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# Morality and the Legal Enterprise—A Reply to Professor Summers

Daniel E. Wueste

A number of commentators have reviewed Professor Robert S. Summers's 1984 book, *Lon L. Fuller*;<sup>1</sup> my own review,<sup>2</sup> accompanied by Professor Summers's "wholly disinterested" response,<sup>3</sup> appears in the present issue of this journal. Professor Summers devotes much of his piece to an assessment of a review by Professor Paul E. LeBel.<sup>4</sup> The tenor of that assessment differs markedly from that of the rest of Professor Summers's response, and while I am tempted to speculate as to the reasons for that difference, I will confine my remarks to Professor Summers's considered response to my own review.

In my review, I said that Professor Summers appears to have come over to the view that Fuller's "inner morality of law" is a morality. I chose my words carefully. For while a change in his view of Fuller's work was evident as early as 1975,<sup>5</sup> culminating in his book's "decidedly sympathetic"<sup>6</sup> account of Fuller's jurisprudence, never did Professor Summers explicitly accept Fuller's claim that the principles of legality constitute a morality. For me, whether Professor Summers had "converted" remained an open question.

It now emerges that what I had regarded and thus cautiously presented as, perhaps, mere appearance is indeed the case. For, as Professor Summers states in his reply to critics, having "reread Fuller prior to writing my book on his work, . . . I now believe that Fuller's principles of legality do have a justified claim to being a morality."<sup>7</sup> Something else emerges as well. When Professor Summers presents his "most compelling"<sup>8</sup> argument in support of Fuller's claim, an argument that Fuller himself never made, he does not dis-

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1 R. SUMMERS, *LON L. FULLER* (1984).

2 Wueste, *Fuller's Processual Philosophy of Law* (Book Review), 71 CORNELL L. REV. 1205 (1986).

3 Summers, *Summers's Primer on Fuller's Jurisprudence—A Wholly Disinterested Assessment of the Reviews by Professors Wueste and LeBel*, 71 CORNELL L. REV. 1231 (1986).

4 LeBel, *Blame this Messenger: Summers on Fuller* (Book Review), 83 MICH. L. REV. 717 (1985).

5 See Summers, *Present State of Legal Theory in the United States*, 6 RECHTSTHEORIE 65, 79-80 (1975).

6 R. SUMMERS, *supra* note 1, at vii.

7 Summers, *supra* note 3, at 1234.

8 *Id.*

tance himself from it, claiming merely to state an argument he does not accept in a more persuasive way. No, Professor Summers presents an argument that he finds persuasive—indeed, compelling. It is an argument for a claim he accepts, namely, that the principles Fuller identifies constitute a morality. Moreover, he maintains that the position he advocates is secure. He is a convert.

In his brief reply to critics, Professor Summers explains his conversion by pointing to the arguments summarized in his book. One such argument received special attention in my review. Specifically, Professor Summers argues that (1) Fuller's theory, as I interpret it, "could not serve all of the essential purposes Fuller seems to have intended,"<sup>9</sup> and (2) quite apart from the fidelity of my interpretation of Fuller, his argument is superior to mine because it is "simpler and more straightforward [and] 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."<sup>10</sup> In short, as Professor Summers sees it, not only is his argument more Fullerian than my argument, it is also more straightforward and therefore preferable to mine.

Professor Summers's argument is simple, reasonably straightforward, and—unlike my argument—does not depend on social facts. Yet, despite Summers's valiant defense, the argument is somewhat less than compelling. In what follows, I will briefly state the reasons behind this judgment. I will also speak to the issue of whether my interpretation of Fuller's theory is such that his "essential purposes" cannot be realized.

## I

### A GUARANTEE OF FAIRNESS?

The central claim in Professor Summers's fairness argument is that compliance with Fuller's principles "necessarily guarantees . . . the realization of a moral value."<sup>11</sup> Identifying the value in question, Professor Summers speaks of "a *fair* opportunity to obey the law."<sup>12</sup> He also speaks of it, somewhat more perspicuously I think, as "fair warning of the adversity" that "ordinarily" follows disobedience "and an opportunity for choice in the matter (however hard)."<sup>13</sup> In my review I said that this claim is doubtful on two counts. First, "it is hard to see how compliance with a set of principles that does not completely disallow retroactivity . . . necessarily

<sup>9</sup> *Id.* at 1237.

<sup>10</sup> *Id.* at 1238.

<sup>11</sup> R. SUMMERS, *supra* note 1, at 37.

<sup>12</sup> *Id.* at 37 (emphasis in original).

<sup>13</sup> Summers, *supra* note 3, at 1235.

guarantees that citizens have a fair opportunity to obey the law."<sup>14</sup> Second, looking at the situation of a blackmailer's victim, one may well hesitate to embrace Professor Summers's claim that being forewarned of adversity in case of noncompliance with a directive and having an opportunity for choice in the matter is in itself moral.<sup>15</sup>

Professor Summers responds to the first point by noting that "[o]bedience is simply not the object" of the sort of retroactive statute Fuller's principles would allow (that is, a "curative" law).<sup>16</sup> Granting that his fairness argument cannot come into play "if obedience cannot be an issue," he indicates that it was not intended to apply in such a case.<sup>17</sup> Later we are told, in no uncertain terms, that this argument comes into play "*where a citizen's obedience is involved.*"<sup>18</sup> Thus, it emerges that the argument comes into play when and only when citizen obedience is an issue.

The question that arises at this juncture is whether the desiderata that make up the internal morality of law are ultimately concerned with the possibility of obedience. As it happens, Fuller poses and answers this question in a footnote in his book, *The Morality of Law*.<sup>19</sup> As Fuller says,

There is no question that the matter may be viewed in this light. Just as it is impossible to obey a law that requires one to become ten feet tall, so it is also impossible to obey a law that cannot be known, that is unintelligible, that has not yet been enacted, etc.<sup>20</sup>

So far so good. Yet, I think it is significant that, in an effort to justify the "separation effected in the text,"<sup>21</sup> that is, to justify his position that the internal morality of law is not "reducible to fewer than eight principles,"<sup>22</sup> Fuller goes on to say the following:

[M]y concern is not to engage in an exercise in logical entailment, but to develop principles for the guidance of purposive 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

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<sup>14</sup> Wueste, *supra* note 2, at 1209.

<sup>15</sup> *Id.* at 1209-10; *cf.* Summers, *supra* note 3, at 1235-36.

<sup>16</sup> Summers, *supra* note 3, at 1235.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1240 (emphasis added).

<sup>19</sup> L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

<sup>20</sup> *Id.* at 70 n.29.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 258. These words appear in the second index entry under the heading "Internal morality of law." The entry marks the location of Fuller's remarks respecting "the separation effected in the text." *Id.* at 70 n.29.

the head of "impossibility of obedience."<sup>23</sup>

In short, recognizing that the desiderata of the internal morality of law may be viewed as Professor Summers would have us view them, Fuller nevertheless holds that these desiderata are not ultimately concerned with the possibility of obedience.

In his book, Professor Summers tells us that Fuller never explicitly set forth the fairness argument. In my review I invited attention to an element of Fuller's position that helps to explain this fact, namely, that the principles of his internal morality of law do not completely disallow retroactive legislation. Somewhat ironically, Professor Summers's response hints at what is perhaps the best explanation of why Fuller never makes the fairness argument. For as we have seen, (1) Fuller eschews the suggestion that the desiderata of the internal morality of law are ultimately concerned with the possibility of obedience, and (2) Professor Summers's fairness argument comes into play when and only when citizen obedience is an issue. Thus, that Fuller did not set forth such an argument comes as no surprise. Indeed, it would be quite surprising to find that he had.

Professor Summers seems to confront a dilemma. On the one hand, if he stands by his fairness argument, he is vulnerable to the charge that his argument for Fuller's internal morality of law is rather non-Fullerian. The other hand is no better. For if the argument is supposed to be faithful to the position Fuller in fact embraces, it is vulnerable to the first objection raised in my review.

Professor Summers holds that having both forewarning of adversity in case of noncompliance with a directive and an opportunity for choice in the matter is "in itself moral."<sup>24</sup> It is important that such a fair opportunity to obey is in itself moral, for Professor Summers maintains that such an opportunity is the moral value realization of which is necessarily guaranteed by "official conformity to Fuller's principles."<sup>25</sup> Putting aside the issue of the guarantee and focusing on whether such an opportunity is in itself moral, I thought it noteworthy that a victim of blackmail will almost certainly be forewarned of adversity in case of noncompliance and have an opportunity for choice in the matter. Indeed, as I suggested in my review, this circumstance may give one cause to doubt Professor Summers's claim that a fair opportunity to obey is in itself moral.

In light of his response to this observation it appears that Professor Summers believes such an opportunity is to be counted a moral value whenever and wherever it exists. Thus, as I understand his remarks respecting the blackmail example, Professor Summers

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<sup>23</sup> *Id.* at 70 n.29.

<sup>24</sup> R. SUMMERS, *supra* note 1, at 37.

<sup>25</sup> Summers, *supra* note 3, at 1235.

would urge us to grant that a moral value has been realized so long as the directions the blackmailer gives to his victim are not such "that in the end the victim is exposed even though he may have tried his best to go along."<sup>26</sup> In short, a moral value is realized here, provided that the victim has "a fair opportunity to go along with the scheme in its entirety,"<sup>27</sup> as he will when, for example, the blackmailer's directions are not "unclear or otherwise impossible to follow."<sup>28</sup>

The brevity of Professor Summers's response to my discussion of this example took me by surprise. For, following Fuller, I had suggested that the character and color of an end such as the opportunity in question derive in part from the means by which the end is realized. Although this suggestion elicited no direct response, Professor Summers later makes some germane remarks in his reply to Professor LeBel. Reporting first that it had not occurred to him that "fairness, as such, might not be a moral value,"<sup>29</sup> Professor Summers also indicates that, like "countless other moral and legal theorists," he embraces "the almost universal assumption" that "fairness is paradigmatically a moral value."<sup>30</sup>

I must confess that it is not clear to me what "fairness, as such" is. I have similar difficulties with the notion of "freedom, as such" or "equality, as such." Like Fuller, I tend to think of fairness, freedom, and equality as social objectives. And, again like Fuller, I am inclined to think that when a social objective is considered in abstraction from the means of its realization, it either "loses substance and descends to the level of a kind of metaphor"<sup>31</sup> or, still worse, becomes little more than "a formless end-utility, like the pleasure of eating or the comfort of keeping warm."<sup>32</sup> For just as means are shaped and stamped by the ends they secure, ends are shaped and stamped by their means of realization.

Approaching the blackmailer example from this perspective, one is in a position to grant (or not grant) that the victim has been given a fair opportunity to go along with the scheme but *deny* that, *eo ipso*, a moral value is realized. Professor Summers is in a rather different position for two reasons. First, given that the blackmailer's victim has been forewarned of adversity in case of noncompliance

<sup>26</sup> *Id.* at 1236.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1239.

<sup>30</sup> *Id.*

<sup>31</sup> L. FULLER, *supra* note 19, at 24; see L. FULLER, *Means and Ends*, in *THE PRINCIPLES OF SOCIAL ORDER* 42 (K. Winston ed. 1981).

<sup>32</sup> L. FULLER, *Means and Ends*, in *THE PRINCIPLES OF SOCIAL ORDER* 57 (K. Winston ed. 1981).

and has an opportunity for choice in the matter, Professor Summers can hardly deny that—to use his words—the victim has “a fair opportunity to go along” with the scheme. After all, in Professor Summers’s view, what we have here are two ways of saying the same thing. Second, holding to the “almost universal assumption” cited above, Professor Summers cannot deny, save at pain of contradiction, that even in this sordid instance of a power relation,<sup>33</sup> a moral value is realized.

Faced with such a requirement of consistency, or more precisely, seeing that one’s position is such that one has to accept a conclusion that is, at the very least, counter intuitive, I for one would be inclined to question the premises that force me to accept it. Indeed, I pointed to the example of blackmail in order to suggest that, inasmuch as the assumptions underlying Professor Summers’s fairness argument lead to such a conclusion, they are subject to doubt. But Professor Summers will have none of it. He is unwilling to grant either (1) that it may be a mistake to regard the mere existence of forewarning of adversity in case of noncompliance and the opportunity to make a choice in the matter as a sure indication that the moral value of fairness has been realized, *or* (2) that a fair opportunity to obey—that is, being forewarned and so on—is not to be counted a moral value whenever and wherever it exists. Thus one finds Professor Summers ending his discussion of the matter with the observation that “affording a person fair warning and a genuine opportunity to go along” might be “morally better . . . than if no such chance were provided.”<sup>34</sup> Is it not more accurate to say that this is not a matter of morality, but one of efficiency in the realization of the blackmailer’s goal? The leader of a “blackmailers’ guild” might instruct new members always to provide their victims with such a chance; indeed, he might even say that what one is trying to do could hardly be called blackmail if such a chance were not provided. In short, Professor Summers’s argument for Fuller’s internal morality of law is vulnerable to the sort of objection he and others raised in 1965. Moreover, because Professor Summers’s argument invokes an abstract conception of a social objective (that is, an objective defined in abstraction from the means of its realization), it seems to be rather non-Fullerian. Fuller plainly considers it a profound but common mistake to suppose that a social objective can be understood “in abstraction from the means of realizing it.”<sup>35</sup>

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<sup>33</sup> For an interesting discussion of “this sordid power relation,” see L. FULLER, *Irrigation and Tyranny*, in *THE PRINCIPLES OF SOCIAL ORDER* 196 (K. Winston ed. 1981).

<sup>34</sup> Summers, *supra* note 3, at 1236.

<sup>35</sup> L. FULLER, *supra* note 32, at 62.

## II SERVING FULLER'S "ESSENTIAL PURPOSES"

Commenting on the alternative argument for an internal morality of law presented in my review, Professor Summers expresses doubt that Fuller's theory, as I interpret it, could "serve all of the essential purposes Fuller seems to have intended."<sup>36</sup> As I interpret Fuller, his internal morality of law is a social morality; more precisely, it "is the morality of a process of social ordering, it is a morality that sets out the role responsibilities of the parties involved in it in the form of principles that summarize the stable interactional expectancies associated with the process."<sup>37</sup> But Professor Summers argues, "Fuller wanted to refute those positivists who denied a necessary connection between law and *critical* morality. Moreover, Fuller viewed his principles of legality as standards of moral criticism."<sup>38</sup> In short, Professor Summers finds my interpretation of Fuller to be "mistaken in an important way."<sup>39</sup>

It is a commonplace that Fuller sought to refute "the general positivist doctrine that there is no necessary connection between law and morality"<sup>40</sup> by pointing to the morality that makes law possible—"the internal morality of law itself."<sup>41</sup> It is also a commonplace that this doctrine<sup>42</sup> addresses the issue of the relationship between law and critical morality. Putting two and two together, it seems that Fuller's position is both perspicuously and precisely summarized by saying that he wanted to refute the positivists' claim that there is no necessary connection between law and critical morality. And, in fact, such a summary statement is a basic element in the received view of Fuller's legal philosophy. Thus, the challenge Professor Summers presents is one that any critic of the received view must meet.

What needs to be shown, I think, is that as Fuller understands what has come to be called the separability thesis, one need not argue that there is a necessary connection between law and *critical* morality in order to discredit it. I made some efforts in that direction in my review,<sup>43</sup> efforts which Professor Summers acknowledges but re-

<sup>36</sup> Summers, *supra* note 3, at 1237.

<sup>37</sup> Wueste, *supra* note 2, at 1229.

<sup>38</sup> Summers, *supra* note 3, at 1237 (emphasis in original).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1233.

<sup>41</sup> Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 645 (1958).

<sup>42</sup> As I indicated in my review, precisely what this doctrine amounts to is less clear than is generally supposed. See Wueste, *supra* note 2, at 1206.

<sup>43</sup> Wueste, *supra* note 2, at 1227.



gards as suggestive only of ambivalence on Fuller's part.<sup>44</sup> Unfortunately, in the limited space available to me here, I cannot provide a complete showing of what needs to be shown. Indeed, I can do little more than offer some brief remarks which will, perhaps, suggest something other than ambivalence.

It is granted on all sides that, according to Fuller, the morality internal to law belies the positivist's "strict separation of law and morality."<sup>45</sup> The question here is whether Fuller understands the issue presented by the separability doctrine in the way I have suggested. In his well-known response<sup>46</sup> to Hart's *Positivism and the Separation of Law and Morals*,<sup>47</sup> Fuller identifies the issue by means of a contrast. What is at issue here, he says, is quite unlike the issue presented by the Pope's pronouncement concerning the duty of a Catholic judge in a divorce proceeding.<sup>48</sup> For although such a pronouncement raises grave issues, it does not present an issue respecting "the relation between law, on the one hand, and, on the other, generally shared views of right conduct that have grown spontaneously through experience and discussion."<sup>49</sup> Pointing to the works of Austin, Gray, and Hart, Fuller casts additional light on his view of the matter. When positivists "distinguish law from morality," he says, "the word 'morality' stands indiscriminately for almost every conceivable standard by which human conduct may be judged that is not itself law."<sup>50</sup> It is patent that generally shared views of right conduct that have grown spontaneously through experience and discussion constitute standards by which human conduct may be judged; and, inasmuch as such standards "can hardly be said to be law in the sense of an authoritative pronouncement"—which, according to Fuller, is the sense in which a positivist uses the term "law"—it is hardly surprising to find Fuller saying that here we confront standards "not of law, but of morality."<sup>51</sup> To drive the point home it need only be observed that Fuller regards the set of principles that constitute the morality of law itself as "a form of customary law, in

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<sup>44</sup> Summers, *supra* note 3, at 1238.

<sup>45</sup> Fuller, *supra* note 41, at 631.

<sup>46</sup> Fuller *supra* note 41.

<sup>47</sup> Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

<sup>48</sup> The pronouncement in question was made in the Pope's November 7, 1949, speech to the Central Committee of the Union of Catholic Italian Lawyers. N.Y. Times, Nov. 8, 1949, at 1, col. 4 (city ed.).

<sup>49</sup> Fuller, *supra* note 41, at 638.

<sup>50</sup> *Id.* at 635.

<sup>51</sup> *Id.* at 639. I have touched on this matter elsewhere. See Wueste, Book Review, 70 ARCHIVES PHIL. L. & SOC. PHIL. 545-48 (1984) (reviewing L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (1981)).

the sense of a system of stabilized interactional expectancies."<sup>52</sup> Putting two and two together, I conclude that as Fuller understands the positivists' doctrine of separability, one need not argue that there is a necessary connection between law and critical morality in order to discredit it.

Unlike Professor Summers's fairness argument, the argument presented in my review places special emphasis on the concept of institutional role. Thus, as Professor Summers is quick to point out, my argument depends on the social facts required to specify the roles which figure in it. The contrast with his fairness argument is sharp. The standard or principle of fairness is an element of critical morality and, as such, it can be divorced from specific social relations or roles. It is applicable to all forms of human behavior. To be sure, the exegetical claim briefly defended above comes into play here. Indeed, as I read Professor Summers, all of the questions he raises respecting the fidelity of my interpretation of Fuller and the strength of the argument associated with it relate to this claim. In this case, however, the issue respecting fidelity is more narrowly drawn. And as it happens, that works to my advantage. A few remarks are therefore in order.

Fuller argues that positivists fail to recognize and appreciate the morality internal to law because they assume, erroneously, that the activities of the lawmaking enterprise "are morally neutral except as the human actions involved may be judged by moral standards applicable to all forms of human behavior . . . . What is ruled out by this view," he says, "is the concept of institutional role—the role of the citizen, the judge, the lawgiver, the cop on the corner."<sup>53</sup> So, here again, the argument presented in my review is consonant with Fuller's position respecting the major failing of the positivist's doctrine of separability, namely, its incompatibility with the existence of a morality internal to the enterprise of subjecting human conduct to the governance of rules.

Professor Summers raises a second objection to my interpretation. He contends that my construal of the morality of the lawmaking enterprise as a role morality, in the sense of a system of stabilized interactional expectancies, fails to account for Fuller's view that his principles constitute standards of moral criticism. Professor Summers claims that construed in this way, there are circumstances in which Fuller's principles "could not serve that

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<sup>52</sup> Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 B.Y.U. L. REV. 89, 95.

<sup>53</sup> L. FULLER, *Two Principles of Human Association*, in THE PRINCIPLES OF SOCIAL ORDER 75 (K. Winston ed. 1981) [hereinafter cited as *Two Principles*]; see also L. FULLER, *supra* note 19, at 192-93, 237-38.

function."<sup>54</sup> More particularly, he argues that my interpretation is mistaken because Fuller's best-known criticism "in the name of these very principles" was directed at Hitler's Germany "where one could hardly say that [these principles] were generally accepted."<sup>55</sup>

Focusing on "the degree to which the Nazis observed . . . the inner morality of law itself,"<sup>56</sup> Fuller argues that it is an egregious error to assume with the positivists that "the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman."<sup>57</sup> There is another, more important difference: the Nazis disingenuously embraced and deliberately exploited "what may be called 'implicit laws of lawmaking' or limitations on governmental power resting in generally received conceptions of what is meant by a regime of order founded on law."<sup>58</sup> To be sure, "[t]he German people were notoriously deferential toward authority."<sup>59</sup> Yet, as "Hitler shrewdly saw," their "habit of law observance was not a blind conditioned reaction toward orders coming from above, but was associated with a faith in certain fundamental processes of government."<sup>60</sup> Thus, "Hitler . . . strove to preserve . . . the familiar outer appearance of due process" as a "screen for his manipulations."<sup>61</sup> He realized that law observance and the practical efficacy of his regime depended "on keeping that appearance as close as possible to reality."<sup>62</sup> In short, as Fuller says, "Where he could without sacrifice, he conformed to the demands of legality."<sup>63</sup> And where the result he sought "would be embarrassed or compromised by those restraints even the appearance of due process entails," Hitler bypassed legal forms entirely, acting not through the state, but through the party "in the streets."<sup>64</sup>

If Fuller is right (and I am inclined to think that he is), the Nazis recognized and exploited the principles of legality. In a manner of speaking, they were already in place. Exploitation presupposes something to exploit. Thus, I should say that these principles were generally accepted in Nazi Germany. But the key point is that the Nazis' acceptance of these principles was thoroughly disingenuous;

54 Summers, *supra* note 3, at 1237.

55 *Id.*

56 Fuller, *supra* note 41, at 650.

57 *Id.*

58 L. FULLER, *ANATOMY OF THE LAW* 65 (Praeger ed. 1968); see Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 465 (1954); Fuller, *supra* note 41, at 659.

59 Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 466 (1954).

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*; cf. Fuller, *supra* note 41, at 652.

the element of moral commitment<sup>65</sup> was simply absent. That, I take it, is Fuller's point.<sup>66</sup>

In truth, whether the principles of legality were generally accepted in Nazi Germany is a tangential matter. The main issue raised by Professor Summers's second objection does not require us to stand so close to the witches' cauldron. No, what is at issue here is whether the authoritative status of Fuller's principles turns on their being accepted; or put another way, whether Fuller regards "that form of legal morality without which law itself cannot exist"<sup>67</sup> as a social (role) morality.

Decrying the legal positivists' tendency to direct attention "away from the moral sources of governmental power,"<sup>68</sup> Fuller argues that there is a morality internal to law, a morality, indeed, that makes law possible. This morality "is not something added to, or imposed on, the power of law."<sup>69</sup> It "is an essential condition of that power itself."<sup>70</sup> In short then, according to Fuller, "the power on which law must rest is essentially a moral power."<sup>71</sup> So far so good. But what of the issue at hand? Does the authority of Fuller's principles turn on their acceptance? Fuller speaks to the issue in a straightforward way in his 1954 article, *American Legal Philosophy at Mid-Century*.<sup>72</sup> This moral power, he says, "derives from the general acceptance of the rules by which the law-making process is conducted."<sup>73</sup> It reflects "the persuasive force of accepted rules."<sup>74</sup> Indeed, as he goes on to say, the "sanction back of the fundamental rules of the game, without which the game itself could not go on, is and can only be general acceptance."<sup>75</sup>

Reflecting on Fuller's assertion, one may be inclined to ask how one should understand the term "acceptance." What is it to accept these fundamental rules of the lawmaking enterprise? I suspect that this question comes close to the heart of the disagreement between Professor Summers and myself. Accordingly, I shall conclude this discussion with some brief remarks addressed to it.

As I suggested in my review, what Fuller has in mind here emerges clearly in his later work. For example, in *Human Interaction*

65 See *Two Principles*, *supra* note 53, at 75 n.7; Fuller, *supra* note 59, at 463-64.

66 See Fuller, *supra* note 41, at 648-61.

67 *Id.* at 651; see Wueste, *supra* note 2, at 1217-19.

68 Fuller, *supra* note 59, at 465.

69 L. FULLER, *supra* note 19, at 155.

70 *Id.*

71 Fuller, *supra* note 59, at 462.

72 Fuller, *supra* note 59.

73 *Id.* at 462.

74 *Id.*

75 *Id.* at 463 (emphasis added).

and the Law,<sup>76</sup> where he argues that the existence of enacted law as an effectively functioning normative system depends upon the existence of stable interactional expectancies between lawgiver and subject (that is, a morality internal to the legal enterprise), Fuller indicates that “[w]e shall be misled . . . if we suppose that the relevant expectancy or anticipation must enter actively into consciousness.”<sup>77</sup> Pointing out that “[o]ur conduct toward others, and our interpretations of their behavior toward us”<sup>78</sup> are constantly shaped by expectancies or anticipations that do not rise to consciousness, Fuller goes on to invite attention to an expectation associated with the lawmaking enterprise, namely, the expectation of congruence between the rules as declared and the rules as administered. “Such anticipations,” he explains, “are like the rules of grammar that we observe in practice without having occasion to articulate them until they have been conspicuously violated.”<sup>79</sup> For Fuller then, the principles of legality or implicit laws of lawmaking are accepted in the sense in which the rules of grammar are accepted. The claim is intriguing. Moreover, it has the ring of truth. After all, as Fuller insists, both the principles of legality and the rules of grammar find direct expression in the conduct of men toward one another.<sup>80</sup>

#### CONCLUSION

In this rebuttal to Professor Summers's disinterested assessment of my review, I have indicated why I find his fairness argument less than compelling. And I have tried to show that Fuller's essential purposes are not compromised when his theory is interpreted along the lines suggested in my review. The dispute between us is, however, largely intramural. We agree that Fuller's thesis that there is a morality internal to law is not only defensible, but warrants serious consideration by contemporary legal philosophers. Indeed, our disagreement is largely over how to mount the best defense of this thesis while remaining faithful to Fuller. I therefore submit—and I suspect Professor Summers would agree—that the nature of our exchange is such that, while quite plainly a debate, it is also something of an invitation to explore the avenues of Fullerian legal philosophy.

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<sup>76</sup> L. FULLER, *Human Interaction and the Law*, in *THE PRINCIPLES OF SOCIAL ORDER* 211 (K. Winston ed. 1981).

<sup>77</sup> *Id.* at 220.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 235.

<sup>80</sup> See L. FULLER, *supra* note 19, at 150-51; L. FULLER, *supra* note 32, at 211-46.

