Summers’s Primer on Fuller’s Jurisprudence-A Wholly Disinterested Assessment of the Reviews by Professors Wueste and LeBel

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INTRODUCTION

My introductory book, Lon L. Fuller, appeared in the spring of 1984 and numerous reviews have followed. Here, I select two for comment. The first, by Professor Daniel E. Wueste, is published in the present issue of this journal. It is perceptive and thoughtful, and more sympathetic than any of the others to Fuller's most controversial thesis, namely, that law has an "internal morality." Professor Wueste rejects my principal defense of that thesis, reinterprets the thesis, and then goes on to defend it in another way. Here I will briefly assess these three positions.

Of all the reviewers so far, Professor Paul E. LeBel is the least sympathetic to Fuller's jurisprudence. At the same time, he is the most skeptical of my treatment of Fuller. In 1985, in the well-known and widely read annual "book review" issue of the Michigan Law Review, Professor LeBel's review appeared under the banner headline Blame this Messenger: Summers on Fuller. Professor LeBel remarks that there is "a good deal that is of value" in my book (even a crumb the author doth savor!), but he ultimately concludes that it is "seriously flawed" and "fundamentally unsound." He also

† McRoberts Research Professor in Administration of the Law, Cornell Law School. Two former students read an earlier draft of this Article and I wish to record my indebtedness and my gratitude to them for their suggestions. They are Mr. Sterling Harwood, J.D. 1984, Cornell University, and Professor Leigh B. Kelley, J.D. 1980, Cornell University.

1 R. Summers, Lon L. Fuller (Jurists: Profiles in Legal Theory No. 4, 1984).
3 Wueste, Fuller's Processual Philosophy of Law (Book Review), 71 Cornell L. Rev. 1205 (1986).
5 Id. at 722.
6 Id. at 721.
opines that the general editor of the series in which my book appeared erred from the beginning by inviting me to write on Fuller. Professor LeBel also indicates that, in his view, my book compares most unfavorably with the three others that had then appeared in the series. In his closing sentence, he offers the veiled suggestion that we would all be better off had I not written the book. (But he does not recommend that it be burned!) Here I will identify and discuss each of the “flaws” Professor LeBel claims to find (and to which he devotes more than passing reference). As we will see, Professor LeBel does have some interest in the central issues, but unlike Professor Wueste, he rejects Fuller’s claim that law has an “internal morality.”

I

Professor Wueste on the Internal Morality of Law

In 1964, in his book The Morality of Law, Professor Fuller set forth eight “principles of legality,” as he called them. In his view, these principles apply at least to the making and administration of statute law (and to certain other forms of what he called “made” law, when appropriate). Thus, at minimum, statute law:

(1) ought to be sufficiently general (that is, take the form of principled rules);
(2) ought to be publicly promulgated;
(3) ought to be sufficiently prospective;
(4) ought to be clear and intelligible;

7 Id. at 731.
8 Id. at 721-22.
9 Id. at 718-21. The previous volumes were: A. Kronman, Max Weber (1983); N. MacCormick, H.L.A. Hart (1981); and W. Morison, John Austin (1982).
10 LeBel, supra note 4, at 731. Here is what he says:

In his earlier text on American legal theory, Professor Summers distinguished the fox from the hedgehog, and adopted the stance of the hedgehog which knows one great thing or which has the best trick of all.

11 I will not, however, respond to the numerous ad hominem remarks and innuendos in Professor LeBel’s review. These include suggestions that I am not a “substantial scholar[ ] in [my] own right,” LeBel, supra note 4, at 721, that I am a kind of “hagiographer,” id. at 722, who is blindly seeking to “sustain Fuller in [an] exalted position,” id. at 723, and that I merely substitute “[l]abelling” for analysis, all in a deeply misguided effort to “protect natural law theory from inanity,” id. at 724.

13 Id. Fuller’s most elaborate treatment of the distinction between “made law” and “implicit law” appears in L. Fuller, Anatomy of the Law 43-84 (1968).
(5) ought to be free of contradictions;
(6) ought to be sufficiently constant through time so people
can order their behavior accordingly;
(7) ought not to require the impossible; and
(8) ought to be administered in a way sufficiently congruent
with its wording so that people can abide by it.

Fuller claimed that these more or less procedural “oughts”
constitute an “internal morality of law.” (He used the adjective “in-
ternal” to mark a contrast with “external” moral principles that in-
form the substantive content of law.) I, and others, interpreted
Fuller in 1964 to mean by a “morality” that these “oughts,” taken
together and as implemented, necessarily secure values of moral
worth. Fuller only hinted at various arguments that might support
his claim that the above principles constitute an internal morality.\(^\text{14}\)
His claim became highly controversial and the many legal theorists
who rejected it included H.L.A. Hart,\(^\text{15}\) Ronald M. Dworkin,\(^\text{16}\) Marshall Cohen,\(^\text{17}\) Graham Hughes,\(^\text{18}\) Wolfgang Friedmann,\(^\text{19}\) and my-
self.\(^\text{20}\) Most held that Fuller’s “oughts” were mere “oughts” of
efficiency, not “oughts” of morality. Several argued along the fol-
lowing lines: Concededly, a government ought to make rules, ought
to publish them, ought to apply them in a fashion congruent with
their textual formulations, and so on if that government is to be ef-
fective in realizing its substantive ends. But, although conformity to
such procedural “oughts” may be effective, it does not necessarily
yield morally good law. For one thing, the substantive ends in-
volved might be morally bad. Similarly, nonconformity with such
“oughts” does not necessarily yield anything bad. Nonconformity
might even yield something good, as when the substantive ends in-
volved are bad.

What is at stake here? Fuller believed that his internal morality
of law refutes the general positivist doctrine that there is no neces-
sary connection between law and morality.\(^\text{21}\) Fuller also viewed the

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\(^\text{14}\) I canvass these arguments in R. Summers, supra note 1, at 36-40.
\(^\text{16}\) Dworkin, The Elusive Morality of Law, 10 Vill. L. Rev. 631 (1965).
\(^\text{17}\) Cohen, Law, Morality & Purpose, 10 Vill. L. Rev. 640 (1965).
\(^\text{18}\) Hughes, Jurisprudence, 1964 Ann. Surv. Am. L. 685, 693-97 (1965); Hughes, Posi-
tivists and Natural Lawyers (Book Review), 17 Stan. L. Rev. 547 (1965) (reviewing L.
Fuller, The Morality of Law (1964)).
\(^\text{19}\) See R. Summers, supra note 1, at 37.
\(^\text{20}\) Summers, Professor Fuller on Morality and Law, 18 J. Legal Educ. 1, 24-27 (1965),
reprinted in MORE ESSAYS IN LEGAL PHILOSOPHY (R. Summers ed. 1971).
\(^\text{21}\) See generally Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv.
L. Rev. 630, 644-648 (1958) and L. Fuller, supra note 12. The issue here is variously
defined. For explicit use of the “no necessary connection” rubric by a leading positivist,
see H.L.A. Hart, The Concept of Law 202 (1961); see also R. Summers, supra note 1, at
27.
internal morality of law as a source of standards for the criticism of
government through law. He assumed, too, that if its moral signif-
icance were better understood, the principles involved would be
taken more seriously, not only by persons who might criticize gov-
ernment but also by officials who make and apply law in the first
place.23

Several years ago, when I reread Fuller prior to writing my
book on his work, I had a change of mind.24 I now believe that
Fuller's principles of legality do have a justified claim to being a mo-
rality. In the end, Professor Wueste seems to think I was right to
change my mind, though in his view, I did so for the wrong reason.
Professor LeBel simply thinks I was wrong to change my mind. Both
lament that I provided no explanation for the change. But the
explanation is simply that I became persuaded by the arguments
that I thought could be made in support of Fuller's claim, argu-
ments I summarized in my book. The argument I found most com-
pelling was this:

Fuller sought to set forth several affirmative arguments in favor of
his claim that the principles of legality somehow constitute a "mo-
rality" (i.e. necessarily translate into principles or values of moral
worth). But since he did not explicitly set forth the argument that
seems to support this characterization most fully, let me present it
here. Sufficient compliance with the principles of legality neces-
arily guarantees, to the extent of that compliance, the realization
of a moral value, even when the content of the law involved hap-
pens to be bad. That moral value is this: the principles of gener-
ality, clarity, prospectivity, and so forth, secure that the citizen will
have a fair opportunity to obey the law. Admittedly, the choice
may be a choice to obey an evil law, but the citizen will at least
have had a fair chance to decide whether to do so or not, and to
act accordingly. This is in itself moral, even though, overall, what
the state happens to be doing to the citizen through the substance
of the law is immoral. Observe that if the principles of legality
were violated, there could be a dual moral objection: the citizen
could be subjected to an evil law and could lack any fair opportu-
nity to know of it in advance and act accordingly. Indeed, to pun-
ish or sanction a citizen for not following an evil (or even a
beneficent) law that is unfollowable is also unjust. And injustice is

22 See, e.g., L. Fuller, supra note 12, at ch. 2.
23 R. Summers, supra note 1, at 27-31.
24 In fact, I have even changed my mind on other occasions! In one case, I was led
to invent a wholly new form of citation: "Don't see." Thus in footnote 1 at page 14 of R.
Summers, Notes on Criticism in Legal Philosophy, in More Essays in Legal Philosophy (R.
Summers ed. 1971), the reader will find: "I once got it all badly wrong. Don't see Sum-
mers, Logic in the Law, 72 Mind 254 (1963)." It is a great pity that this new form of
citation has not yet caught on, for I believe most authors might find some use for it, even
Professor LeBel.
indisputably immoral. (Fuller did point out that when his eight requirements are not sufficiently met, the citizen can have no meaningful basis on which to discharge any general moral obligation he might otherwise have to obey the law. This could be construed as an oblique way of making the fairness and injustice arguments I set forth in the text.)

On two grounds, Professor Wueste rejects my foregoing fairness argument in support of a necessary connection between Fuller's principles of legality and morality. I will take up each in turn. First, Professor Wueste focuses on Fuller's own earlier concession that an occasional departure from a principle of legality might even be morally justified. For example, this could be true of a retroactive statute legitimizing children of invalid marriages. According to Professor Wueste, if such a departure is justified, then there could be no necessary connection between Fuller's principles and morality. Indeed, nonconformity with such an "ought" could actually be morally beneficent. But in an example of this kind, no issue arises as to whether a citizen has an opportunity (let alone a fair one) to obey such laws. Obedience is simply not the object of a retroactive statute legitimizing children. And if obedience cannot be an issue, my fairness argument cannot (and was not intended to) come into play. Yet I would argue that when statute law is used, obedience (or some form of compliance) will commonly be an official objective, and this will give point to whether the citizen has fair warning and an opportunity to follow that law. In such circumstances, official conformity to Fuller's principles (taken together) necessarily secures, so far as law can, this form of fairness. Of course, one may respond that legal systems could get along without effective statute law (and all similar forms of "made" law). I deny this, at least in the case of developed legal systems. One may also respond that officials might choose not to visit a citizen's noncompliance with an adverse consequence if that citizen lacked a fair opportunity to obey. But barring this, some adversity would ordinarily follow (something Fuller assumed). Thus official adherence to Fuller's principles of legality will at least afford the citizen some fair warning of the adversity and an opportunity for choice in the matter (however hard).

Second, Professor Wueste denies that having a fair opportunity to obey is always in itself moral; he cites the example of a person who is given a "fair opportunity" to go along with a blackmailer's

25 R. Summers, supra note 1, at 37-38 (emphasis in original, footnotes omitted).
26 L. Fuller, supra note 12, at 50-54.
27 Wueste, supra note 3, at 1209.
scheme. Professor Wueste argues that the evil nature of that scheme somehow saps this opportunity of any and all fairness it might otherwise have. He implies that the same would be true in the case of an evil law that is nonetheless fairly followable. Thus, conformity to Fuller's principles of legality is not necessarily moral. Now, one can easily imagine a person who not only blackmails, but also departs from Fuller's principles of legality in the process. He might, for example, give the victim directions that are unclear or otherwise impossible to follow, so that in the end the victim is exposed even though he may have tried his best to go along. Plainly, we have a dual moral objection: not only is the substance of the scheme of blackmail morally bad, but the victim is not even given a fair opportunity to go along with the scheme in its entirety. So, too, with an evil and unfollowable law. Furthermore, affording a person fair warning and a genuine opportunity to go along with a blackmail scheme might, in the circumstances, actually be morally better (though not necessarily morally good overall) than if no such chance were provided. The same may be said of a followable, as contrasted with an unfollowable, law (even though the law in both instances is evil).

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28 Id. at 1209-10.
29 Id. at 1210-11. In his reply to this article, Wueste, Morality and the Legal Enterprise—A Reply to Professor Summers, 71 CORNELL L. REV. 1252 (1986), Professor Wueste seems to refuse to accept the terms of my variation on his blackmail example. Id. at 1255-57. Yet he provides no argument that such a situation could not realistically exist. Of course, one may imagine countless contexts where an individual is subjected to a scheme both evil in design or result and unfair in execution which infringes upon Fuller's moral principles.

Professor Wueste may assume that otherwise moral ends necessarily lose all their moral value when realized to any extent through means in any degree evil. If he has made this assumption, he should argue for its adoption, for its correctness is not beyond doubt. On the other hand, Professor Wueste may believe that bad ends sap all goodness from their end only when they are "bad enough," or that even where the means are very bad, some residue of goodness may remain in their end. I incline to the latter view. Again, either view calls for justification.

30 Most of those who have disputed with Fuller over the internal morality of law seem to have assumed that Fuller's claim must be construed as a claim that there is a necessary connection between his principles of legality and moral value. I see no reason to assume that Fuller's claim can take on real significance only if so construed. In fact, a number of the arguments at which Fuller hinted (and which I articulated in my book) support only a strong contingent connection. Utilitarianism is analogous here. Few moral theorists would deny that utilitarianism is a morality, yet the connection between acting on utilitarian principles and any resulting moral value (i.e. utility) of that action is contingent, often highly so. Utilitarianism seeks to maximize expected utility, which is probabilistic rather than necessary. So, contrary to Professor Wueste's suggestion, Fuller did not give his case away by admitting some exceptions.

In his reply, Professor Wueste denies that my fairness argument conforms to Fuller's writings on the subject. Wueste, supra note 29, at 1254-55. Fuller's text on which he relies, however, is not so inhospitable to my argument:

[1] It should be observed that my concern is not to engage in an exercise in
As I read him, Professor Wueste goes on to offer a reinterpretation of Fuller's claim. He says Fuller was not claiming that there is a necessary connection between principles of legality and morality in the sense of critical morality (proper or true or enlightened morality), as I have so far assumed, but only in the sense of conventional morality (socially accepted morality). Professor Wueste says that for Fuller, moral "norms . . . owe their authoritative status to acceptance,"\(^{31}\) and that for Fuller, "morality is a social phenomenon."\(^{32}\)

From this it would not, however, follow that for Fuller morality is merely a social phenomenon. Further, Fuller's theory, as Professor Wueste reinterprets it, could not serve all of the essential purposes Fuller seems to have intended. For one thing, Fuller wanted to refute those positivists who denied a necessary connection between law and critical morality.\(^{33}\) Moreover, Fuller viewed his principles of legality as standards of moral criticism. If, to serve this function, Fuller's principles would also have to be generally accepted, then they could not serve that function wherever not so accepted. Yet much of Fuller's own criticism (in the name of these very principles) was directed at Nazi Germany, where one could hardly say that his principles of legality were generally accepted.\(^{34}\)

Although Professor Wueste's reinterpretation of Fuller's claim thus seems to be mistaken in an important way, I will briefly remark on the interesting and extended argument he offers in support of that claim as reinterpreted. The claim, as Professor Wueste reinterprets it, is that Fuller's principles of legality and conventional (that is, socially accepted) morality are necessarily interconnected.\(^{35}\) Professor Wueste's argument to support this claim is that: (1) Fuller's principles of legality "characterize the responsibility of legislators in logical entailment, but to develop principles for the guidance of purposeful human effort. . . . From the standpoint of the lawmaker, . . . there is an essential difference between the precautions he must take to keep his enactments consistent with one another and those he must take to be sure that the requirements of the law lie within the powers of those subject to them. Essential differences of this sort would be obscured by any attempt to telescope everything under the head of "impossibility of obedience.""

L. FULLER, supra note 12, at 70 n. 29. Here, Fuller sought only to clarify; he was not addressing the justification issue to which I address my fairness argument. Indeed, even if Fuller were to repudiate my argument, it would not follow that my argument could not fit the foregoing text in substance. (In such matters, one may even be more Fullerian than Fuller.) Also, insofar as Fuller did seek to argue in support of this thesis, he at least suggested the very fairness argument I explicitly provide. R. SUMMERS, supra note 1, at 37-38.

\(^{31}\) Wueste, supra note 3, at 1218.
\(^{32}\) Id. at 1219.
\(^{33}\) L. FULLER, supra note 12, at ch. 2.
\(^{34}\) See, e.g., Fuller, supra note 21, at 644-657.
\(^{35}\) Wueste, supra note 3, at 1227.
the exercise of their authority”; (2) these principles are thus “elements of a role morality”; (3) a role morality consists of the “stable interactional expectancies of those persons who enter into the relation in question, for example, . . . lawmaker and citizen”; hence (4) “there is a necessary connection between law and morality.” This argument finds some textual support in Fuller’s writings. Indeed, it is even possible to construe the concept of “role morality” in this argument as referring to social phenomena devoid of critical moral values as such. What this suggests to me, however, is only that Fuller may have been ambivalent here.

As I have indicated, to serve all of his essential purposes, I believe Fuller had to be concerned partly with the relation between his principles of legality and morality in the sense of critical morality. But further, one need not construe a “role morality” merely as social phenomena devoid of critical moral values. One may also construe a role morality as a critical morality, depending on whether it implicates such values. If I am right, Fuller’s principles of legality (which Professor Wueste characterizes as part of a merely conventional role morality) do implicate critical moral values, including fairness. Such an interpretation of Fuller was not merely on the “tip of my tongue” (as Professor Wueste puts it) when I wrote my book on Fuller; I devoted a short paragraph to it. Even so, I do not think this approach to understanding Fuller provides a better argument for Fuller’s internal morality of law than my fairness argument. Even assuming that both arguments could ultimately be construed to implicate the same form of fairness, mine is simpler and more straightforward. Further, my argument does not depend on the social facts required to specify the roles which must figure in Professor Wueste’s defense of an internal morality of law.

II

Professor LeBel on the Internal Morality of Law

Professor LeBel rejects Fuller’s thesis that law has an internal morality, and thus also rejects my effort to defend that thesis. Here

36 Id.
37 Id.
38 Id.
39 Id.
41 Professor Wueste’s own references to reciprocity might be read to implicate a version of the critical moral value of fairness. Wueste, supra note 3, at 1217, 1221-22, 1224.
42 Id. at 1208.
43 R. Summers, supra note 1, at 38.
we come to what might be called the first "major flaw" that Professor LeBel claims to find in my book. He writes:

Summers identifies the citizen's "fair opportunity to obey the law" as the moral value that is secured by compliance with Fuller's principles of legality. . . . Left unstated is the basis on which the value. . . . Summers identifies assume[s] the guise of [a] moral value. . . .

The arbitrariness of Summers' bridging of the gap between legal principles and moral principles is demonstrated by his consideration of a criticism that was directed at Fuller's principles. Summers cites an exchange between Fuller and Wolfgang Friedmann in which Fuller resists Friedmann's characterization of Fuller's principles as "'mere conditions of efficacy.'" Yet Summers himself had earlier written [in 1965]:

A further reason for refusing to apply the halo word "morality" to the author's principles of legality is that there is an apposite alternative: They may be viewed as "maxims of legal efficacy" and maxims of this nature are not, as such, conceptually connected with morality. If a person assembles a machine inefficiently, the result is inefficiency, not immorality.

If Summers' facile equation of the fairness of an opportunity to obey the law . . . with morality is sufficient to turn Fuller's principles into a morality of law, then the obvious step to have taken would have been to state simply that inefficiency is immoral. 

Professor LeBel's position is not wholly clear. He might be claiming that fairness is not a moral value, and therefore that Fuller's principles of legality cannot constitute a morality even though they secure the citizen a "fair opportunity to obey the law." Actually, it had not occurred to me that fairness, as such, might not be a moral value. Rather, I had assumed (along with countless other moral and legal theorists) that fairness is paradigmatically a moral value. Alternatively, Professor LeBel may only be objecting to my failure to set out a full-fledged theory of "the basis" on which I claim that fairness is a moral value. I do not have such a theory, but a few others, including Professor Rawls, have made some efforts in this direction. I know of no one who has concluded that such a theory cannot be constructed. In any event, the lack of a fully worked out theory ("basis") does not imply that fairness is a nonmoral value. Moreover, given the almost universal assumption that fairness is a moral

44 LeBel, supra note 4, at 723-24 (quoting Summers, supra note 20, at 129 (emphasis in original)).
value, Professor LeBel should offer specific arguments to the contrary. One might then have some notion of what calls for rebuttal.

Professor LeBel also says that if my "facile equation" of the fairness of an opportunity to obey the law with morality is sufficient to turn Fuller's principles into a morality of law, then the obvious step for me to have taken would have been to state simply that inefficiency is immoral. I did not in my book *equate* fairness with morality. In my view, morality is not single-valued, and is still more complex in other ways. Furthermore, "the obvious step" would not be for me to state simply that "inefficiency is immoral." Rather, I argue that it is morally objectionable for officials to depart from Fuller's principles of legality (at least where a citizen's obedience is involved), for this denies the citizen a fair warning and some opportunity for choice in the matter. Of course, such a departure might be both inefficient and immoral. But it might also be immoral yet efficient, given the officials' aims under the circumstances. Fuller, citing unpublished laws in Nazi Germany and retroactive laws in the Soviet Union in the 1960s, emphasized that a regime might find it efficient to violate the principles of legality.46

III

PROFESSOR LEBEL ON LEGAL POSITIVISM AND LEGAL VALIDITY

The deficiencies of positivistic theories of legal validity is a major theme in Professor Fuller's writings.47 Unlike me, Professor LeBel has a low estimate of Fuller's contribution on this front. (He says it is "barren[]."48) At the same time, Professor LeBel embraces legal positivism with, if I may adopt his own word, a "gushing" enthusiasm.49 Certainly these differences between his general position and mine help explain the negative tenor of his review.

Professor LeBel says that the "most serious" and "most inexcusable" flaw in my book lies in my description of the major legal theory which Fuller opposed—legal positivism.50 In my book, I did not purport to offer a full description of legal positivism. But,

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46 L. Fuller, * supra* note 40, at 40-41, 202-03. I do not wish to deny the possibility that inefficiency may be immoral. Indeed, in a utilitarian theory of morality, it is immoral.

47 One can readily discern this in works as early as L. Fuller, *The Law in Quest of Itself* (1940).

48 LeBel, * supra* note 4, at 731. Professor LeBel is more generous in his estimate of Fuller's writings on legal processes but he still dismisses these as merely "tangentially jurisprudential." Id. at 731.

49 Id. at 722. Evidence of the embrace appears throughout the review. See, e.g., id. at 718, 730.

50 Id. at 727.
among other things, I did make the following remarks about positivistic theories of legal validity:

Many positivists envisioned a kind of two-tiered "system," in which the lower tier consists of the ordinary binding precepts of the system [e.g., rules of contract, tort, and property] and the upper tier of some accepted general criterion for identifying the precepts of the lower tier. The general identifying criterion incorporates the feature or features that all and only the binding precepts of the lower tier have in common. Or as H.L.A. Hart put it, the accepted criterion (or a limited set of criteria) specifies "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group." In this two-tiered system, the criterion itself (or a limited set of criteria) qualifies as part of the system because of its social acceptance, whereas the binding rules of the lower tier, though they also may be accepted, qualify as law by satisfying the criterion of valid law that is already an internal part of the system. For example, if, in Great Britain, the socially accepted general criterion is "whatever the Queen in Parliament adopts is law," then any rule so adopted is valid law in Great Britain.51

I went on to point out that several leading positivists (to whose work Fuller was reacting) also subscribed, implicitly or explicitly, to a special theory about the nature of the criteria (standards, tests) of valid law. According to this theory, such standards are essentially formal in character. That is, they are source-based and not content-oriented. Source-based standards, which purport to identify all and only the valid lower-tier precepts of the system, implicitly or explicitly require that the validity of a lower-tier precept be attributable to its formal authoritative origin. In my book, I explicitly described a "source-based" standard of validity in these terms: "If the putative law can be traced to an authoritative lawgiver, then it is valid; if not, it is invalid."52 Thus, in such a theory, the validity of a putative lower-tier precept always turns on its source, not its content.

Here is how Professor LeBel responds:

At the heart of Summers' distortion of legal positivism is an inexplicable failure to comprehend the meaning that positivists attach to the term "validity." Summers argues that a "source-based" test of validity fails to capture the extent to which content is actually relevant to the validity of "a lower-tier precept" . . . . As evidence of this failure, Summers describes the apparent conflict between the source-based validity and the content-based validity of an unconscionable contract, a will that conflicts with state gov-

51 R. Summers, supra note 1, at 43. For a similar account of positivistic theories of validity, see R. Dworkin, Taking Rights Seriously 39-45 (1978).
52 R. Summers, supra note 1, at 44.
ernmental policy, an arbitrarily discriminatory statute. . . . [E]ach of the so-called content-oriented tests of legal validity is itself dependent on what a positivist would have no difficulty describing as a source-based legally valid rule. Contracts are unenforceable because of a legal rule of unconscionability, wills violate state governmental policy embodied in properly enacted statutes, and statutes are set aside as discriminatory under a federal or state constitutional provision. Summers fails to distinguish between the validity of rules, which positivists purport to be able to determine on a source-based standard, and the validity of public and private acts, which must of course include reference to content-oriented standards, but to such standards as are found in or inferable from legally valid rules.53

Professor LeBel has misunderstood me in a rather unique and fundamental way here.54 I did not then deny (nor do I now deny) that forms of law embodying "content-oriented tests of legal validity" may, in turn, for their validity be dependent on, as Professor LeBel puts it, "what a positivist would have no difficulty describing as a source-based legally valid rule."55 For example, section 2-302 of the Uniform Commercial Code (on unconscionability) adopts a content-oriented standard for the validity of contract clauses,56 yet section 2-302 is itself valid law because it was duly enacted by the legislature (source).57

I did deny and continue to deny that in a modern legal system such as ours the validity of forms of putative lower-tier law (including rules of contract, tort, and property) is always or even usually determinable solely by reference to source-based standards of validity. Often, their validity is not only a matter of their properly originating in an authoritative source but also a matter of their satisfying content-oriented standards. A general theory of legal validity

53 LeBel, supra note 4, at 727-28 (citations omitted).
54 None of the other 10 reviewers, see supra note 2, and none of the several persons who read the manuscript prior to publication so misunderstood me.
55 LeBel, supra note 4, at 728.
56 Section 2-302 of the Uniform Commercial Code provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

57 I do not also assert that all standards of validity must necessarily be valid solely by virtue of satisfying a source-based test.
must explicitly provide for this if it is to permit faithful and rich descriptions of the relevant legal phenomena.\textsuperscript{58} Fuller saw this clearly and stressed it.\textsuperscript{59} Positivists preoccupied with formal source-based standards neglected the extent to which content is relevant to the validity of a lower-tier precept.\textsuperscript{60} But have such positivists really existed, or are they merely straw-men—figments of my (and Fuller's, and also Dworkin's) imagination? Yes, they existed (and continue to exist),\textsuperscript{61} and Professor LeBel concedes as much above when he says that "positivists purport to be able to determine [the validity of rules] on a source-based standard."\textsuperscript{62} In a legal system, one finds not a few rules.\textsuperscript{63} So much, then, for Professor LeBel's charge that I am guilty of a basic "distortion of legal positivism" and of an "inexplicable failure to comprehend the meaning that positivists attach to the term 'validity.'"\textsuperscript{64} In truth, there is no such distortion, and the positivist "straw-man" that Professor LeBel says is my invention ex-

\textsuperscript{58} See generally Summers, Toward a Better General Theory of Legal Validity, 16 RECHTSTHEORIE 65 (1985).

\textsuperscript{59} See, e.g., L. Fuller, supra note 47, at 88-95; Fuller, supra note 21.

\textsuperscript{60} R. Summers, supra note 1, at 42-51.


\textsuperscript{62} LeBel, supra note 4, at 728. Professor LeBel might be read to mean only that the validity of all standards for determining the validity of rules is a matter of source (something itself not beyond dispute). However, in the very sentence in which this quoted phrase appears, Professor LeBel uses the same contrast I use, namely, the contrast between source-based and content-oriented standards of validity.

\textsuperscript{63} There is a puzzle here about how to interpret Professor LeBel. Although he admits that "positivists purport to be able to determine [the validity of rules] on a source-based standard," LeBel, supra note 4, at 728, he says earlier that a theorist whose "theory of legal validity is unconcerned with content" is a "positivist straw-man." See id. at 728 n.42. Of course, the very lack of concern with content that Professor LeBel admits is essentially the positivist position that Fuller and other critics of positivism (including myself) attack. At the very least, Professor LeBel is not clear here.

Indeed, Professor LeBel is inconsistent throughout his review. I will cite several additional examples. First, he regularly refers to Professor Dworkin's work approvingly, yet he takes no account of the fact that in charging Fuller and me with concocting a positivist straw-man whose theory of the validity of lower-tier law neglects content he is, in effect, leveling the same charge at Professor Dworkin. See R. Dworkin, supra note 51, at 39-45. Second, Professor LeBel says that I morally overload the concept of validity, LeBel, supra note 4, at 724, yet he suggests that the very values with which I overload validity are not moral values. Id. at 723. Third, Professor LeBel disparagingly asks if I must add still another value to the moral universe, id. at 725, yet he elsewhere suggests that I must add more values if Fuller's principles are to constitute a genuine morality, id. at 724.

\textsuperscript{64} Id. at 727. Actually, I do not believe two tiers are enough. One must at least distinguish (1) putative law of the lower tier which might be valid by virtue of source alone or by virtue of source and content, (2) standards of validity themselves not valid by virtue of general acceptance and rational appeal but by virtue (at least in part) of their derivation from an authoritative source and perhaps also their content, and (3) ultimate
ists after all. It is regrettable (indeed, it may even be an occasion for blame) that, in this age of far too much to read, authors of book reviews (even extended ones) cannot be more reliable messengers.

Professor LeBel claims to find a further basic flaw in my book, one that also falls within the general theory of legal validity. He says I adopt an "open-ended view of law," one in which law is determinable by "Gallup poll and horoscope." He exclaims: "If this be the alternative to positivism, give me positivism!" Of course, I do not accept these caricatures. What is more, there is a good deal at stake here. If I am right, traditional positivistic theories are falsified rather dramatically in a modern legal system such as ours. At the very least, the validity of many lower-tier common law rules of contract, property, and tort is not solely a matter of looking for the antecedent and authentic stamp of some official originator, and no sharp line can be drawn between the legal and the moral in "legal" argumentation.

I must quote somewhat at length from my book for the reader to understand the issues here. After explaining that some leading positivists asserted or assumed that the validity of lower-tier law (for example, rules of contract, tort, or property) does not depend on its "general acceptance and rational appeal," but instead depends solely on satisfying an "upper-tier" standard of validity that is source-based, I went on, in Fullerian spirit, to say:

Common-law precepts dealing with rules of contracts, torts, property, and the like are vital forms of lower-tier law. Yet they owe their status as law in large measure to general acceptance and rational appeal, rather than to conformity with a general criterion or standard of validity entirely internal to the system (i.e., having been laid down by prior judges). The ingredients of the common law are in large part notions of reason (not necessarily sound in objective terms) growing out of the subject matter of the common-law cases that arise. And in our system, whether or not a precedent is sufficiently good to become "settled" law and therefore truly law is largely a matter of the acceptability of its ingredients to subsequent judges and to the legal profession at large. Thus common-law precepts are largely law by virtue of the acceptance of these ingredients in light of their rational appeal, not by virtue of having been formally laid down by some duly authorized state official (i.e., a judge), the positivist's usual criterion of validity here.

It may appear that these forms of implicit lower-tier law can-

standards of validity in some sense valid by virtue of general acceptance and rational appeal.

65 Id. at 730.
66 Id.
not be known in advance — that we must wait until a judge interprets a statute, or recognizes a custom, or decides a case, before we can know the law. This would not be the result, on the positivist’s theory, for criteria of validity internal to the system are known and usable in advance, a great virtue. But even if, on Fuller’s view, lower-tier law owes its status as law primarily to acceptance and rational appeal, it does not follow that citizens, lawyers, and others must usually wait for a judge’s ruling to know the law. Although this cannot be developed here, in my view, the grounds on which interpretational notions, custom, and common law are received are very largely generalizable, are in fact so generalized, and are widely understood within at least the legal profession. Thus for the law to be knowable in advance, it is simply not necessary to have . . . a system in which law is identifiable preferably by reference to the antecedent and authentic stamp of some authoritative originator. Law can be sufficiently identified by other means.

Before quoting Professor LeBel’s response to the foregoing passage I should stress that the context (which he ignores) of my remarks above shows that I am mainly seeking to rebut the familiar argument that if a form of law owes its validity largely to general acceptance and rational appeal, the implications of that law could not be reasonably known in advance. Here is what Professor LeBel says:

Summers’ attempt to use the experience of the common law as proof of the failure of the positivist quest involves him in a convoluted tangle of uses of the word “law” that might well be better abandoned than sorted out. The steps in the argument . . . are essentially these: (1) Common-law rules owe their status as law to “general acceptance and rational appeal,” rather than to their “having been laid down by prior judges;” (2) common-law rules are “sufficiently good to become ‘settled’ law and therefore truly law” when their rational appeal “to subsequent judges and to the legal profession at large” gives them a certain level of acceptance; (3) common-law rules have the status of law even before a judicial decision because (and here Summers must be quoted lest the reviewer be accused of intentionally parodying his views)

in my view, the grounds on which interpretational notions, custom, and common law are received are very largely generalizable, are in fact so generalized, and are widely understood within at least the legal profession. Thus for the law to be knowable in advance, it is simply not necessary to have the kind of system for which so many positivists seem to have yearned — a system in which law is identifiable preferably by reference to the antecedent and authentic stamp of some au-

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67 R. Summers, supra note 1, at 50 (footnote and citation omitted).
Authoritative originator. Law can be sufficiently identified by other means.

Summers' argument can be tested by taking a fairly common situation and seeing where the steps of his reasoning lead. Driver A and driver B are in a two-car collision, in which B struck A's car from the rear, and B wishes to sue A for damages for the personal injuries and property damage suffered in the accident. The supreme court of the state in which the accident occurred has consistently held to a common-law rule of contributory negligence. In recent years, nearly two-thirds of the states have replaced contributory negligence with one of three different forms of comparative negligence. The legislature of our hypothetical state has considered but not enacted a comparative negligence bill in each of its last three sessions. In such a state of affairs, it is difficult to believe that anyone could seriously contend that "the law" in this jurisdiction is anything other than the most recent pronouncement to have received the "antecedent and authentic stamp of some authoritative originator." If the state supreme court were to decide tomorrow to adopt a system of comparative negligence, would that be the law of the state because of its "general acceptance and rational appeal"? Would it become "good" or "settled" law only when its rational appeal "to the legal profession at large" has produced an (unspecified) level of acceptance? And before the court announced the comparative negligence rule, did that rule have the status of law because it was "knowable in advance" at least within those segments of the legal profession which could see it coming?68

Professor LeBel thus attempts to reduce my position to absurdity. He thinks that the "steps of [my] reasoning lead" to the absurd conclusion that before a state's highest court actually announced a comparative negligence doctrine, that doctrine could nevertheless already have "the status of [valid] law because it was 'knowable in advance' at least within those segments of the legal profession which could see it coming," even though (1) the court had previously had occasion to adhere to the common-law rule of contributory negligence and had consistently done so and (2) the legislature had considered but not enacted a comparative negligence bill in each of its last three sessions.

I agree with Professor LeBel that if my position entailed such a conclusion, then it would be absurd. But such a conclusion hardly follows from my position, and Professor LeBel fails to provide any argument that it does. He even fails to perceive that the passage of mine which he quotes, and on which he principally relies, is offered

68 LeBel, supra note 4, at 729-30 (quoting R. Summers, supra note 1, at 50 (emphasis in original)) (footnotes omitted).
mainly as a rebuttal to the positivistic claim that the only alternative
to determining the validity of lower-tier law in accord with a source-
based standard (the "antecedent and authentic stamp of some au-
thoritative originator") is an alternative in which it is impossible
(or nearly so) to know in advance what the law is. Moreover, despite
my repeated use of explicit qualifying expressions (such as "in large
measure" and "in large part") he fails to note that I presuppose (in
the type of situation he envisions) that one can meaningfully cite at
least some prior judicial action (appropriately generalized as need
be) in support of recognizing the putative law in question. Yet in
Professor LeBel's example, intended to reduce my argument to ab-
surdity, no such prior judicial action in the jurisdiction favors com-
parative negligence. On the contrary, Professor LeBel postulates
that the state's highest court has "consistently held to a common-
law rule of contributory negligence."  

In the above quoted passages, Professor LeBel also appears to
deny Fuller's claim (and mine) that in our own common-law system
"general acceptance and rational appeal" have a significant role to
play not only in determining the validity of certain upper-tier law
(criteria of validity), as many positivists would concede, but in deter-
mining the validity of putative lower-tier law, too. Certainly he
poses what is for him a merely rhetorical question: "If the state
supreme court were to decide tomorrow to adopt a system of com-
parative negligence, would that be the law of the state because of its
'general acceptance and rational appeal'?" For Professor LeBel,
the answer is obviously "no." Rather, such would be the law solely
because it satisfies a positivist's source-based standard, in that it
bears the "antecedent and authentic stamp of some authoritative
originator."

Perhaps the principal issue here between Professor LeBel and
me reduces largely to an empirical question about the standards of
validity actually operative within our own common-law system. In
the particular example Professor LeBel cites, the positivist source-
based story does have special persuasive appeal, given the back-
ground, context, and recency of court action. One should note,
however, that the idea of comparative negligence was one whose
time had come, and it was accepted by virtue of its content, not its
source. More to the point, Professor LeBel appears to cite his ex-
ample in support of a general positivist position that the validity of

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69 Id. at 729.
70 Nowhere in my book did I deny the general relevance of source to validity. It is
true that I emphasized the relevance of content, especially in chapter 4, because in this
respect one finds a major weakness in positivism.
71 LeBel, supra note 4, at 729.
72 Id.
lower-tier common-law rules in our system is determined by reference to source, not content. Yet in support of my position, one can easily identify many cases in which subsequent courts deciding whether to give effect even to a very recently announced common-law rule have ultimately refused to do so because of immediate and rapidly growing concerns over the quality of its content (that is, its rational appeal and general acceptance within the judicial and legal community). Here, as I observed in my book, a threshold (perhaps minimal) requirement of substantive goodness or rightness is at work within our system (at least in regard to new precedent of dubious content). In my book I characterized this as a kind of content-oriented standard of validity that draws heavily on moral ideas and thus blurs the line between legal and moral argument, much to the chagrin of positivists. Relatedly, in support of my overall position, one can refer to the question frequently put by practicing lawyers when a somewhat doubtful (in content) common-law case is handed down: “Is that good law?” (meaning that if it is not, it is unlikely to become settled, and therefore, valid law). And perhaps I may add that if I am wrong here about the facts of our own system, so too are many other observers (in addition to Fuller).


74 R. SUMMERS, supra note 1, at 35, 50.

75 There is much evidence of Professor LeBel’s own positivism here. See, e.g., LeBel, supra note 4, at 731 (disparaging “an amorphous and indeterminate ‘morality’”). One is reminded of the arch-positivist, John Austin, who lamented the “uncertainty, scantiness, and imperfection of positive moral rules.” J. AUSTIN, supra note 61, at 300 n.29. But once the threshold content-oriented standards of validity of the kind I identify here are admitted into the kingdom of law, the sharp lines between law and non-law so dear to positivists simply cannot be. There can be no sharp line between a precedent with prima facie dubious content and one without. There can be no sharp line marking the period in which a precedent having prima facie dubious content is being “tested” for validity. There can be no sharp line between the legal and the moral arguments relevant to such testing. And there can be no sharp line between a precedent that cannot yet be regarded as settled and therefore valid law and one that can be so regarded.

76 Professors who have done little or no law practice are less likely to be conscious of the frequency with which practicing lawyers pose the question: “Is that good law?” Actually, Professor LeBel misunderstands the essential thrust of this question. See LeBel, supra note 4, at 727 n.42.

77 For example, consider these remarks of the late Professor Henry M. Hart, Jr.: [Cohen] says: "Law is law, whether it be good or bad, and only on the
I will now discuss another important flaw that Professor LeBel claims to find in my book. At one point I briefly considered, in an exploratory spirit, the extent to which a Fullerian argument might be made that certain legal processes besides adjudication must, in order to qualify as such processes, embody some processual commitment to moral values and moral rights. Fuller regularly made just such an argument with respect to adjudicative processes—he said that if a process is genuinely adjudicative, it necessarily to some degree affords affected parties a fair opportunity to be heard. In my book, I cited the example of a “right of parties potentially affected by a proposed law to a legislative hearing in which they may try to influence the content of the legislation, and indeed, the very principle of majority rule by which legislation is enacted.” I went on to suggest that these notions are “parallel to the adjudicative right to a hearing with its implications for fairness and legitimacy.”

Professor LeBel is dumbstruck by what he perceives to be appalling ignorance of the law here. He reads me to claim that parties potentially affected by a proposed law have a legal right to a legislative hearing, and then goes on to cite case law to the effect that no such right exists. Yet in the passages involved, in the section of the chapter where these passages occur, and generally in the chapter itself (which is entitled “The Morality and Immorality of Law”) I am writing of moral values and moral rights.

admission of this platitude can a meaningful discussion of the goodness and badness of law rest.” But the platitude turns out to be at best multifarious, and, if I am right, full of fallacy. If the statement said simply, “Settled law is settled law,” it could perhaps be accepted as a truism. But the truism conceals the problem of determining when asserted “law” is settled, which inescapably involves ethical questions. A far more serious fallacy is disclosed if we read the statement as saying: “Settled law (that is, law which ought to be accepted as settled) is law, whether it be good or bad.” For this involves in many cases a direct contradiction in terms. . . .

Hart, Holmes’ Positivism—An Addendum, 64 Harv. L. Rev. 929, 936 n.21 (1951) (citation omitted).

R. Summers, supra note 1, at 40-41. This raises important questions about the possible bearing of normative criteria for the use of such terms as adjudication and legislation, questions that I cannot go into here.

Id. at 41.

LeBel, supra note 4, at 724.

Indeed, the key paragraph introducing the chapter reads in full:

Fuller was also mindful that his general thesis about the value-laden character of law naturally raises the more specific question of the relationship between law and that most important subclass of all values, moral values. In short, do the substantive and instrumental notions of what ought to be, which on Fuller’s view necessarily figure in law, ever also necessarily translate into moral values? This question is another controversy-ridden staple of legal theory, and Fuller gave different answers here, depending on the variety of “law” in question: precepts, the system, processes.
A final, important flaw in my book on Fuller, according to Professor LeBel, is my misleading characterization of Fuller's overall position in 20th century American legal theory as that of a "pragmatic instrumentalist." I plead guilty to having written a book on American instrumentalist theory published in 1982.83 Now, here is what Professor LeBel says:

When Summers turns from his pet theory [the movement called pragmatic instrumentalism] to the work of someone [Fuller] who by all reasonable reckoning was outside of the movement, a potential trap is set for the reader who is unaware of the peculiar perspective from which Summers views American legal theory. In his 1978 essay on Fuller and the pragmatic instrumentalists, Summers noted the desirability of accommodating Fuller's views within that theory of law. Four years later, Summers described Fuller as a major critic of American pragmatic instrumentalism. Now, in a book purporting to be about Fuller, Summers states that "Fuller stood . . . on the side of the instrumentalists," but he simply "did not belong to the realist wing of the American pragmatic instrumentalism". . . . The reader who is attempting to obtain an understanding of Fuller must consider the possibility that Fuller's views have undergone at least some distortion in order to enable Summers to bring Fuller into a non-realist "wing of American pragmatic instrumentalism."84

I will offer but two of the many criticisms one could make of this passage. In 1978, in a memorial tribute in the Harvard Law Review, I characterized Fuller as a major critic of various tenets of American instrumentalist legal theory.85 Thus it is misleading to say, as Professor LeBel does, that in this tribute I noted the desirability of "accommodating" Fuller's views within American instrumentalist

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R. Summers, supra note 1, at 34.

The nature of Professor LeBel's error supports my suspicion that he is not conversant with very much of the corpus of Fuller's own writings. There is still other evidence of this in Professor LeBel's review. For example, his phrasing at one point suggests that he questions whether one may attribute to Fuller the thesis that "the positivist quest for a general criterion by which the law could be identified and differentiated must fail." LeBel, supra note 4, at 727 n.41 (quoting R. Summers, supra note 1, at 42). Anyone who has read Fuller's best book, The Law in Quest of Itself (1940), would not think of questioning this. Professor LeBel also indicates that Fuller's writings are clear, well organized topically, and readily accessible to the general reader. LeBel, supra note 4, at 720. Again, no one at all conversant with the corpus of Fuller's jurisprudential work would say this.

83 R. Summers, Instrumentalism and American Legal Theory (1982). Professor LeBel also offers a mini-review of this book. Among other things, he opines that the views I express there are "idiosyncratic," LeBel, supra note 4, at 722, and "peculiar," id. at 726.

84 LeBel, supra note 4, at 726 (footnotes and citation omitted).

85 Summers, Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law, 92 Harv. L. Rev. 433 (1978).
thought. More importantly, when Professor LeBel interprets my statement that "Fuller stood . . . on the side of the instrumentalists" he (again) neglects the context. In light of that context, the reader can readily see that in the key sentence from which Professor LeBel quotes I am merely stressing Fuller's agreement with the anti-formalism in instrumentalist thought. Here is what I said, in context:

The controversy over formalism dominated American legal theory well into the 1930's. There is no question where Fuller stood: He was on the side of the instrumentalists. However, though he was as much an anti-formalist as most realists, he did not belong to the realist wing of American pragmatic instrumentalism.86

Professor LeBel reads this passage to mean that I am there categorizing Fuller as a member of the "non-realist wing of American pragmatic instrumentalism." But I simply did not say that, nor is it fairly inferable from what I said. In the end, I am inclined to agree with Professor LeBel that Fuller stood outside the American instrumentalist movement, but the matter is very much more complicated than he is wont to make it and calls for a separate essay.

CONCLUSION

In retrospect, I now regret somewhat having chosen to treat the review by Professor Wueste together with Professor LeBel's. Apologies to Professor Wueste are in order, and I hereby extend them. I have also devoted rather more attention to Professor LeBel's review than its substance alone merits. I apologize to no one for this. Truth in jurisprudence is important in its own right. It is not the only thing at stake, however. An author who takes the time to respond publicly and in detail to a prime instance of the relatively new and burgeoning genre of book reviewing sometimes called "trashing,"87 may also contribute to the demise of that singularly unscholarly phenomenon.

86 R. Summers, supra note 1, at 4.