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> Now there ain't nobody nowhere nohow gonna ever understand me the way you did.
>
> — Bruce Springsteen[1]

In 1985, I published in the *Michigan Law Review* a review[2] of a recent book by Professor Robert S. Summers on the legal philosophy of Lon Fuller.[3] Professor Summers has published in the *Cornell Law Review* an ironically titled criticism of my review[4] and of another review.[5] In a number of respects, Professor Summers' *Assessment* has served to increase my understanding of his book, and I trust that other readers will be similarly benefited. Although Professor Summers' response to my review of his book takes issue with what I said on a number of points, I strongly suspect that few readers would be interested in a detailed defense of what I said in that review. Such an exercise is likely to be as unproductive to the participants and as incomprehensible to the reader as the "He said I said . . . but what I really said was . . . and anyway what I meant was . . . and only an idiot would think that I meant . . ." exchanges between gonzo historians that fill the back pages of the *New York Review of Books.* Several of the points that Professor Summers makes are worthy of some further attention, however, if for no other reason than that they demonstrate

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1. Springsteen, *Bobby Jean* (CBS Records, Inc. 1984) (title appears on Springsteen's *Born in the USA* album).

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

3. R. SUMMERS, LON L. FULLER (Jurists: Profiles in Legal Theory No. 4, 1984).

4. 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).

5. Wueste, *Fuller's Processual Philosophy of Law* (Book Review), 71 CORNELL L. REV. 1205 (1986). Professor Wueste responded to the concerns expressed by Professor Summers in Wueste, *Morality and the Legal Enterprise — A Reply to Professor Summers,* 71 CORNELL L. REV. 1252 (1986).

the contemporary significance of some very old debates. Among the topics on which the differences between my views and those recently expressed by Professor Summers might matter are first, the meaning of the question whether a judicial decision is good law, second, the underpinnings of the morality characterization given to particular practices or goals within a legal system, and third, the significance of moral criticism. On each of these topics, I will give a very brief statement of how Professor Summers and I appear to differ,[6] and attempt to explain why the differences may be important.

I. WHAT DO WE MEAN WHEN WE ASK "IS THAT GOOD LAW"?

Professor Summers asserts that I fail to grasp what lawyers mean when they ask whether a decision is "good law."[7] Although he does not explain what lawyers *do* mean by that question, one can draw the inference that he thinks the question is a matter of substantive goodness "that draws heavily on moral ideas."[8] There may well be occasions when the words "good law" are used in such a way that the phrase has some connotation of substantive goodness. Without some special contextual suggestions to the contrary, however, it seems to me that the routine interpretation of the "good law" question would instead indicate that it is primarily an inquiry about whether the decision is currently valid, in the sense of being capable of exerting some binding or persuasive effect on the decision of future cases.

When performing any sort of serious linguistic analysis, one should be attuned to the ordinary way in which people, particularly professionals, speak. In this regard, a tin ear is as damaging to the linguistic philosopher as it is to the music critic. As I understand common professional speech, substantive goodness would be questioned along the lines of whether a judicial decision is "a good case" or "a good rule" or "a good decision."[9] In the situation in which the substantive goodness of a statute is at issue, the question is likely to be whether the statute is "a good law," which even more closely resembles the "good

6. Professor Summers' *Assessment* contains a number of complaints about the way my review attributed to him positions that he does not hold. To the extent that I have misunderstood Professor Summers in any significant way, I can assure him that, however unskillful he may consider the execution to have been, my review was a good-faith attempt to identify weaknesses that I perceived in *Lon L. Fuller.* It was not an effort to "trash" the book by attributing to him absurd positions that have no foundation in the book itself.

7. *See* Summers, *supra* note 4, at 1248 n.76.

8. *Id.* at 1248.

9. To be accurate, one would need to distinguish between "a good case" and "a good rule" on the basis of whether the evaluation encompassed all or only part of what the court had decided. Such a degree of accuracy, I suspect, is more a matter of intuitive understanding and context than it is a result of conscious choice.

law" terminology. What these substantive goodness inquiries have in common is that in each instance the key term is preceded by an indefinite article. The question about "good law," that is, one that lacks the indefinite article, is not a shorter version of the same question; it is a different question.

Drawing the distinction between the two questions does not in any fashion commit the questioner to the position of denying the importance of the substantive goodness question. It does, however, suggest the need for an explanation of why one would want to ask a legal validity question that is separate from, and arguably analytically prior to, the question of substantive goodness. From another perspective, one could ask what, if anything, is lost by interpreting the validity question as an inquiry about substantive goodness. Although I do not pretend to answer these questions as well as such scholars of jurisprudence as H.L.A. Hart,[10] I will attempt to indicate one of the major reasons why I think the distinction matters.

When attempting to predict what a court will do in a particular dispute, a lawyer needs to understand more than the contemporary community mores with which a decision may or may not be in tune.[11] In our legal system in which judges purport to operate under a rule of law that includes a doctrine of precedent,[12] a judicial decision can be understood to create a force that is analogous to resistance within an electrical circuit.[13] A lawyer striving for a specific result must recognize that an unfavorable precedent may create a "resistance" that has an institutional character qualitatively different from the more explicitly economic, political, or ideological pressures for and against change. None of this is to deny that an idea "whose time ha[s] come"[14] will be better able to overcome the resistance of unfavorable precedent. Asking whether a decision is "good law" helps to highlight both the institutional nature of the precedential resistance that needs to be overcome and the special quality of the arguments against change that need to be anticipated and rebutted.

The confusion that may be generated by imprecision in the use of

10. *See* H.L.A. HART, THE CONCEPT OF LAW 204-07 (1961).

11. I am assuming here that reference to conventional morality might produce a particular evaluation. A more likely scenario, I would suggest, is one in which conventional morality provides mixed signals about the substantive goodness or badness of a decision. This leaves aside the evaluation of a judicial decision according to a critical, nonconventional morality.

12. A recent and highly illuminating jurisprudential essay on this subject is Schauer, *Precedent,* 39 STAN. L. REV. 571 (1987).

13. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 110-15 (1978) (distinguishing precedent's enactment force from its gravitational force).

14. Summers, *supra* note 4, at 1247.

such terms as "validity," "acceptance," and "good law" is amply demonstrated by Professor Summers' examples in *Lon L. Fuller* and in his *Assessment.* To illustrate how the general acceptance and the rational appeal of a new legal rule are significant factors in determining its legal validity,[15] Professor Summers offers the example of a jurisdiction's change from a rule that recognizes contributory negligence to a rule that determines liability on comparative negligence grounds. As support for the proposition that the quality of the content of a decision is an important part of the legal validity of that decision, he offers the rule adopted by the Supreme Court of New Jersey regarding the state-of-the-art defense in asbestos products liability litigation — the *Beshada* rule.[16] Professor Summers' discussion of these two situations provides a useful case study on the need to keep separate ideas separate.

In discussing his comparative negligence hypothetical, Professor Summers states that "the idea of comparative negligence was one whose time had come, and it was accepted by virtue of its content, not its source."[17] I think Professor Summers is confusing some very different ideas here. The fact that an idea is one "whose time ha[s] come" is not a reliable indicator that a court will adopt it. One need only look superficially into the law of torts, for example, to find judicial opinions agreeing that an idea's time has come but still refusing to adopt the idea. Nevertheless, I will accept Professor Summers' presupposition that there is in fact language in the opinions of the court with competence to make the shift in legal rules which can be identified as an indication that the shift is a desirable one that is on the way. In the terms of the metaphor introduced earlier, this type of judicial language can indicate that the resistance created by the precedent in favor of a contributory negligence rule is weakening.

Professor Summers underemphasizes the significant fact that the shift from contributory negligence to comparative negligence is an exercise in making new law, that is, an exercise in innovation.[18] The

15. R. SUMMERS, *supra* note 3, at 50.

16. Summers, *supra* note 4, at 1248 n.73. *See* Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982) (manufacturers and distributors of asbestos products not permitted to assert as defense to strict liability failure-to-warn claim the fact that they neither knew nor could have known that asbestos was dangerous when it was marketed).

17. Summers, *supra* note 4, at 1247.

18. *But cf.* R. DWORKIN, LAW'S EMPIRE 49-53 (1986) (legal decisionmaking is an exercise in creative interpretation). Professor Dworkin would say that my innovation description is accurate, but only in a trivial sense. *See id.* at 6. One might say many things about the relative merits of contributory negligence and comparative negligence and about the wisdom of a court that adopts the latter rule. Nevertheless, until the court does so, the observation that the law of the state is anything other than contributory negligence and that after the decision the law of the state is now different from what it was is certainly not trivial. A description of judicial decision-

idea's attractiveness to the court with the competence to adopt it within a particular jurisdiction is much more likely to stem from the appeal of the idea's content than from the pedigree of the idea's origin,[19] but if that is all that is meant by an idea's being "accepted by virtue of its content, not its source," the point is so obvious as to be uninteresting. Professor Summers' statement does acquire meaning if we shift our focus from the action of the court making the (new) comparative negligence law to the reaction shown by some other group of people. With this new focus, we could inquire about the "acceptance" of the comparative negligence rule from the perspective of lower courts, of lawyers, or of the high court at a later date. It is in the context of this shift in perspective from the original enactment of a rule to its subsequent treatment that Professor Summers' example of the *Beshada* state-of-the-art defense becomes relevant.

The question of "whether to give effect even to a *very recently* announced common-law rule"[20] can be understood as a question of "acceptance" in two different senses. In a narrow sense, acceptance is a matter of the continued *existence* of the legal rule. In a broad sense, acceptance is a question of the *extension* of the rule. It is true that lawyers may criticize the new rule, and argue that it ought to be overruled. If those arguments are successful and the decision is overruled, the common-law rule will no longer exist, and in that way it will have failed to be accepted in the narrow sense, that is, as a legal rule with continuing validity. An alternative way of depriving a decision of acceptance in the narrow sense would be the enactment of a statute setting forth a contrary rule.[21]

Professor Summers' *Beshada* example illustrates the second, or broad, sense in which a new rule might be said to run into problems with acceptance. The *Beshada* rejection of the state-of-the-art defense was, as Professor Summers correctly points out,[22] severely criticized,

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making that depicts this particular situation as innovative in a trivial sense seems to me to have made a misstep at the outset, whatever that theory's merits might be in explaining and guiding other aspects of adjudication.

19. On occasion, one court may appear to be following another court's decisions so closely that it is difficult to determine the extent to which the former is impressed by the ideas themselves or the fact of their having been adopted by the other court. For an illustration of this relationship between the highest courts of Alaska and California, *compare* Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979), *with* Barker v. Lull Engg. Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). This would not appear to be the situation contemplated by Professor Summers' statement.

20. Summers, *supra* note 4, at 1248 (emphasis in original).

21. A provision that would accomplish this result with regard to the *Beshada* state-of-the-art rule has been part of many of the federal products liability legislative proposals. *See, e.g.*, S. 44, 98th Cong., 1st Sess. §§ 5(e), 6(c) (1983).

22. *See* Summers, *supra* note 4, at 1248 n.73.

but that criticism can best be understood as making the argument that the *Beshada* rule is not "a good rule." It is still important to realize that a heavily criticized decision can remain "good law" in the narrow sense of acceptance, and that *Beshada* in fact remains "good law" in New Jersey to this day.[23] What Professor Summers ought to mean by his comment that "the court which had decided it more or less abandoned it as a precedent"[24] is that *Beshada* is not currently considered by the court which adopted it to be "a good rule" outside of the specific setting of asbestos products liability.[25] Saying instead that the decision is not "good law" addresses the question of legal validity, and that question needs to be kept separate from the question of "substantive goodness or rightness"[26] in order to maintain an accurate depiction of the legal landscape.

The *Beshada* rule also illustrates that the broad sense of acceptance as extension can proceed along two dimensions, doctrinal and spatial. The New Jersey Supreme Court's refusal to extend the rule to a drug products liability case[27] reflects the failuré of the decision to achieve a broad doctrinal acceptance. A recent decision by the highest court of Maine not to adopt the *Beshada* rule in an asbestos case[28] reflects the failure of the *Beshada* decision to achieve a broad spatial acceptance.[29]

A linguistic analysis that fails to distinguish clearly between whether something is "good law" and whether something is "a good rule" is deficient for a number of reasons. First, it can fail to capture the institutional competence character of judicial responses to some arguments for change. An idea whose time has come may be thwarted by a judicial statement to the effect that, however much the court may agree that the suggested change is a good idea, the proper forum in which to advocate the change is the legislature. As long as courts seek to portray what they do as something other than purely or overtly political decisionmaking, a previous decision that is "good law" may very well serve to prevent a judicial move to what even the courts

23. Recent authority continues to hold that in New Jersey asbestos products liability cases, the asbestos manufacturer will not be allowed to assert a state-of-the-art defense. *See* Prod. Safety & Liab. Rep. (BNA) No. 45, at 791 (Nov. 7, 1986) (discussing Meloni v. Johns-Manville Sales Corp., No. 81-2542 (D.N.J. 1986)).

24. Summers, *supra* note 4, at 1248 n.73.

25. The Supreme Court of New Jersey has refused to extend the *Beshada* rule to a different type of products liability situation. Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984).

26. Summers, *supra* note 4, at 1248.

27. *See* note 25 *supra.*

28. Bernier v. Raymark Indus., 516 A.2d 534 (Me. 1986).

29. Within the field of products liability, the decision that best exemplifies broad doctrinal and spatial acceptance is MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

might agree is "a good (*i.e.*, better) rule." Second, the *Beshada* example illustrates the role of a particular kind of advocacy when an attorney encounters the resistance created by a recently enacted common-law rule. One might easily have predicted when *Beshada* was decided that the Supreme Court of New Jersey would be receptive to arguments to limit the doctrinal scope of application of the *Beshada* rule, while nevertheless being skeptical that the court would make a complete about-face so soon after deciding *Beshada.* When arguments for such a limitation are made, it might be said that the thrust of the argument is one that implicates the broad sense of "acceptance," so that the rule is not given an extended or expanded scope of application. Again, what needs to be recognized is the difference between these limiting arguments addressed to future judicial action and the separate question of the legal validity of the rule that has been adopted by a court with the power to bind lower courts. It is that difference that I fear is too easily obscured by the kind of description of legal validity that Professor Summers offers.

II. The Underpinnings of a Morality Characterization

One of the criticisms I suggested in my review of Professor Summers' book concerned the incompleteness of the account that he offered of the moral base of a natural law theory. I attempted in my review to raise questions about the way legal philosophers of the natural law schools sometimes arrive at the morality characterization of the specific tests they wish to incorporate into the determination of legal validity. The example I used — the identification of an opportunity to obey the law as the value that is served by the principles of Fuller's inner morality of law[30] — involved a particular line of Fuller's argument of which Professor Summers' earlier writings had appeared to be critical and about which *Lon L. Fuller* seemed to express no reservations.[31] This example was also meant to show how the reader would have benefited from a more carefully developed explanation of why Professor Summers has overcome his earlier reservations.[32] In his book, Professor Summers identified a "fair opportunity to obey the law" as a moral value.[33] I should have made it clearer in my review, when I questioned the steps by which that opportunity is character-

30. LeBel, *supra* note 2, at 723.

31. *See id.* at 723-24.

32. *See id.* at 721-23. Professor Summers acknowledged this point in his *Assessment,* and then took issue with Professor Wueste on the reasons supporting such a change. *See* Summers, *supra* note 4, at 1234-38.

33. R. Summers, *supra* note 3, at 37.

ized as a moral value, that I was not suggesting that Professor Summers' characterization necessarily fails unless he can set out a full-fledged theory supporting it.[34] Nevertheless, the way in which one views an opportunity to obey the law is a matter of some consequence. As I will try to show here, a mere statement that it is a moral value leaves too many important questions unanswered.[35]

The phrase "a fair opportunity to obey the law" is itself not free from ambiguity. A preliminary question that might be asked is whether *any* lack of an opportunity to obey the law is unfair or whether instead only *some* failures to provide such opportunities are unfair. If the latter, less ambitious assertion is what is meant, then a proponent of this particular standard of morality ought to explain how individuals and officials might distinguish between the fair and the unfair lack of an opportunity to obey. If instead the former, stronger point is being made, so that any lack of opportunity to obey the law is to be considered unfair, the notion of fairness that compels such a conclusion should be identified. Is an opportunity to obey the law a right? If so, what is its source? If it is a right, is it absolute or is it qualified in some way? Is an opportunity to obey the law important for instrumental reasons? If so, toward what goal does it aim and why is this the way to achieve that goal? In the absence of at least some discussion of points such as these, one simply does not know how Professor Summers' particular value — an opportunity to obey — is to be understood in theory or in operation. This point may appear in the abstract to be fairly trivial, or not worth the effort I am suggesting. What needs to be recognized, however, is the key role that Professor Summers assigns to this point. It is the fair opportunity to obey the law that supplies the answer to the question of why Fuller's process values constitute an inner *morality* of law. "Because they provide a fair opportunity to obey the law" is no more satisfactory an answer by itself than is the even more cursory response, "Because they're fair."

An example of why I think this matters may help to clarify my position. I set out above a strong and a weak version of the meaning

34. *But cf.* Summers, *supra* note 4, at 1239. Professor Summers is correct to point out that if I were to make the claim that fairness is not a moral value, I should be required to support or defend that claim. *See id.* at 1240. I did not, however, make such a claim.

35. I do not suggest that fairness does not require an opportunity to obey the law, or that a legal system that completely ignores the provision of such an opportunity may be characterized as fair. There are, however, some significant practical questions that follow from the identification of an opportunity to obey the law as the value that lends support to the "inner" moral character of a legal system. Unless Professor Summers is making the unlikely claim that there is only one way to view how and why the opportunity to obey the law is a necessary component of fairness, a critical step in the attempt to bolster the reader's understanding of Fuller's morality characterization seems to me to be missing.

of the assertion that fairness requires an opportunity to obey the law. Instead of there being only these two options, the meaning of the assertion could range along a spectrum from the strongest to the weakest claim. Where one chooses to place the claim along that spectrum can have important consequences for the moral evaluation of a legal system. A consideration of strict liability in tort will illustrate those consequences. Suppose that a manufacturer of a machine used in an industrial process designs and constructs the machine in such a way that at all relevant times the manufacturer's conduct cannot be characterized as negligent. In the two decades after the manufacture and sale of the machine, the law of negligence is supplemented with a doctrine of strict liability in tort that focuses on the safety of the product rather than the conduct of the manufacturer. Applying this strict tort liability, a court holds the manufacturer liable to an employee of a purchaser who is injured while using the machine. The stronger the claim about the fairness of an opportunity to obey the law, the more likely it is that this hypothetical case presents not only significant policy questions but substantial moral problems as well.

When we actually look for the underlying theories of fairness or morality that might be used to determine the strength of the moral claim about an opportunity to obey the law, we find in practice both in our society at large and in the institutional materials of our legal system not a single universally accepted theory of morality. Rather, we find a condition that Professor Dworkin refers to as a moral pluralism.[36] As Professor Summers notes,[37] the choice between social contract theories of justice and utilitarian theories might produce conflicting answers to specific normative questions within a particular legal system. This situation creates the possibility that a particular value, such as an opportunity to obey the law, is both underdetermined and overdetermined by theories of morality. A particular moral theory might support any number of various schemes of law, including one in which an opportunity to obey the law plays a very weak role and is easily trumped by competing values. It might instead be the case that all theories of morality demand a legal system that gives a substantial weight to an opportunity to obey the law. If Professor Summers is arguing that an opportunity to obey the law is what gives the process values of Fuller their moral character, and that this moral character should be useful in evaluating current legal practices, it would be helpful to know exactly what we are being asked to accept

36. *See* R. DWORKIN, *supra* note 18, at 213.

37. *See* notes 34-35 *supra.*

— a particular theory of morality or fairness, or an overarching statement about morality or fairness that purports to give substantial weight to this opportunity under any particular theory. I do not mean to suggest that Professor Summers has no answers to these questions. Indeed, he begins to sketch his answers in his *Assessment.* My review and my response to his *Assessment* are intended to suggest that, without considerably more careful and thorough explanation than was provided in Professor Summers' book, it is difficult to apply his characterization of Fuller's inner morality of law to the contemporary legal world.

III. THE SIGNIFICANCE OF MORAL CRITICISM

In my review of Professor Summers' book, I took one of his examples as an opportunity to question whether natural law thinking assigns morality a heightened role within the concept of legal validity. I drew attention to the disparity between the moral claim that he made regarding a right to a legislative hearing and the current practice of our legal system in which no such general right to a legislative hearing is recognized.[38] In his response, Professor Summers demonstrates, perhaps inadvertently, precisely what I feared was true, namely, that in assigning moral value issues a role within the determination of legal validity, the significance of moral evaluation can be trivialized. He suggests that I read him "to claim that parties potentially affected by a proposed law have a *legal* right to a legislative hearing," and thus that I appeared to charge him with an "appalling ignorance of the *law.*"[39] Neither in my review nor here do I accuse Professor Summers of any such ignorance of the law. In fact, his vehement protest that he was "writing of *moral* values and *moral* rights!"[40] rather than legal rights underscores the point I was raising.

The kind of moral criticism that Professor Summers was making in *Lon L. Fuller* should be of some significance. He claims that parties affected by a proposed law have a moral right to a legislative hearing, although in our legal system those parties have no such legal right to that hearing. This disparity raises important questions about the role of moral criticism in determining legal validity. At the very least, one would expect a call for reform of the current legislative process, so that the recognition of this moral right could be incorporated into the legal system. But an attempt at such institutional reform would lead

38. *See* LeBel, *supra* note 2, at 724.

39. *See* Summers, *supra* note 4, at 1249 (emphasis in original).

40. *Id.* at 1249 (emphasis in original).

us back to the same ambiguity that surrounds Professor Summers' argument about the fairness of an opportunity to obey the law.[41] What is the strength of this particular moral value? Will other values outweigh the moral right to a legislative hearing? If so, which values and under what circumstances? Even more than in the case of the opportunity to obey the law, the identification of the moral theory supporting the right to a legislative hearing would be essential to an understanding of how one is to treat this moral claim.

Suppose, however, that the more likely outcome of this call for reform is a refusal to incorporate a right to a hearing into the legislative process. What are the consequences of operating a legislative process that has this moral imperfection? Is the process itself so flawed that nothing that issues from it can be in accord with a morally correct notion of a legal system? Are there instead more particularized inquiries regarding the lack of a hearing on specific legislation that would determine whether the system as a whole has the "inner morality" necessary in a legal system? If only individual statutes are subject to question, what is the strength of the objection to their enactment? Does the process flaw call into question only the moral character of the statutes enacted without a hearing, or is their validity being questioned as well?

Questions of this sort seem to me to be the natural consequences of the positions that Professor Summers has staked out. On some of the points on which he has criticized my review of his book, I hope that I have demonstrated that there is in fact no disagreement between us. As to the other points addressed in the three substantive sections of this response, I trust that I have raised a few points of disagreement with a sufficient degree of clarity so that the reader can understand what the disagreement is and why the resolution of those disagreements might be a matter of some significance.

41. *See* notes 30-37 *supra* and accompanying text.