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### Recommended Citation

Daniel E. Wueste, *Fuller's Processual Philosophy of Law*, 71 Cornell L. Rev. 1205 (1986)  
Available at: <http://scholarship.law.cornell.edu/clr/vol71/iss6/5>

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## BOOK REVIEW

### Fuller's Processual Philosophy of Law

*Daniel E. Wueste* †

LON L. FULLER. *Robert S. Summers*. Stanford: Stanford University Press. 1984. Pp. xiii, 174. \$19.95 (hard).\*

#### INTRODUCTION

It is commonplace in the history of jurisprudence that two theories have competed for favor: legal positivism and natural law theory. The standard means of differentiating these two theories is to point to what is called the separability thesis—the idea, roughly, that there is no noncontingent link, no necessary connection between law and morality. Legal positivists embrace this thesis; natural law theorists reject it. Marking the difference in terms of an affirmation and a denial, most writers assume that these two theories are not only mutually exclusive but also jointly exhaustive of the possibilities. Thus it is hardly surprising that questions of the following form are prominent in the literature: Can so and so acknowledge  $\emptyset$  and remain a positivist (or a natural law theorist)? For example, some ask whether Hart's acknowledgement of a "minimum content of Natural Law" (that is, a certain content which by natural necessity any legal or moral system must have) can be squared with his positivistic conception of a hierarchy of legal rules having the so-called rule of recognition at its apex.<sup>1</sup> Similarly, noticing that what Joseph Raz calls the "sources thesis"—the thesis that legal norms are such that "their existence and content can be established . . . without recourse to moral argument"<sup>2</sup>—is compatible with Lon Fuller's posi-

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<sup>1</sup> See A. D'ENTREVES, *NATURAL LAW* 185-203 (2d ed. 1970); Hoffmaster, *Professor Hart on Legal Obligation*, 11 *GA. L. REV.* 1303, 1321-24 (1977). Soper raises a similar question with respect to Raz's theory in Soper, *Legal Theory and the Problem of Definition* (Book Review), 50 *U. CHI. L. REV.* 1170, 1195-97 (1983).

<sup>2</sup> J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 212 (2d ed. 1980).

tion in *The Morality of Law*,<sup>3</sup> one may query whether Fuller is correctly regarded as a natural law theorist. One writer, pointing to such matters, questions Fuller's credentials as a natural law theorist and refers to him as "the child, or rather the stepchild, of a positivist age."<sup>4</sup>

#### A. Avoiding a Trap

One can scarcely doubt the wisdom of taking notice of the alluring components of the rival theories. And it may be worthwhile to consider a theorist's vulnerability to the siren songs of the legal positivist or the natural lawyer. But surely, tying the theorist to the mast of the separability thesis is appropriate only if the fate awaiting one not so secured is, as it was for the mariners of Greek mythology, intolerable. Moreover, the mast itself appears to be such that, tied to it, the theorist is secured to something that does not stand fast. That is indeed the case if David Lyons is right, for he contends that the separability thesis "is ambiguous, and its foundations are unclear."<sup>5</sup> To be sure, Lyons's conclusion that the separability thesis "turns out to be an unreliable test for jurisprudential allegiances"<sup>6</sup> may not meet nods of agreement.<sup>7</sup> Still, in the face of the doubt he raises respecting its reliability as a test for such allegiance, it seems reasonable to place questions respecting a theorist's "ideological credentials"<sup>8</sup> on the back burner.

One of the virtues of Robert S. Summers's *Lon L. Fuller*<sup>9</sup> is that Fuller's jurisprudential allegiance does not loom large in the book. Focusing attention on what Fuller was reacting to, in particular, the importation of "a scientific ethos into legal theory" which fosters neglect of "the essentially purposive and value-laden nature of law,"<sup>10</sup> Summers presents the recurring themes in Fuller's attacks on legal positivism in an especially illuminating way. More importantly, however, stressing the process orientation of Fuller's legal philosophy, Summers directs attention to the feature that distinguishes Fullerian jurisprudence from mainstream jurisprudence

<sup>3</sup> L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

<sup>4</sup> Anastaplo, *Natural Right and the American Lawyer: An Appreciation of Professor Fuller*, 1965 WIS. L. REV. 322, 327 (1965).

<sup>5</sup> Lyons, *Moral Aspects of Legal Theory*, in *SOCIAL AND POLITICAL PHILOSOPHY* 223 (Midwest Studies in Philosophy No. 7, 1982).

<sup>6</sup> *Id.*

<sup>7</sup> See Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 140-43 (1982).

<sup>8</sup> The nomenclature is Murphy's. See J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW* 42 (1984).

<sup>9</sup> R. SUMMERS, *LON L. FULLER* (Jurists: Profiles in Legal Theory No. 4, 1984). The previous volumes of the series were A. KRONMAN, *MAX WEBER* (1983); N. MACCORMICK, *H.L.A. HART* (1981); W. MORISON, *JOHN AUSTIN* (1982).

<sup>10</sup> R. SUMMERS, *supra* note 9, at 19.

and, in particular, from that of H.L.A. Hart. In short, Summers's Fuller is a strident antipositivist who holds that "the notion of 'a legal process' [is] a more fundamental unit of jurisprudential analysis than either the notion of 'a legal rule' or the notion of 'the legal system.'" <sup>11</sup>

### B. Surprising But Welcome Sympathy

As Summers says at the outset of the book, the account he presents here "diverges from" <sup>12</sup> his early writing on Fuller. Indeed, inasmuch as "it is a decidedly sympathetic account," <sup>13</sup> the divergence is quite sharp. Backing away from his earlier criticisms of Fuller, Summers reports that he reread the whole of Fuller's writings and came to the conclusion that, for one reason or another, "[s]ome of us . . . missed a good deal in them" the first time around. <sup>14</sup> Though he does not come right out and say it, it seems clear that his heightened regard for Fuller's contribution to legal theory is the upshot of his having come to see that Fuller's interest in eunomics—"the science, theory or study of good order and workable arrangements" <sup>15</sup>—is not merely one interest among a rather large set of interests, but an abiding interest that underlies and informs much of his writing, particularly after 1954. <sup>16</sup> In any case, with seven chapters devoted to aspects of eunomics and three cast in its light, <sup>17</sup> it can scarcely be doubted that Summers believes the best

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at vii (preface).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Although Summers does not say who the others are here, he gives us a clue in Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 499 & n.91 (1978). In that article, Summers invites the reader to compare Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668 (1965) (severely criticizing Fuller's work) [hereinafter cited as *Philosophy*], and Dworkin, *The Elusive Morality of Law*, 10 VILL. L. REV. 631 (1965) (same) [hereinafter cited as *Elusive Morality*], with R. DWORIN, *TAKING RIGHTS SERIOUSLY* (1977) (developing themes adumbrated in L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940) and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958)). Summers also points to a change in his own view by inviting comparison of Summers, *Professor Fuller on Morality and Law* (Book Review), 18 J. LEGAL EDUC. 1 (1965) (reviewing L. FULLER, *THE MORALITY OF LAW* (1964)) [hereinafter cited as *Morality and Law*], with Summers, *The Present State of Legal Theory in the United States*, 6 RECHTSTHEORIE 65, 78-79 (1975) (appraising Fuller's work rather sympathetically).

<sup>15</sup> Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 477 (1954); see R. SUMMERS, *supra* note 9, at 8, 14, 74, 77.

<sup>16</sup> Summers did not see this in 1965. See *Morality and Law*, *supra* note 14, at 1.

<sup>17</sup> Chapter 1 provides an excellent survey of Fuller's "life and times." Chapters 2-8 are devoted to aspects of eunomics; chapters 2-5 focus on the centrality of reason and morality in law, and the next three chapters focus on the relation between means and ends in the context of socio-legal processes of ordering, including custom, contract, legislation, and adjudication. Chapters 9-11 are cast in the light of eunomics and discuss Fuller's contributions to legal method, contract jurisprudence, and legal education. In

way to understand Fuller's work is to view it as "an extended study of the nature, functions, and limits of legal processes."<sup>18</sup>

Summers's attempt to provide "a sympathetic general account of Fuller's thought"<sup>19</sup> is successful primarily because of his welcome focus on eunomics. Unfortunately, although he does an admirable job of amplifying and illustrating Fuller's eunomical theses, Summers provides no explicit answer to what is likely to be a burning question for his readers: Where, if at all, have Fuller's critics gone wrong? To be sure, Fuller is not a systematic theorist. And, as Summers observes, he does "not always see how to get the most theoretical mileage out of his insights."<sup>20</sup> Yet, as Summers also observes, the general lack of appreciation for Fuller's work is only partially explained by pointing to these facts. Surely the widespread belief that Fuller's critics are right contributes heartily to this unfortunate state of affairs.

Summers himself was a severe critic of Fuller's notion of a morality internal to law. Indeed, he is one of the four central figures in Fuller's "Reply to Critics" prepared for the revised edition of his book *The Morality of Law*.<sup>21</sup> Obviously then, if only with respect to this one issue, Summers is in a position to answer our question. To my mind, it is truly regrettable that he does not do so. As we shall see, however, the answer is, as it were, on the tip of his tongue.

## I

### AN INTERNAL MORALITY OF LAW?

Summers appears to have adopted the view that Fuller's "inner morality of law" is a morality. Indeed, enthusiastically reiterating arguments he had earlier dismissed, Summers seems literally to join the other side.<sup>22</sup> Unfortunately, the sympathy and enthusiasm with which Summers restates these arguments does nothing to diminish the force of the objections he and others raised to them in 1965.<sup>23</sup> The difficulty runs deep. For even when he abandons restatement and turns to the task of reconstructing an argument Fuller makes in

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chapter 12, Summers offers some speculation on how Fuller came to hold his views. R. SUMMERS, *supra* note 9.

<sup>18</sup> R. SUMMERS, *supra* note 9, at 8.

<sup>19</sup> *Id.* at vii (preface).

<sup>20</sup> *Id.*

<sup>21</sup> L. FULLER, *supra* note 3, at 187-242.

<sup>22</sup> Compare R. SUMMERS, *supra* note 9, at 34-41, 152 with *Morality and Law*, *supra* note 14, at 24-27, 14-15 & n.43.

<sup>23</sup> See Cohen, *Law, Morality and Purpose*, 10 VILL. L. REV. 640 (1965); *Elusive Morality*, *supra* note 14; *Philosophy*, *supra* note 14; *Morality and Law*, *supra* note 14; Hart, Book Review, 78 HARV. L. REV. 1281 (1965) (reviewing L. FULLER, *THE MORALITY OF LAW* (1964)). As Fuller observes, there is "an amazing uniformity" in these critics' views. L. FULLER, *supra* note 3, at 191.

only "an oblique way"<sup>24</sup>—the argument "that seems to support [the morality designation] most fully"<sup>25</sup>—the objections raised in 1965 are still apposite and telling.

The argument in question runs as follows: The principles Fuller regards as internal to law are moral principles because sufficient compliance with them "necessarily guarantees, to the extent of that compliance, the realization of a moral value," namely, the "fair opportunity [of citizens] to obey the law."<sup>26</sup> The claim that compliance with Fuller's principles "necessarily guarantees . . . the realization of a moral value," is doubtful on two counts. First, although compliance with Fuller's principles tends to secure what Summers regards as a moral value, it is hard to see how compliance with a set of principles that does not completely disallow retroactivity—because, as Fuller says, retroactive laws "may actually be essential to advance the cause of legality"<sup>27</sup>—necessarily guarantees that citizens have a fair opportunity to obey the law. Because lawmakers do not necessarily run afoul of Fuller's principles by enacting retroactive laws and because there can be no fair opportunity to obey such laws, Summers's claim is clearly overdrawn. We shall have to rest content with the weaker but plausible claim that compliance with Fuller's principles tends to secure this opportunity for citizens.

The second difficulty with Summers's reconstruction of Fuller's argument for an internal morality of law is more fundamental. Summers contends that having a fair chance to decide whether to obey a directive and act accordingly "is in itself moral."<sup>28</sup> Thus, "even though, overall, what the state happens to be doing to the citizen through the substance of the law is immoral," provided that the citizen has "a fair chance" to decide whether to comply with the directive he confronts and act accordingly, a moral value is realized.<sup>29</sup> But is the fair chance to make such a decision and act accordingly "in itself moral"? Does this opportunity have moral value regardless of the means by which it is realized?<sup>30</sup> Is it to be counted a

<sup>24</sup> R. SUMMERS, *supra* note 9, at 38.

<sup>25</sup> *Id.* at 37.

<sup>26</sup> *Id.* Summers offers a similar argument respecting justice. The key idea is that it would be unjust to punish someone for not following an "unfollowable" law. *Id.* This argument, like the one discussed above, is vulnerable to the objection raised at *infra* text accompanying note 31.

The demands of the inner morality of law are listed at *infra* text accompanying note 43.

<sup>27</sup> L. FULLER, *supra* note 3, at 53; *see id.* at 239 (discussing Cohen's claim, *supra* note 23, that Fuller's admission regarding retrospective laws gives his case away); *cf. Morality and Law*, *supra* note 14, at 26 (discussing Fuller's admission).

<sup>28</sup> R. SUMMERS, *supra* note 9, at 37.

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

<sup>30</sup> For a discussion of this issue, see *infra* text accompanying note 36.

moral value whenever and wherever it exists? If it is, then one should be willing to say without hesitation that even though what a blackmailer happens to be doing to his victim is immoral, so long as his victim has a fair chance to decide whether to comply and then to act accordingly, a moral value is realized. Yet hesitation does not seem out of place here. And that, in turn, raises doubt about the claim that an opportunity of the sort under consideration is in itself moral. Moreover, even if this doubt were overcome, Summers's argument for the morality designation would still fall short of its mark. As Summers himself pointed out in 1965, the fact that  $\emptyset$  tends to secure the realization of a moral value does not in itself warrant the conclusion that  $\emptyset$  is moral. After all, "[m]any things, including wealth and literacy, tend to assure moral goodness but they are not themselves moral."<sup>31</sup>

Summers presents the argument considered above because it seems to provide more support for the morality designation than any explicit argument presented by Fuller. Unfortunately, this argument falls short. Thus, it appears that Summers needs some assistance in assisting Fuller. Moreover, taking our cues from Fuller, what is perhaps the central deficiency of the argument is readily identifiable.

Summers grants that the citizen's "choice may be a choice to obey an evil law," but, he says, "the citizen will at least have had a fair chance to decide whether to do so or not, and to act accordingly."<sup>32</sup> He claims that this opportunity "is in itself moral."<sup>33</sup> As we noted above, however, a blackmailer's victim may have the same sort of opportunity. And in this case, the moral value of such an opportunity is at least questionable. Consider the two cases. The citizen faces a demand respecting his or her conduct. So, too, the blackmailer's victim. In each case, the individual has an "opportunity to know of it in advance and act accordingly."<sup>34</sup> Indeed, in the latter case it is inevitable that the victim will have such an opportunity. After all, the demand of a blackmailer is a demand respecting future conduct. Moreover, in each case the individual who has the opportunity in question stands to lose something if he or she chooses not to comply.

Nevertheless, the two cases are distinguishable in important ways. Whereas the citizen confronts a legal norm, the blackmail victim confronts a threat, a coercive demand from someone who is entitled neither to make the demand nor to have it satisfied. Blackmail

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<sup>31</sup> *Morality and Law*, *supra* note 14, at 25.

<sup>32</sup> R. SUMMERS, *supra* note 9, at 37.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

and the enterprise of subjecting human conduct to the governance of rules (to use Fullerian parlance) are strikingly different. The moral value of the latter may be questioned, but there is no question as to the moral value of the former—it has none. This absence of moral value is, of course, the reason for the hesitation alluded to above.

If we view such an opportunity as a consequence of purposive human action (or, as seems apt with the fair chance to obey the law, as a social end, consciously sought or not), then following Fuller, we might say that it “takes its ‘character and color’ from the means by which it is realized.”<sup>35</sup> As Fuller points out, what one says about an abstractly conceived end and what one says after that end “has been given flesh and blood through some specific form of social implementation”<sup>36</sup> may differ. Abstractly conceived, the instant opportunity may appear moral. Yet, when it is given flesh and blood through some specific means, we may think otherwise. Our thinking otherwise is neither surprising nor unjustifiable if the character and color of this opportunity derives, in part, from the means by which it is realized. Indeed, because the means in the examples above—blackmail and lawmaking—are strikingly different, it is hardly surprising to find that some who are prepared to grant the moral value of the opportunity in one case hesitate to do so in the other. One may be tempted to say that the opportunity has moral value only insofar as the means of its realization can justify such a judgment respecting its character and color. To say this, however, is to turn Summers’s argument on its head. Put crudely, instead of arguing for the moral value of a means by pointing to an end, one would be arguing for the moral value of an end by pointing to a means. What we should say—what Fuller would have us say—is that it works both ways. That is, ends shape and stamp their means of realization and means shape and stamp the ends they secure.<sup>37</sup> Viewed from this perspective, Summers’s argument is incomplete. At best, he takes us but halfway. So, again, it seems that Summers needs some assistance in assisting Fuller. Engaging in a bit of reconstruction and making the most of points Summers makes but not as forcefully as he should, in what follows I will attempt to provide the assistance he needs. Attention will be focused on the regulative principles internal to the means by which the value Summers points to is realized.<sup>38</sup>

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<sup>35</sup> L. FULLER, *Means and Ends*, in *THE PRINCIPLES OF SOCIAL ORDER* 55 (K. Winston ed. 1981).

<sup>36</sup> *Id.*

<sup>37</sup> R. SUMMERS, *supra* note 9, at 102.

<sup>38</sup> Summers comes close to providing the assistance Fuller needs when he turns to the matter of legitimacy and the tacit reciprocity that underlies it. *Id.* at 38. Indeed, at this juncture, Summers points to the key idea of a role morality. Unfortunately, he does

### A. Fuller's Focus on Processes of Social Ordering

Like his opposite number in the Hart-Fuller debate, H.L.A. Hart, Fuller holds that (1) the authority of law is a product of law, and (2) a legislator's acts are lawmaking acts only if they are in compliance with the fundamental rules specifying the essential lawmaking procedures. In other words, Fuller and Hart agree that these fundamental rules or criteria of legal validity are legally authoritative, in short, law. At one with Kelsen on this score, Hart and Fuller both maintain that law regulates its own creation.<sup>39</sup> Beyond this point, however, their positions differ markedly. That their positions are different, is, of course, well known. Precisely how they are different and, importantly, why they are different is not. Stressing that Fuller regards legal processes as the primary units of jurisprudential analysis,<sup>40</sup> Summers does much to rectify this situation. And, as we shall see, by stressing this fact Summers paves the way for those of his readers who seek to understand Fuller's claim that among the criteria of legal validity there are principles constituting a morality that is internal to law and, indeed, makes law possible.

Fuller conceives of law as a set of social processes or institutionalized forms of social ordering, and he regards such forms of human interaction as conscious and reasoned responses to problematic situations. In keeping with this eunomic conception of law, Fuller holds that the authority of law is the result of the satisfaction of certain intrinsic demands associated with the forms of legal ordering.<sup>41</sup> Although Fuller identifies and studies various forms of socio-legal ordering (including contract, mediation, adjudication, and managerial direction),<sup>42</sup> his exposition of the intrinsic demands of the form of ordering known as legislation is far more extensive than his exposition of the internal demands of the other forms. Indeed, that exposition is the heart and soul of *The Morality of Law*.

In this book, Fuller variously refers to the intrinsic demands of legislation as the "inner morality of law," "the special morality of

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not pursue this idea. In chapter 8 we are told that legitimacy and fairness are process values, "values that attach to the workings of a process and are desirable in themselves." *Id.* at 109. Because the idea holds such promise for understanding Fuller, it is something of a disappointment that Summers does not elaborate on the notion of a process value. He has done so elsewhere, however. See, e.g., Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974). The notion of a role morality receives attention at *infra* text accompanying notes 74-80.

<sup>39</sup> See Wueste, Book Review, 70 ARCHIVES FOR PHIL. L. & SOC. PHIL. 545 (1984) (reviewing L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (K. Winston ed. 1981)).

<sup>40</sup> R. SUMMERS, *supra* note 9, at 74-75.

<sup>41</sup> See L. FULLER, *supra* note 3, at 115, 128-29, 148, 155; L. FULLER, *ANATOMY OF THE LAW* 43, 48, 60 (Praeger ed. 1968); R. SUMMERS, *supra* note 9, at 36-41, 71-72, 85; Fuller, *supra* note 15, at 462-63; Wueste, *supra* note 39, at 545-48.

<sup>42</sup> R. SUMMERS, *supra* note 9, at 74-75.

law," "the principles of legality," and "procedural natural law." He introduces the demands of the inner morality of law by means of a story about a hapless king, Rex, who fails in eight distinguishable ways to make law for his subjects.<sup>43</sup> Corresponding to each of the eight ways in which Rex fails to make law is a demand of the morality that makes law possible. Those demands are that rules must be (1) general, (2) promulgated, (3) typically prospective rather than retroactive, and (4) clear (that is, readily intelligible). Laws must also be such that the acts they require are neither (5) incompatible nor (6) impossible to perform. Moreover, (7) laws must not be changed too frequently, and finally (8) there must be a congruence between the rules as declared and the rules as administered.<sup>44</sup> These demands are not derived from principles of justice or other moral principles relating to the substantive aims or content of law.<sup>45</sup> Rather, they are discovered by a realistic consideration of what is necessary to ensure that the attempt to guide human conduct by rules does not "miscarry."<sup>46</sup> Put another way, these demands are identified by considering what is essential to the proper functioning of this form of social ordering.<sup>47</sup> They are the "natural laws" of a particular kind of human undertaking, namely, the enterprise of subjecting human conduct to the governance of rules.<sup>48</sup> As Fuller says, borrowing a phrase from Karl Llewellyn, they are contained in the "law job" itself.<sup>49</sup>

Discussions of social ordering processes often distinguish vertical ordering (that is, order imposed from above) from horizontal ordering (order achieved through reciprocal adjustments on a horizontal plane). On the basis of such a distinction it is commonly supposed that officially declared law is a clear example of vertical ordering and that contract and customary law are clear examples of horizontal ordering. But these social processes are more complex than the distinction suggests. For example, when one examines the legislative process it emerges that many horizontal adjustments of

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<sup>43</sup> L. FULLER, *supra* note 3, at 33-38.

<sup>44</sup> The complete discussion of the eight canons is at *id.* 46-91; *see also* R. SUMMERS, *supra* note 9, at 28, 36, 159.

<sup>45</sup> *But see* Nicholson, *The Internal Morality of Law: Fuller and His Critics*, 84 ETHICS 307 (1974) (interpreting Rex Story rather differently from interpretation presented here).

<sup>46</sup> L. FULLER, *supra* note 3, at 38-39. Fuller's use of the term "miscarry" suggests, *inter alia*, that the eight principles are not constitutive but regulative or restraining principles. This in turn suggests that the role of legislator is what Mortimer Kadish and Sanford Kadish call a "recourse" role—a role that extends a liberty while it constrains, a role whose demands are understood in terms of responsibility rather than obligation *per se*. *See* M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 35 *passim* (1973).

<sup>47</sup> *See* L. FULLER, *supra* note 3, at 96 ("[Natural laws] remain entirely terrestrial in origin and application.").

<sup>48</sup> R. SUMMERS, *supra* note 9, at 73.

<sup>49</sup> L. FULLER, *supra* note 3, at 192.

interest take place in the course of drafting and enacting laws. Indeed, even the lawmaking of a dictator involves some accommodation to demands expressed in the rumbling discontent of the governed. What is often overlooked, but stressed by Fuller, is that a contractual element (reciprocity) enters into any ordering of human relationships by declared and published rules.<sup>50</sup> With this observation we can begin to see how the enterprise of subjecting human conduct to the governance of rules constrains a lawmaker's actions. If a lawgiver wants his subjects to accept and follow his rules, then he must show some minimum of respect for those rules in his actions. For example, he must respect them in the distribution of awards and the imposition of punishment. In other words, the promulgation of a code of legal rules involves a tacit commitment by government to abide by those rules in judging the citizen.<sup>51</sup> If this commitment is grossly disregarded, though society may continue to function by other principles, "a regime of 'officially declared law' will not be achieved."<sup>52</sup>

## B. Fuller's Critics

For the most part, Fuller's critics agree that his eight principles are, in the Fullerian sense, internal to law. That is, by and large, the critics agree that compliance with these principles is necessary to the efficacious governance of human conduct by general rules, that these principles outline what must be done in order to make law. Hart is a case in point.<sup>53</sup> He does not reject the eight canons as such. He does object, however, to Fuller's "designation of these principles of good legal craftsmanship as [a] morality."<sup>54</sup> It is not the claim of internality, but the claim that the canons are moral principles that Hart rejects. It is reasonable to maintain that the principles of the legal enterprise—Hart prefers to call them the principles of legality—are internal to that enterprise. But, Hart says, calling them moral principles "perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality."<sup>55</sup> Hart illustrates the point as follows:

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<sup>50</sup> R. SUMMERS, *supra* note 9, at 84.

<sup>51</sup> *Id.* at 38, 84.

<sup>52</sup> L. FULLER, *The Role of Contract in the Ordering Processes of Society Generally*, in *THE PRINCIPLES OF SOCIAL ORDER* 172 (K. Winston ed. 1981). In *The Morality of Law*, Fuller calls the requirement that a lawgiver abide by his own rules (i.e. published rules) the "social meaning" of the publication of rules. L. FULLER, *supra* note 3, at 217. He also says that it is "the very essence of the Rule of Law." *Id.* at 209-10; *see id.* at 153-59 (discussing this requirement as mark of "one deep affinity between legality and justice").

<sup>53</sup> Hart, *supra* note 23. Cohen, Dworkin, and Summers share this view with Hart. *See* works cited *supra* note 23; *see also* L. FULLER, *supra* note 3, at 197-98.

<sup>54</sup> Hart, *supra* note 23, at 1286.

<sup>55</sup> *Id.*

Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.<sup>56</sup>

But Fuller does not regard the principles internal to the "law job" as moral principles just because the law job is a purposive activity. Some of Fuller's critics, notably Ronald Dworkin, have seen this. Indeed, as Dworkin sees it, to think that Fuller "means by morality nothing more than strategy"<sup>57</sup> is to misinterpret and belittle his work. Rather than rejecting Fuller's morality designation because it rests on (and is likely to perpetuate) a "confusion of principles guiding any form of purposive activity with morality,"<sup>58</sup> Dworkin rejects this designation because, as he sees it, the arguments for it involve "two related mistakes."<sup>59</sup>

Dworkin suggests that Fuller identifies the eight canons as moral principles because "some of the most notorious examples of political immorality—in Nazi Germany and South Africa, for example—involved gross violations of one or more of these canons."<sup>60</sup> As Dworkin quite rightly points out, however, such acts are "not *just* a violation of one of Professor Fuller's canons but something more."<sup>61</sup> Thus it emerges that Fuller's morality designation rests on a mistake—the mistake of concluding "from examples of political immorality which involve violations of the eight canons, that these canons state moral principles."<sup>62</sup> That, at any rate, is what Dworkin would have us believe. But Dworkin's criticism misses the mark; Fuller does not identify the eight canons as moral principles on the basis of such examples of political immorality.

Dworkin comes closer to understanding Fuller's basis for designating these principles as "moral" when he invites attention to the second of the "two related mistakes." This mistake consists of a failure to recognize that even if the eight canons are moral principles, it does not follow that a ruler who observes these canons only to the extent necessary to make bad law *complies* with these moral

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<sup>56</sup> *Id.*

<sup>57</sup> *Elusive Morality*, *supra* note 14, at 631-32.

<sup>58</sup> Hart, *supra* note 23, at 1286-87.

<sup>59</sup> *Elusive Morality*, *supra* note 14, at 633.

<sup>60</sup> *Id.* at 632-33.

<sup>61</sup> *Id.* (emphasis in original).

<sup>62</sup> *Id.* at 633.

principles. Dworkin's point is that not every act which in some sense coincides with or falls under some moral principle in a mechanical sense is correctly regarded as an act in compliance with that principle.<sup>63</sup> He is quite right. When we say, correctly, that an act is in compliance with a principle, we claim (1) that the act coincides with the principle and (2) that the principle is a reason in favor of the act, a reason for doing it. If the principle is a moral principle, then it supplies a moral reason. Because Fuller's canons, as Dworkin understands them, do not offer "even a shade of moral argument"<sup>64</sup> in favor of what a ruler is doing when he observes the canons only to the extent necessary to make bad law, Dworkin concludes that Fuller must be mistaken. In short, if it is correct to say that such a ruler *complied* with these canons, then the canons are strategic, rather than moral, principles.<sup>65</sup>

Dworkin's criticism is welcome insofar as it invites attention to the correctness of calling the canons moral principles if they constitute moral reasons for acting in the way they prescribe. Fuller, of course, believes that they do. If respect for the canons is essential to the enterprise of subjecting human conduct to the governance of rules (a point to which his critics largely agree), then, he writes, "certainly it does not seem absurd to suggest that those principles constitute a special morality of role attaching to the office [read: 'job'] of law-maker and law-administrator."<sup>66</sup> And the phrase "the internal morality of law," he says, is used to describe the "onerous and often complex responsibility"<sup>67</sup> of doing the "law job" right in the first place.<sup>68</sup> The pivotal notion here is the notion of role responsibility, not purpose. As Kenneth Winston puts it, the eight canons are internal "in the sense that they attach to the particular task the legislator is called upon to perform. . . . [T]he canons *constitute a morality* in the sense that they characterize the responsibility of legislators in the exercise of their authority."<sup>69</sup> That the concept of role responsibility is key here is demonstrated by the fact that it provides the basis for a response to both Hart's and Dworkin's criticisms. Invoking the concept of role responsibility, we are in a position to mark a distinction between the principles of Hart's conscientious poisoner and those of Fuller's lawgiver. After all, to say that the

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63 *Id.* at 634.

64 *Id.*

65 *Id.*

66 L. FULLER, *supra* note 3, at 206.

67 *Id.* at 223.

68 *See* R. SUMMERS, *supra* note 9, at 38.

69 L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 158-59 (K. Winston ed. 1981) (editor's note) (emphasis added); *see also* L. FULLER, *supra* note 3, at 131 (emphasizing central place of responsibilities enumerated by canons in creation of legal system).

former set of principles characterizes or, better, constitutes an enumeration of the poisoner's responsibilities is, at best, a rather queer use of language, but to say that the principles of the law-giver's enterprise constitute such an enumeration makes perfectly good sense. What of Dworkin's criticism? The response here can be put succinctly: precisely because these responsibilities are role responsibilities, the principles that enumerate them supply reasons for specific sorts of action. Moreover, in view of the foregoing, there is a warrant for saying that compliance with these principles is not merely compliance with strategic principles.<sup>70</sup>

### C. The Status of the Principles Internal to a Legal Process

The proposition that the concept of role responsibility is the centerpiece of Fuller's conception of a morality internal to law obviates Hart's objection and mitigates the force of Dworkin's objection. I say "mitigates" because, at this juncture, whether the reasons for action supplied by the principles of the "law job" are moral reasons is an open question. As I suggested earlier, it seems to follow from the use of the term "responsibility" that the principles supply something more than merely strategic or prudential reasons. "Responsibility" is a rich normative concept. (The adjective "rich" is apposite here because (1) it is arguable that "purpose" is also a normative concept, and (2) as we have seen, not all purposive activity is felicitously characterized by "responsibility" language.) But even if we accept this conclusion, as I think we should, a major task confronts us. The question simply takes another form: What is the status of Fuller's principles if they are not merely strategic or prudential? Fuller argues that they are moral because they enumerate role responsibilities and because the "law job" has as an essential feature an element of reciprocity.<sup>71</sup> These two points are closely related.

Let us consider a critic's response to this statement of Fuller's view. The critic is likely to argue along the following lines:

According to Fuller, morality is necessarily connected to law because the principles of the so-called inner morality of law enumerate the role responsibilities of those who undertake to subject human conduct to the governance of rules. I will grant that 'responsibility' is a rich normative concept, but this question remains: Are all role responsibilities moral responsibilities, or more particularly, are the role responsibilities associated with the various forms of legal ordering moral responsibilities? It seems clear that the answer in each case is no. Look, one of the role responsibilities of the public executioner is to kill persons condemned by

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<sup>70</sup> See L. FULLER, *supra* note 3, at 206.

<sup>71</sup> See *id.* at 162-67.

the courts of capital crimes, but this may be a grossly immoral form of legalized 'murder' (in the moral sense). Or, again, it may be the role responsibility of a member of the Ku Klux Klan to hold the arms of little black girls while his leader beats or rapes them. Is this a moral responsibility? The other Klansmen expect him to do this, they count on him to do it; if he does not, he lets them down.<sup>72</sup>

The critic's questions and objections appear to be right on target. But then Hart's attack on Fuller—that is, the objection that Fuller conflates the notions of purposive activity and morality—seems to be right on target, too. Indeed, the affinities between the Klansman example and Hart's artful poisoner are quite plain. Yet both Hart's objection and the recently introduced objections miss the target. Why? First and fundamentally, our critic—and Hart—misreads Fuller's claim that law and morality are necessarily linked as a claim regarding a (conceptual?) link between positive law and *critical* morality (that is, philosophical, nonconventional morality). That is not, however, what Fuller has in mind. If one understands critical morality as a set of binding norms for the guidance and evaluation of human conduct that owe their authority to their being either rationally discovered or justified rather than to their being accepted, it is plain that Fuller does not intend to assert that law is necessarily connected to critical morality. Do not misunderstand me. I am not saying that Fuller eschews the notions of rational justification or discovery by reason in the moral arena—that is manifestly false. These notions are important for Fuller. Rather, the point is that Fuller's inner morality of law, the morality that makes law possible, is a morality consisting of norms for the guidance and evaluation of human conduct that *do* owe their authoritative status to acceptance. This morality is not a morality of pure reason, divorced from the facts of social relationships. No, for Fuller a morality divorced from the facts of social relations is the morality of a "solitary ethical soliloquizer"; it is "based on a profound misconception of the relation between morality and social forms."<sup>73</sup>

Those who conceive of morality in this way—in this connection Fuller cites Kant, the utilitarians, and the emotivists—neglect the "social dimension" of morality. "What is lacking in all these philosophies," Fuller says, "is the simple picture of human beings con-

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<sup>72</sup> Professor Carl Wellman, playing devil's advocate, put this objection to me. I thank him for doing so.

<sup>73</sup> L. FULLER, *Irrigation and Tyranny*, in *THE PRINCIPLES OF SOCIAL ORDER* 201 (K. Winston ed. 1981) ("solitary ethical soliloquizer" is Kantian); see Fuller, *A Rejoinder to Professor Nagel*, 3 NAT. L.F. 83, 99 (1958) [hereinafter cited as *Rejoinder*]; see also Fuller, *Human Purpose and Natural Law*, 3 NAT. L.F. 68 (1958); Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NAT. L.F. 77 (1958).

fronting one another in some social context, adjusting their relations reciprocally, negotiating, voting, arguing before some arbiter, and perhaps even reluctantly deciding to toss for it."<sup>74</sup> Lest the significance of this diagnosis be missed, I hasten to add that as Fuller sees it, the conception of morality embraced by his critics suffers from this defect.<sup>75</sup>

Fuller was quite favorably impressed by Dorothy Emmet's 1966 book, *Rules, Roles and Relations*.<sup>76</sup> Indeed, in his "Reply to Critics," he opines that she "has done a great service to ethical philosophy" by reintroducing the concepts of "social role" and "role morality."<sup>77</sup> That he applauds Emmet in this way is hardly surprising; according to Fuller, "the modes of analysis appropriate to problems of role morality are also relevant to moral problems which do not involve the performance of roles that have been recognized as such."<sup>78</sup> Indeed, Fuller contends that study along Emmetian lines "would deepen our insight into moral problems generally."<sup>79</sup> The corrective Fuller recommends for legal theory, namely, an interactional approach, is one he recommends for moral theory as well.<sup>80</sup> For Fuller, morality is a social phenomenon; and because law as he understands it is also a social phenomenon, he has profound difficulty with the positivist dogma that law and morality are distinct. Indeed, Fuller rejects that dogma as false.

#### D. Fuller's Conception of Morality

Fuller, like Emmet, rejects one of two claims commonly associated with the thesis of the autonomy of ethics. The two claims are (1) the claim of nonreducibility—"no 'ought' proposition can be defined in terms of facts alone"—and (2) the claim of nondeductibility—"There may not be calculi with rules by which 'ought' propositions can be deduced from 'is' propositions . . ."<sup>81</sup> Both Emmet<sup>82</sup> and Fuller<sup>83</sup> embrace the first of these two claims and re-

<sup>74</sup> L. FULLER, *supra* note 73, at 201.

<sup>75</sup> L. FULLER, *supra* note 3, at 237 ("[A]nalytical legal positivism 'lacks a social dimension.' As a cure for this defect I have recommended 'an interactional theory of law.' I am convinced that the concept of morality adopted by my critics suffers . . . from the same defect . . .").

<sup>76</sup> D. EMMET, *RULES, ROLES AND RELATIONS* (1966).

<sup>77</sup> L. FULLER, *supra* note 3, at 239.

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

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

<sup>80</sup> *See id.* at 237-41.

<sup>81</sup> D. EMMET, *supra* note 76, at 54.

<sup>82</sup> *Id.* at 54-55.

<sup>83</sup> The theme pervades Fuller's work. It is at issue in the Fuller-Nagel debate and prominent in Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457 (1954).

ject the second. Fuller agrees with Emmet that "Some value will be invoked or assumed, as one which the facts acquire in relation to human purposes, interests, needs, and there will always be the further question whether these ought to be pursued."<sup>84</sup> With regard to the "non-deducibility" claim, both writers hold that what is needed and available are bridges that facilitate passage from statements about what "is" to statements about what "ought to be done"—something David Hume sees clearly and means to invite attention to in the celebrated passage from Book III of his *A Treatise of Human Nature*.<sup>85</sup> For Hume, the bridges are notions of human interests and passions.<sup>86</sup> Contemporary philosophers such as A.C. MacIntyre have added wanting, needing, desiring, pleasure, happiness, and health to the list of bridge notions.<sup>87</sup> These notions can bridge the gap between:

what "is" and what "ought to be done" because they can be given a factual content (there are things we want, need, like, etc.), and at the same time, needs, interests, desires, etc., generally speaking, carry the implication that we approve of their being satisfied.<sup>88</sup>

One can simply report that someone has an interest, of course. But one may also say that someone has an interest with the implication that that interest is legitimate. In the first case, one makes a descriptive statement, in the second, an evaluative statement. As Emmet and Fuller agree, whether a statement is descriptive or evaluative is more to the point than the distinction between "sheer fact" and value. Indeed, for both writers, the question is such that one can scarcely maintain that there is a hard and fast distinction between fact and value.<sup>89</sup>

Distinguishing descriptive and evaluative statements is not as easy as proponents of the autonomy of ethics suppose. Indeed, it is often rather difficult.<sup>90</sup> For Fuller, the difficulty is most prominent when one confronts and attempts to understand purposive human behavior. And because law and morality *qua* forms of social ordering are constructed through purposive human behavior (that is, social interaction), the difficulty is telling for legal and moral theory.

A purpose is a fact, but it is a fact that sets a target; it is a direction-giving fact. So soon as we recognize this quality of a purpose, it becomes clear that within the limits of its framework a purpose is at once a fact and a standard for judging facts. To such

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<sup>84</sup> D. EMMET, *supra* note 76, at 54.

<sup>85</sup> D. HUME, *A TREATISE OF HUMAN NATURE* (L. Selby-Biggs 2d ed. 1978) (1739).

<sup>86</sup> *Id.* at 469-70.

<sup>87</sup> See, e.g., MacIntyre, *Hume on "Is" and "Ought,"* 68 *PHIL. REV.* 451 (1959).

<sup>88</sup> D. EMMET, *supra* note 76, at 47.

<sup>89</sup> R. SUMMERS, *supra* note 9, at 25-26, 70-71, 134.

<sup>90</sup> *Id.* at 21-24, 27.

a fact the "logic" that tells us it is impossible to deduce what ought to be from what is becomes inapplicable.<sup>91</sup>

So far so good. The notion of purpose facilitates passage from statements about what "is" to statements about what "ought to be." But some purposes are bad; their targets are unacceptable. For example, both Fuller and his critics would agree that the purposes of the artful poisoner and the Klansman are morally unacceptable. Indeed, the mixing of description and evaluation here is grist for Fuller's mill. It is basic to Fuller's assumption that we should (and ordinarily do) withhold the appellation "responsibilities" when talking about what is expected of these actors. In Fuller's view, the internal principles of the poisoner's purposive activity neither enumerate role responsibilities nor constitute a morality of the enterprise. As he says in response to Hart, the law-maker's and law-administrator's responsibilities "deserve some more flattering comparison than that offered by the practices of the thoughtful and conscientious poisoner who never forgets to tear the chemist's label off before he hands the bottle to his victim."<sup>92</sup> Fuller saw a key distinction here: the purposive activities of the conscientious poisoner or Klansman, unlike those of a lawmaker or law-administrator, are not constitutive elements in forms of human interaction that are beneficial to the participants. If there are "benefits" here, they are realized by the actors and not by those acted upon—the victims. That we call those acted upon by conscientious poisoners or Klansmen "victims" is revealing. Indeed, one might even say that these purposive activities are not interactional; parties do not interact here, rather, one acts on and to the detriment of another. In any case, that these purposive activities are uniformly regarded as detrimental is crucial, for Fuller's concern with purposive activities is confined to those associated with forms of social ordering, ways of coming together that are a benefit to the participants.<sup>93</sup> But there is a more basic point here; namely, that Fuller recognizes a distinction between the notion of purposive activity, where the "ought" of the internal principles of an activity is merely prudential, technical or strategic, and morality, where the "ought" of the internal principles of an enterprise is something more than a strategic, technical, or prudential "ought." Fuller finds this augmented, prudential "ought" (which he regards as a moral "ought") in social contexts. This "ought" is associated with purposive *social* activity—that is, purposive and beneficial social interaction—and it is distinguished

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<sup>91</sup> Fuller, *supra* note 15, at 470.

<sup>92</sup> L. FULLER, *supra* note 3, at 206.

<sup>93</sup> L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 67 (K. Winston ed. 1981) (editor's note).

from the mere prudential "ought" by the presence of reciprocity in the social context.

The distinction Fuller recognizes between a merely strategic or prudential "ought" and a moral "ought" (an "ought" of *social* morality) is not the distinction Hart accuses him of ignoring. Hart distinguishes "the notion of efficiency for a purpose"—where an "ought" is strategic or prudential—from "those final judgments about activities and purposes with which morality in its various forms is concerned."<sup>94</sup> For Fuller, this distinction suggests that questions "of morals are entirely distinct from those of social procedures, since morals have to do with ends, while procedures are merely means to ends."<sup>95</sup> Certain forms of purposive activity may be judged morally acceptable, but the "ought" of purposive activity itself constitutes nothing more than a recommendation that certain means are likely to be the most effective way of securing some end, whether it be good, bad, or indifferent.<sup>96</sup> In short, the "ought" of purposive activity is always a prudential "ought," moral questions only being raised by the nature of the end pursued. As Summers points out, Fuller will have none of it.<sup>97</sup>

Questions regarding means may be (and often are) something more than technical questions of efficiency. To think otherwise is to misconstrue the means-end relation. As Fuller points out, "Is its end good and does it serve that end well?" is not the only relevant moral question respecting a form of purposive activity.<sup>98</sup> For Fuller, morality is not confined to nor is it primarily concerned with final judgments about activities and purposes. Means and ends are not severable from one another in the way proponents of the view sketched above suppose they are. Means and ends do not arrange themselves in tandem fashion; rather, they are arranged in "circles of interaction."<sup>99</sup> Thus, Fuller says, "any sharp distinction between a science of means and an ethics of ends is impossible."<sup>100</sup> Like Emmet, Fuller recommends collaboration among the social sciences, a study of means and ends in interaction: ✓

There is nothing more divisive than a discussion of ends in abstraction from means, and the wrangling schools among professional philosophers may be attributed chiefly, I think, to this

<sup>94</sup> Hart, *supra* note 23, at 1286.

<sup>95</sup> L. FULLER, *supra* note 73, at 201.

<sup>96</sup> See D. EMMET, *supra* note 76, at 39. I follow Emmet's characterization of the prudential "ought."

<sup>97</sup> R. SUMMERS, *supra* note 9, at 76, 153-54; see *id.* at 75-109 (discussing at 102-03 Fuller's views on the relation between means and ends).

<sup>98</sup> L. FULLER, *supra* note 35, at 55.

<sup>99</sup> *Id.* at 54.

<sup>100</sup> Fuller, *supra* note 15, at 480.

circumstance. On the other hand, a concentration on means to the exclusion of ends, such as is often affected in economics and sociology, leads to a situation in which each "social discipline" talks past all the others and no effective communication takes place at all.<sup>101</sup>

In short, both Fuller and Emmet question the theses of the autonomy of ethics and the autonomy of sociology. Borrowing a phrase from Summers, Fuller's position can be put succinctly: these social disciplines "overlap mightily."<sup>102</sup> Indeed, for Fuller morality is a social phenomenon.

Because Fuller's internal morality of law consists of norms inherent in the law job (that is, in the enterprise of subjecting human conduct to rules), the key question is whether one can derive statements about what "ought to be done" from statements of fact (such as, "The purpose of lawmakers and law-administrators is to subject human conduct to the governance of rules."). As we have seen, Fuller answers this question affirmatively. But as his critics quickly point out, even if one can derive statements about what "ought to be done" from statements of fact, it does not follow that the statements one derives involve a moral "ought."<sup>103</sup> As Fuller sees it, that is the thrust of Hart's artful poisoner objection.

Although Fuller never articulates a completely satisfactory response to this objection, his work contains the makings of an adequate response. As I said earlier, the central element in a Fullerian response to this objection is the concept of role responsibility. His critics hold that Fuller regards the principles internal to the law job as moral simply because the law job is a purposive activity. The critics are mistaken. The case for the internality of the principles turns on the purposiveness of the law job; the case for their status as moral principles does not. To be sure, Fuller argues that the notion of a purpose bridges the gap between "is" and "ought" statements. But that is only the opening salvo in his attack on legal positivism.

Hart's reading to the contrary notwithstanding, Fuller recognizes a distinction between the prudential or strategic "ought" and the moral "ought" (for Fuller, an augmented prudential "ought"). His recognition of this distinction is, perhaps, less than obvious. But, as I suggested earlier, the narrow focus of his eunomical study—his focus on forms of good social ordering and his insistence that moral philosophy must study means and ends in interaction—flags his recognition of this distinction. Not all purposes are good. More to the point, given Fuller's view respecting the means-ends

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101 *Id.*; cf. D. EMMET, *supra* note 76, at 17-55.

102 R. SUMMERS, *supra* note 9, at 25.

103 *Id.* at 37.

relation, not all purposive *activity* is good. The character and structure of the activity (means and ends in interaction) is the key. Again, the purposiveness of the law job is not the basis for the moral status of that job's internal principles. It could not be. If it were, as Hart argues, Fuller would have to grant that the principles internal to the conscientious poisoner's purposive activity are moral principles. But Fuller will not grant this and, indeed, when he first encountered Hart's line of argument, he thought it "so bizarre, and even perverse, as not to deserve an answer."<sup>104</sup> What Hart fails to see is that Fuller does not hold that all purposive activity involves a moral "ought." For example, in Fuller's view, the purposive activity of the conscientious poisoner does not involve a moral "ought." The purposive activity of the lawmaker, on the other hand, is for Fuller a prime example of a purposive activity that does involve a moral "ought." Presumably, there is a relevant difference between these two forms of purposive activity, a difference that makes a difference. One difference between them is that the latter, but not the former, is generally regarded as good. For Fuller, however, this difference is not decisive. The difference that makes a difference is one respecting the social structure of these purposive activities. The distinction between them is marked by pointing to the dimension of reciprocity in the role relationships of the legal enterprise.

As I read Fuller, his best argument for the morality designation is as follows: The roles of officials (judges, legislators, administrators) *and* nonofficials (citizens in the legal community at large, litigants, parties to mediation) are internal to the purposive activity or enterprise of subjecting human conduct to the governance of rules. These roles are structured, in part, by the principles of the purposive activity itself; because these principles enumerate role responsibilities, they are moral principles. But are the responsibilities associated with a role moral responsibilities? Perhaps the best way to approach this question is to construe it as Fuller does, namely, as a question respecting the derivability of moral "ought to be done" statements from statements of fact. Thus, is the "ought" in an "ought-to-be-done" statement that is derived from a statement of fact respecting someone's role, a moral "ought"?

A cautionary note is in order. As Fuller conceives of it, morality is neither confined to nor primarily concerned with final judgments about activities and purposes. It is a social phenomenon born of and sustained by human interaction. Moreover, the authoritative status of its principles derives from "a general acceptance, which in turn rests ultimately on a perception that they are right and neces-

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<sup>104</sup> L. FULLER, *supra* note 3, at 201.

sary.”<sup>105</sup> Speaking generally, what Fuller understands by “morality” is “generally shared views of right conduct that have grown spontaneously through experience and discussion.”<sup>106</sup> These shared views are conventional, but they are not arbitrary—on this point Fuller’s view resembles that of Hume<sup>107</sup> and Emmet.<sup>108</sup> For Fuller, a moral “ought” is an “ought” of social morality.

In an excellent discussion of whether one can derive statements about “what ought to be done” from statements of fact, Emmet invites attention to the following example: “You ought to help her because, after all, she is your mother.”<sup>109</sup> Here, Emmet says, the question is whether the obligation to help follows from the fact of parenthood, or more generally, whether a statement about what ought to be done in a social situation follows from a statement of fact. Emmet insists (and Fuller would agree) that it does. For Emmet, this “fact is not a mere fact”<sup>110</sup>—in Fullerian parlance, a “neutral datum”<sup>111</sup>—such as the fact that I am sitting at my desk writing these words, or that I am five feet, eight inches tall. Rather, “it is a fact of social relationship. And a fact of social relationship is one about people occupying roles *vis-à-vis* each other.”<sup>112</sup> The fact of parenthood *qua* fact of social relationship is value laden in that it is “understood as a relationship in which certain conduct is expected as appropriate to the roles of the people involved.”<sup>113</sup> The notion of “role” is a bridge between “factual descriptions of social situations and moral pronouncements about what ought to be done in them.”<sup>114</sup>

Fuller’s claim that the eight canons constitute a morality should be understood along the preceding lines. For, as he says, the eight canons “constitute a special morality of role,”<sup>115</sup> and a “[r]ole morality is patently a morality of interaction.”<sup>116</sup> That is, it is intrinsic to a process of human interaction. It is “not something projected on those processes by a moralistic outside observer”;<sup>117</sup> rather, “it

<sup>105</sup> Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 639 (1958).

<sup>106</sup> *Id.* at 638.

<sup>107</sup> D. HUME, *supra* note 85, at 484.

<sup>108</sup> See, e.g., D. EMMET, *supra* note 76, at 40-41 (moral expectations are “so strongly grounded in custom and so widely accepted that they have come to seem self-evident”; yet there is good reason for them, they are not arbitrary).

<sup>109</sup> *Id.* at 40.

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., *Rejoinder*, *supra* note 73, at 102.

<sup>112</sup> D. EMMET, *supra* note 76, at 40 (footnote deleted).

<sup>113</sup> *Id.* at 41.

<sup>114</sup> *Id.*

<sup>115</sup> L. FULLER, *supra* note 3, at 206.

<sup>116</sup> *Id.* at 239.

<sup>117</sup> *Id.* at 218.

is a part of social reality."<sup>118</sup>

Again, the norms of the morality internal to law are associated with institutional roles. With Emmet, Fuller holds that "the notion of a role has a reference to a norm of behavior built into it."<sup>119</sup> That is, "a notion of some conduct as appropriate"<sup>120</sup> is built into the notion of a role. These roles are constructed in and by human interaction, and the norms of behavior built into them consist of stable interactional expectancies. The interactional aspect provides a basis for introducing the element of reciprocity.

### E. Role Moralities

Fuller's internal morality of law is a morality of interaction. That it is not a critical morality emerges clearly in chapter 3 of *The Morality of Law*, where Fuller compares the internal "moralities of science and of law," inviting attention in each case to the "distinctive ethos" of the enterprise.<sup>121</sup> Specifically, he invites attention to the "responsibilities of scientific morality"<sup>122</sup> (for example, to publish when an important discovery is made even if the discoverer "can foresee that a rival scientist, building on it, may perhaps be enabled to make a further discovery overshadowing his own"<sup>123</sup>) and questions in this context that parallel those apposite to the "activity we call law."<sup>124</sup> Both of these moralities are role moralities. A role morality is an interactional morality; it is concerned with how one should act in a certain capacity. It is a morality that "carries specific obligations," but, as Emmet says, these obligations are "to be distinguished from those of purely personal morality, or from general obligations to human beings as such."<sup>125</sup> In short, a role morality "sets forth special standards applicable to the discharge of a distinctive social function."<sup>126</sup> Roles and role moralities are intrinsic to forms of human association and interaction.

As Emmet points out, an institutional role is not timeless; rather, it is "a pattern of routine behaviour in space and time in a given society, guided by normative expectations."<sup>127</sup> The pattern itself is subject to change "because it comes out of an historical pro-

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<sup>118</sup> *Id.* at 219.

<sup>119</sup> D. EMMET, *supra* note 76, at 140.

<sup>120</sup> *Id.* at 40; *cf.* L. FULLER, *supra* note 3, at 239.

<sup>121</sup> L. FULLER, *supra* note 3, at 121.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 122.

<sup>125</sup> D. EMMET, *supra* note 76, at 159 (footnote deleted); *see* L. FULLER, *supra* note 3, at 193 (indicating that role morality is "no mere restatement of the moral principles governing human conduct generally").

<sup>126</sup> L. FULLER, *supra* note 3, at 193.

<sup>127</sup> D. EMMET, *supra* note 76, at 151.

cess of interactions between individuals, but it is sufficiently regular over a period to be whittled out and fixed for theoretical purposes."<sup>128</sup> A role is a capacity in which someone acts in relation to others; it "is a name for a typical relation in which typical action is expected."<sup>129</sup> Reflecting the specific character of such a social relation, a role morality outlines a way of acting "which is considered appropriate in a relation of that kind, either for functional reasons or from custom and tradition."<sup>130</sup> It consists of the stable interactional expectancies of those persons who enter into the relation in question, for example, lawyer and client, doctor and patient, judge and litigant, lawmaker and citizen. In short, the notions of role and role morality apply to relationships which (1) are sufficiently structured to be "whittled out and fixed for theoretical purposes," that is, are neither transitory nor spontaneous, and (2) have some pattern of conduct associated with them, a more or less diffuse notion of appropriate behavior, which is "recognized in the breach as well as in observance."<sup>131</sup> Role moralities and the stable interactional expectancies that comprise them are identified through realistic consideration of complexes of human interaction. The norms of a role morality are not derived from reason alone, though, to be sure, reasons for them can be offered—such norms are neither self-authenticating nor arbitrary. Ordinarily such reasons "refer to some policy or way of life or form of human relationship judged to be good."<sup>132</sup>

It is clear that the notions of role and role morality apply to the relationships which obtain among those engaged in the scientific and legal enterprises. Both are, of course, purposive activities; but that they are purposive activities does not in itself provide a warrant for use of the term "morality" in one's discussion of them. Rather, the warrant is provided by the character and structure of the social or interactional relationships these activities involve.

Fuller argues that there is a necessary connection between law and morality. His argument has two parts. First, he argues that the eight canons of lawmaking are internal because they attach to the legislators' task. Second, he argues that they constitute a morality because they characterize the responsibility of legislators in the exercise of their authority. In short, the eight canons are the elements of a role morality. But if the canons are internal and they constitute a morality, then there is a necessary connection between law and morality. That is Fuller's argument in a nutshell.

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128 *Id.*

129 *Id.* at 170.

130 *Id.* at 14.

131 *Id.* at 169.

132 *Id.* at 52.

There are two ways to attack Fuller's argument: one can defeat the argument by showing that the canons are not internal or by showing that they do not constitute a morality. Most of Fuller's critics mount the latter sort of attack. For example, both Hart<sup>133</sup> and Dworkin<sup>134</sup> accept the claim of internality but raise objections to the claim that the eight canons constitute a morality. Their criticisms, however, rest on a failure to understand that (1) the concept central to Fuller's argument for the moral status of the canons is that of role responsibility, not that of purpose; and (2) the canons are principles of a social morality, that is, a morality of interaction. In both cases the attempt to show that Fuller's argument fails in the second way turns on a showing that the concept which is central to the argument regarding internality (namely, purpose) is such that the principles are merely principles of strategy or good legal craftsmanship. But the concept which is the linch pin of the argument for the morality designation is not purpose, so the objections are beside the point. The notion of purpose pertains directly to the internality claim. In other words, purpose is the central concept in the argument that the connection between the canons and the law is necessary. The claim that the canons constitute a morality is separate and the key element in the argument for it is the concept of role responsibility.

#### F. Answering the Critic's Question

The critic asks, "Are the role responsibilities of the law-giver, enumerated in the eight canons, moral responsibilities?" The short answer "yes" is too short. It is too short because the critic's objection is informed by a conception of morality that is rather different from that underlying Fuller's claim that the canons enumerate moral responsibilities. Most importantly, this short answer does not reveal that these role responsibilities are responsibilities of a social morality, a morality of interaction: If the critic's point is that these role responsibilities are not moral in the sense of critical morality, we should happily grant that he is right. But it is not Fuller's intention to argue that they are moral in this sense. Indeed, given that Fuller conceives of morality as a social phenomenon and holds that such diverse critical moral theories as utilitarianism and Kantianism lack a social dimension and misconstrue the means-end relation, it would be rather surprising to find him arguing that role responsibilities are moral in the sense of critical morality.

I am no mind reader, but I suspect that the reader may con-

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<sup>133</sup> Hart, *supra* note 23, at 1285-86; see also H. HART, *THE CONCEPT OF LAW* 202 (1961); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623-24 (1958).

<sup>134</sup> Dworkin, *Philosophy*, *supra* note 14, at 669.

clude that Fuller's critic is right after all. In a sense he is, but as with the short answer above, we ought not walk away just yet. For although the critic's point is a point well-taken, it is not well-taken as an objection to Fuller's theory. Fuller claims that the role responsibilities of the law-maker are *X*. The critic points out that they are not *Y*. But here *X* and *Y* are different. The game is not over, it is just beginning.

In fairness to his critics, I should say that Fuller muddies the waters. Identifying his theory as a version of natural law theory, he argues that there is a necessary connection between law and morality and, as it were, presents an engraved invitation to understand his work in precisely the way most of his critics do, that is, as a sustained effort to establish that law is necessarily connected to critical morality ("morality proper").<sup>135</sup> But as we have seen, rather than arguing that law is necessarily connected to morality proper, Fuller argues that law is necessarily connected to social morality. When Fuller claims that the eight canons internal to the enterprise of law are moral, he means moral in the sense of social morality.<sup>136</sup> And it should be noted that the social morality in question 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.

#### CONCLUSION

Like Hart, Fuller holds that an act is a lawmaking act only if it complies with the rules specifying the essential lawmaking procedures. But Fuller denies what Hart asserts, namely, that the rules specifying the essential lawmaking procedures are "unified by their hierarchical arrangement" in a rule of recognition, that is, "a legally ultimate rule [that] differs both from the ordinary subordinate rules of the legal system and from ordinary social conventions or customs."<sup>137</sup> Fuller objects to Hart's talk of a single rule and he insists that Hart's distinction between the legal and the social cannot be made.<sup>138</sup> Indeed, for Fuller, these rules are the rules of a social morality that makes law possible. To be sure, Fuller speaks of natural laws in this connection. But, as Summers makes plain, what Fuller has in mind are natural laws of social order, that is, "compulsions necessarily contained in certain ways of *organizing* men's relations

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<sup>135</sup> J. RAZ, PRACTICAL REASON AND NORMS 162 (1975); J. RAZ, *supra* note 2, at 213.

<sup>136</sup> R. SUMMERS, *supra* note 9, at 55.

<sup>137</sup> Hart, *supra* note 23, at 1293.

<sup>138</sup> R. SUMMERS, *supra* note 9, at 42-61.

with [one an]other,"<sup>139</sup> compulsions intrinsic to forms or processes of social ordering that are born of and sustained by human interaction. Moreover, by lowering the banner of natural law and raising the banner of economics in its place, Summers helps the reader to see how this point is related to a difference between the starting points and interests of mainstream legal philosophers and advocates, such as Fuller, of a processual legal philosophy.

At Summers's hand, what some regard as "high romance" in Fuller's work has settled down to some "cooler form of regard."<sup>140</sup> But, as Hart suggested in 1965, although Fuller's "many readers will feel the drop in temperature . . . they will be amply compensated by an increase in light."<sup>141</sup> Indeed. Robert S. Summers's *Lon L. Fuller* deserves careful and widespread attention.

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<sup>139</sup> *Id.* at 73 (quoting Fuller, *American Legal Philosophy at Mid Century*, 6 J. LEG. EDUC. 457, 476 (1954)) (emphasis supplied by Summers).

<sup>140</sup> Hart, *supra* note 23, at 1296.

<sup>141</sup> *Id.*