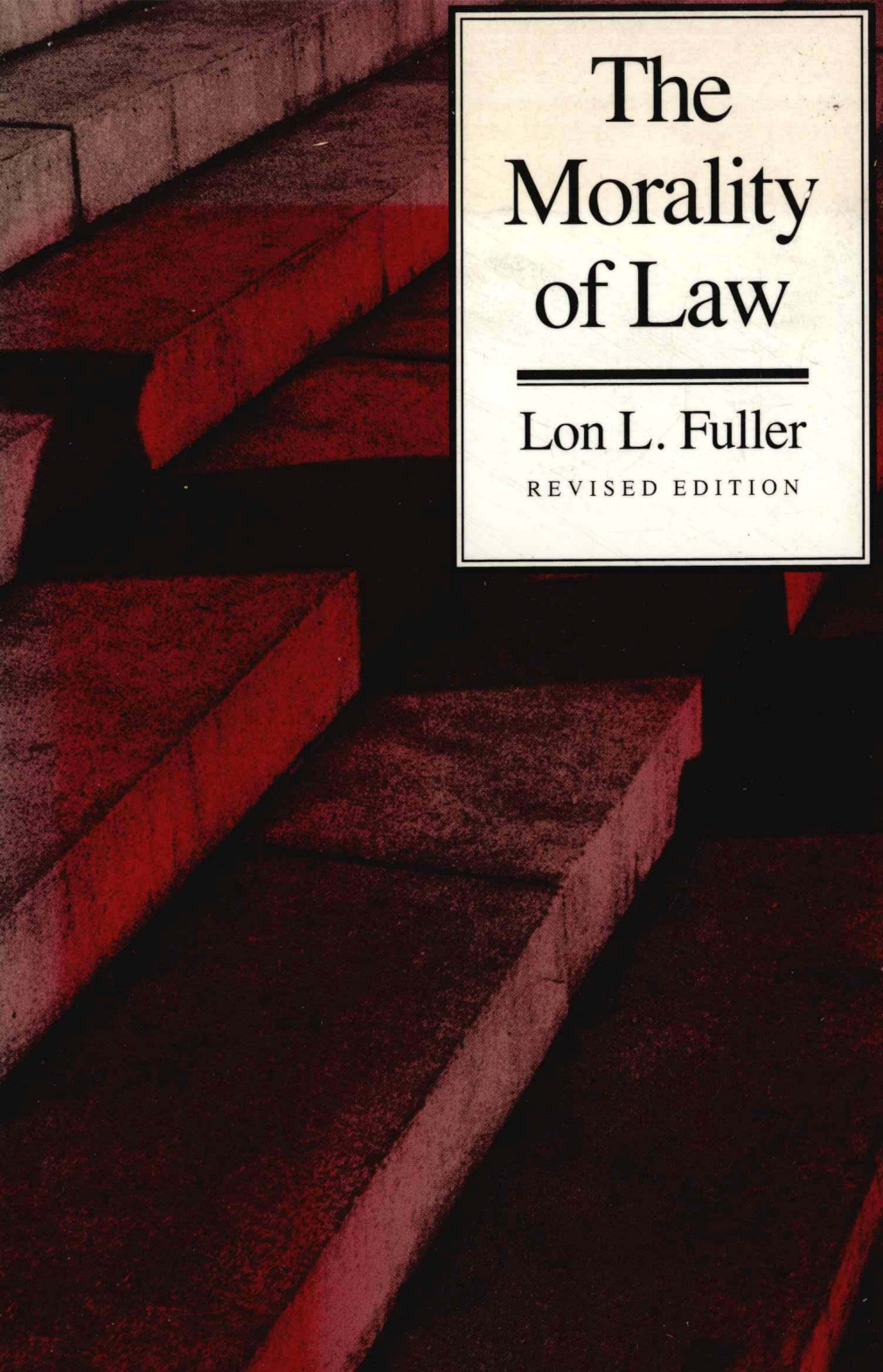

The Morality of Law

Lon L. Fuller

REVISED EDITION

STORRS LECTURES ON JURISPRUDENCE

YALE LAW SCHOOL, 1963

PREFACE TO THE SECOND EDITION

In this new edition of *The Morality of Law* the first four chapters have been reprinted from the type as it was originally set, with only a minor correction or two. The only change of substance consists, therefore, in the addition of a fifth and final chapter entitled "A Reply to Critics."

The fact that the first four chapters remain virtually unchanged does not imply complete satisfaction with either the form or the substance of the presentation achieved in them. It means simply that I have not proceeded far enough in my rethinking of the problems involved to undertake any substantial reformulation of the views I first expressed in lectures delivered in 1963. It means also that basically I stand by the positions taken in those lectures.

I hope that the new fifth chapter will not be viewed simply as an exercise in polemics. For many decades legal philosophy in the English-speaking world has been largely dominated by the tradition of Austin, Gray, Holmes, and Kelsen. The central place their general view of law has occupied does not mean that it has ever been received with entire satisfaction; even its adherents have

often displayed discomfort with some of its implications. In the new concluding chapter of this book I have achieved, I think, a better articulation of my own dissatisfactions with analytical legal positivism than I had ever achieved before. For this I am deeply indebted to my critics, and particularly to H. L. A. Hart, Ronald Dworkin, and Marshall Cohen. Their strictures have not always been softly phrased, but by the same token they have not been blunted by the self-protective obscurities often found in polemic attacks. By laying bare the basic premises of their thought, they have helped me to do the same with mine.

Since the first edition of this book has been found of some value by scholars whose primary interests lie in legal sociology and anthropology, it might be well to offer a suggestion to those first approaching the book from the standpoint of similar interests. My suggestion is that they begin by reading Chapters II and V in that order, skipping for the time being the others. This mode of approaching the book will serve the dual purpose of suggesting whatever of value it may have for their special concerns, at the same time offering some notion of the basic differences in viewpoint that divide legal scholars in the task of defining their own subject.

In closing I want to express a word of appreciation for the contribution made to this book (and to my peace of mind) by Martha Anne Ellis, my secretary, and Ruth D. Kaufman of the Yale University Press. Their diligence and perception have largely lifted from my concern the time-consuming and anxiety-producing details that always accompany the conversion of a manuscript into final printed form.

May 1, 1969 L.L.F.

PREFACE TO THE FIRST EDITION

This book is based on lectures given at the Yale Law School in April 1963 as a part of the William L. Storrs Lecture Series. Though the present volume expands the original text several times over, I have preserved the lecture form as congenial to the subject matter and as permitting the informal and often argumentative presentation I preferred. The result is a certain incongruity between form and substance; even the polite patience of a Yale audience would hardly have enabled it to sit through my second "lecture" as it now appears.

As an appendix I have added something that I wrote long before I undertook these lectures. It is called The Problem of the Grudge Informer. It may be found useful to read and think about this problem before turning to my second chapter. The problem was originally conceived to serve as a basis for discussion in my course in jurisprudence. During the past few years it has also been used as a kind of introduction to the problems of jurisprudence in a course taken by all first-year students in the Harvard Law School.

In making my acknowledgments first thanks must go to the Yale Law School, not only for the welcome spur of its invitation,

but for granting an extension of time so that I might more nearly meet its demands. I must also express my gratitude to the Rockefeller Foundation for helping me to gain access, during the school year 1960–61, to that rarest commodity in American academic life: leisure. By leisure I mean, of course, the chance to read and reflect without the pressure of any immediate commitment to being, or pretending to be, useful. Quite simply, without the aid of the Foundation I would not have been able to accept Yale's invitation. My indebtedness to colleagues runs to so many for such diverse forms of aid that it is impossible to acknowledge it adequately. None of them, it should be said, had any chance to rescue the final text from those last-minute infelicities to which stubborn authors are prone. During the early stages of the undertaking, however, their contributions were of so essential a nature that in my eyes this book is as much theirs as mine. Finally, in acknowledging the very real contribution of my wife, Marjorie, I shall borrow a conceit from another writer: she may not know what it means, but she knows what it meant.

L. L. F.

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BY LON L. FULLER

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I THE TWO MORALITIES

Sin, *v.i.* *1. To depart voluntarily from the path of duty prescribed by God to man.*—Webster's New International Dictionary

Die Sünde ist ein Versinken in das Nichts.[1]

The content of these chapters has been chiefly shaped by a dissatisfaction with the existing literature concerning the relation between law and morality. This literature seems to me to be deficient in two important respects. The first of these relates to a failure to clarify the meaning of morality itself. Definitions of law we have, in almost unwanted abundance. But when law is

1. This quotation may be purely imaginary. I *think* I recall it from something I read long ago. Friends learned in theology have been unable to identify its source. They inform me that its thought is Augustinian and that there is a closely parallel passage in Karl Barth: "Die Sünde ist ein Versinken in das Bodenlose." However, "das Bodenlose" implies a loss of limits or boundaries and therefore suggests a transgression of duty. What I have sought is an expression of the concept of sin as viewed by a morality of aspiration—sin as a failure in the effort to achieve a realization of the human quality itself.

compared with morality, it seems to be assumed that everyone knows what the second term of the comparison embraces. Thomas Reed Powell used to say that if you can think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind. In the present case, it has seemed to me, the legal mind generally exhausts itself in thinking about law and is content to leave unexamined the thing to which law is being related and from which it is being distinguished.

In my first chapter an effort is made to redress this balance. This is done chiefly by emphasizing a distinction between what I call the morality of aspiration and the morality of duty. A failure to make this distinction has, I think, been the cause of much obscurity in discussions of the relation between law and morals.

The other major dissatisfaction underlying these lectures arises from a neglect of what the title of my second chapter calls, "The Morality That Makes Law Possible." Insofar as the existing literature deals with the chief subject of this second chapter—which I call "the internal morality of law"—it is usually to dismiss it with a few remarks about "legal justice," this conception of justice being equated with a purely formal requirement that like cases be given like treatment. There is little recognition that the problem thus adumbrated is only one aspect of a much larger problem, that of clarifying the directions of human effort essential to maintain any system of law, even one whose ultimate objectives may be regarded as mistaken or evil.

The third and fourth chapters constitute a further development and application of the analysis presented in the first two. The third, entitled "The Concept of Law," attempts to bring this analysis into relation with the various schools of legal philosophy generally. The fourth, "The Substantive Aims of Law," seeks to demonstrate how a proper respect for the internal morality of law limits the kinds of substantive aims that may be achieved through legal rules. The chapter closes with an examination of the extent to which something like a substantive "natural law" may be derived from the morality of aspiration.

The Moralities of Duty and of Aspiration

Let me now turn without further delay to the distinction between the morality of aspiration and the morality of duty. This distinction is itself by no means new.[2] I believe, however, that its full implications have generally not been seen, and that in particular they have not been sufficiently developed in discussions of the relations of law and morals.

The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. In a morality of aspiration there may be overtones of a notion approaching that of duty. But these overtones are usually muted, as they are in Plato and Aristotle. Those thinkers recognized, of course, that a man might fail to realize his fullest capabilities. As a citizen or as an official, he might be found wanting. But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing. Generally with the Greeks instead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as beseems a human being functioning at his best.[3]

Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain

2. See, for example, A. D. Lindsay, *The Two Moralities* (1940); A. Macbeath, *Experiments in Living* (1952), pp. 55–56 et passim; W. D. Lamont, *The Principles of Moral Judgement* (1946); and by the same author, *The Value Judgement* (1955); H. L. A. Hart, *The Concept of Law* (1961), pp. 176–80; J. M. Findlay, *Values and Intentions* (1961); Richard B. Brandt, *Ethical Theory* (1959), esp. pp. 356–68. In none of these works does the nomenclature I have adopted in these lectures appear. Lindsay, for example, contrasts the morality of "my station and its duties" with the morality of the challenge to perfection. Findlay's book is especially valuable for its treatment of the "hortatory" abuses of the concept of duty.

3. Cf. "the Greeks never worked out anything resembling the modern notion of a legal right." Jones, *The Law and Legal Theory of the Greeks* (1956), p. 151.

specific goals must fail of its mark. It is the morality of the Old Testament and the Ten Commandments. It speaks in terms of "thou shalt not," and, less frequently, of "thou shalt." It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.

In his *Theory of Moral Sentiments,* Adam Smith employs a figure that is useful in drawing a distinction between the two moralities I am here describing.[4] The morality of duty "may be compared to the rules of grammar"; the morality of aspiration "to the rules which critics lay down for the attainment of what is sublime and elegant in composition." The rules of grammar prescribe what is requisite to preserve language as an instrument of communication, just as the rules of a morality of duty prescribe what is necessary for social living. Like the principles of a morality of aspiration, the principles of good writing, "are loose, vague, and indeterminate, and present us rather with a general idea of the perfection we ought to aim at, than afford us any certain and infallible directions of acquiring it."

It will be well at this point to take some form of human conduct and ask how the two moralities might proceed to pass judgment on it. I have chosen the example of gambling. In using this term I do not have in mind anything like a friendly game of penny ante, but gambling for high stakes—what in the translation of Bentham's *The Theory of Legislation* is called by the picturesque term, "deep play."[5]

How would the morality of duty view gambling thus defined? Characteristically it would postulate a kind of hypothetical moral

4. *The Theory of Moral Sentiments, 1,* 442. The distinction taken by Smith is not between a morality of duty and a morality of aspiration, but between justice and "the other virtues." There is plainly, however, a close affinity between the notion of justice and that of moral duty, though the duty of dealing justly with others probably covers a narrower area than that embraced by moral duties generally.

5. See the note to page 106 of Hildreth's translation as reprinted in the International Library of Psychology, *Philosophy and Scientific Method* (1931).

legislator who would be charged with the responsibility of deciding whether gambling was so harmful that we ought to consider that there is a general moral duty, incumbent on all, to refrain from engaging in it. Such a legislator might observe that gambling is a waste of time and energy, that it seems to act like a drug on those who become addicted to it, that it has many undesirable consequences, such as causing the gambler to neglect his family and his duties toward society generally.

If our hypothetical moral legislator had gone to the school of Jeremy Bentham and the later marginal utility economists, he might find good reasons for declaring gambling intrinsically harmful and not merely harmful because of its indirect consequences. If a man's whole fortune consists of a thousand dollars and he wagers five hundred of it on what is called an even bet, he has not in fact entered a transaction in which possible gains and losses are evenly balanced. If he loses, each dollar he pays out cuts more deeply into his well-being. If he wins, the five hundred he gains represents less utility to him than the five hundred he would have paid out had he lost. We thus reach the interesting conclusion that two men may come together voluntarily and without any intent to harm one another and yet enter a transaction which is to the disadvantage of both—judged, of course, by the state of affairs just before the dice are actually thrown.

Weighing all these considerations, the moralist of duty might well come to the conclusion that men ought not to engage in gambling for high stakes, that they have a duty to shun "deep play."

How is such a moral judgment related to the question whether gambling ought to be prohibited by law? The answer is, very directly. Our hypothetical legislator of morals could shift his role to that of lawmaker without any drastic change in his methods of judgment. As a lawmaker he will face certain questions that as a moralist he could conveniently leave to casuistry. He will have to decide what to do about games of skill or games in which the outcome is determined partly by skill and partly by chance. As a statutory draftsman he will confront the difficulty of distin-

guishing between gambling for small stakes as an innocent amusement and gambling in its more desperate and harmful forms. If no formula comes readily to hand for this purpose, he may be tempted to draft his statute so as to include every kind of gambling, leaving it to the prosecutor to distinguish the innocent from the truly harmful. Before embracing this expedient, often described euphemistically as "selective enforcement," our moralist turned lawmaker will have to reflect on the dangerous consequences that would attend a widened application of that principle, already a pervasive part of the actual machinery of law enforcement. Many other considerations of this nature he would have to take into account in drafting and proposing his statute. But at no point would there be any sharp break with the methods he followed in deciding whether to condemn gambling as immoral.

Let us now view gambling as it might appear to the morality of aspiration. From this point of view we are concerned not so much with the specific harms that may flow from gambling, but with the question whether it is an activity worthy of man's capacities. We would recognize that in human affairs risk attends all creative effort and that it is right and good that a man engaged in creative acts should not only accept the risks of his role, but rejoice in them. The gambler, on the other hand, cultivates risk for its own sake. Unable to face the broader responsibilities of the human role, he discovers a way of enjoying one of its satisfactions without accepting the burdens that usually accompany it. Gambling for high stakes becomes, in effect, a kind of fetishism. The analogy to certain deviations in the sex instinct is readily apparent and has in fact been exploited to the full in an extensive psychiatric literature on obsessive gambling.[6]

The final judgment that the morality of aspiration might thus pass on gambling would not be an accusation, but an expression of disdain. For such a morality, gambling would not be the violation of a duty, but a form of conduct unbefitting a being with human capacities.

6. See the bibliography listed in Edmund Bergler, *The Psychology of Gambling* (1957), note 1, pp. 79–82.