
BOOK REVIEWS

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Robert Summers. *Instrumentalism and American Legal Theory*. Ithaca and London: Cornell University Press, 1982. Pp. 295 [\$24.50]. Reviewed by David Stevens.*

Introduction

Robert Summers' *Instrumentalism and American Legal Theory*¹ is a difficult and, in many places, ponderous book that attempts to describe, develop and criticize a theory of law which Summers calls "pragmatic instrumentalism". This theory, he claims, "qualifies as America's only indigenous legal theory and represents a genuine and substantial contribution to Western legal thought".² Summers states that his primary aim in the book is to explore "the instrumental and pragmatic facets of legal phenomena",³ and not to present an historical study of the various American figures whom he identifies as the intellectual progenitors of his theory. Among his secondary aims is the provision of "a comprehensive framework within which it may be possible to make instrumentalist theorizing . . . somewhat more intelligible and coherent than it has been previously."⁴

Summers' book is a synthesis and elaboration of three articles that he has written during the last eight years. *Pragmatic Instrumentalism in Twentieth Century American Legal Thought — A Synthesis and Critique of Our Dominant General Theory about Law and its Use*⁵ is a lengthy but more succinct statement of the thesis presented in the book under review and probably all that needed to be said on the subject. *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*⁶ is a short account of the major points of disagreement between Lon Fuller and the American

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¹Robert Samuel Summers, *Instrumentalism and American Legal Theory* (1982).

²*Ibid.*, 12. The author qualifies this statement by adding that the theory "is far from a comprehensive and finished effort".

³*Ibid.*

⁴*Ibid.*, 13.

⁵(1981) 66 Cornell L. Rev. 861.

⁶(1978) 92 Harv. L. Rev. 433.

legal realists. *Naive Instrumentalism and the Law*⁷ is one of a collection of essays in honour of H.L.A. Hart. In it, Summers criticizes "naive instrumentalism" by arguing for many "forms of goal-structures" and consequently many varieties of instrumentalism in the law. In addition, earlier versions or portions of the book have appeared in Dutch in 1981, and German in 1982.

Instrumentalism and American Legal Theory joins what has become an American academic pastime of substantial proportions: the re-appraisal and occasional rehabilitation of a mildly provocative perspective on law — legal realism — and the canonization of the heretofore merely legendary Oliver Wendell Holmes.⁸ It seems that each generation of American lawyers, beginning fifty years ago when Karl Nickerson Llewellyn vouched that "Holmes' mind had travelled most of the road [of realistic jurisprudence] two generations back", has felt a compelling urge to come to terms with the myth of Holmes and to measure their jurisprudence against his thought.⁹ In the words of one contemporary American intellectual historian, G. Edward White:

⁷In P. Hacker & J. Raz, eds, *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (1977) 119. In an earlier article, *The Technique Element in Law* (1971) 59 Calif. L. Rev. 733, Summers developed a taxonomy for the kind of instrumentalist theory he expounds in parts three and four, of his book, so perhaps it would be more accurate to say that the book under review is a synthesis of four not three, articles.

⁸The most recent literature on Holmes includes: Burton, *Justice Holmes and the Jesuits* (1982) 27 Am. J. Jurisprudence 32; Bogen, *Free Speech Metamorphosis of Mr. Justice Holmes and the Jesuits* (1982) 27 Am. J. Jurisprudence 32; Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory* (1982) 10 Hofstra L. Rev. 673; Gorden, *Holmes' Common Law as Legal and Social Science* (1982) 10 Hofstra L. Rev. 719; White, *The Integrity of Holmes' Jurisprudence* (1982) 10 Hofstra L. Rev. 633; Monagan, *Holmes' Common Law: An Originating Venture* (1981) 67 A.B.A.J. 312; Lundquist, *Oliver Wendell Holmes and External Standards of Criminal and Tort Liability: Application of Theory on the Massachusetts Bench* (1979) 28 Buffalo L. Rev. 607.

For a sampling of the recent literature on realism see: Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship* (1982) 95 Harv. L. Rev. 1669; Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore* (1980) 29 Buffalo L. Rev. 195; Tushnet, *Post-Realist Legal Scholarship* [1980] Wis. L. Rev. 1383; Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience* (1979) 28 Buffalo L. Rev. 459; Lyons, *Legal Formalism and Instrumentalism - A Pathological Study* (1981) 66 Cornell L. Rev. 949; Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence* (1981) 66 Cornell L. Rev. 986; Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen* (1981) 66 Cornell L. Rev. 1032; and J.W. Johnson, *American Legal Culture, 1908-1940* (1981).

⁹Llewellyn, "A Realistic Jurisprudence - The Next Step" in K. Llewellyn, *Jurisprudence* (1962) 3, 29. Llewellyn was fond of eulogizing Holmes and was wont, on occasion, to deify him. For example, in 1935, he wrote as his opening paragraph of "Holmes" in *Jurisprudence*, 513:

Men reflect institutions. Men are made of the institutions they have grown into, absorbed in whole or in part, and recombined into an individual personality. But to some men it is given themselves to become an institution. Holmes molds America.

But Llewellyn was not alone, nor was he the first in such profuse praise. See the "Appendix"

Writing about Oliver Wendell Holmes can be likened to playing Hamlet in the theatre: It is a kind of apprenticeship that [American] legal scholars undertake as a way of measuring their fitness to endure the academic travails ahead.¹⁰

Perhaps it is closer to the truth to say that it is through the persistent reassessment and re-interpretation of the thought of the ageless Holmes that each generation of American lawyers begins to understand and express, and on occasion polemicize, its own version of truth in American law. The recurrent references to the "Olympian" are either to give the proffered version of truth the credibility of that pre-eminent American authority or, less frequently, to assault him as the incarnation of all that is wrong, ethically or ideologically, in American Law.¹¹

This longstanding preoccupation with Holmes has been complemented recently by a resurgence of interest in the American realist movement. Much modern scholarship in this vein has, perhaps naturally, identified Holmes as the intellectual progenitor of the realist gospel.¹² Some of that writing appears intended to reassess and consolidate the substantial contributions made by legal realism to modern American positivist thought.¹³ Indeed,

to Llewellyn, *Holmes* (1935) 35 Colum. L. Rev. 485, 490-2, for a compendium of literature on Holmes up to 1935. See also H.C. Shriver, *What Justice Holmes Wrote, and What Has Been Written About Him: A Bibliography, 1866-1976* (1978). In addition, see the summaries of the history of Holmes' hagiography in G. Edward White, "The Rise and Fall of Mr. Justice Holmes" in *Patterns of American Legal Thought* (1978) 174, and in Touster, *supra*, note 8, 673.

¹⁰White *supra*, note 8, 633.

¹¹Gorden's article, *supra*, note 8, is an outstanding example of a reassessment of Holmes' jurisprudence that appears to be intended as somewhat polemical. It is also one of the most interesting and thought-provoking of the recent reassessments. Recent American legal scholarship demonstrates that Holmes can be cited in support of nearly all of America's perspectives on law. Currently, the economics-and-law movement cites Holmes frequently, largely, it appears, out of a desire to give their somewhat skewed view of legal and moral reality a pedigree and perhaps a credibility it might otherwise lack in America. Upon reflection though it is not surprising that Holmes can be cited in support of a vast body of American jurisprudential thought, since the philosophical foundation of most American jurisprudence is, like the philosophical basis of Holmes' thinking itself, predominantly utilitarian and pragmatic in orientation.

¹²"Naturally" because the realists treated Holmes in this way themselves. The best and most interesting accounts of the American realist movement are: E. Purcell Jr., *The Crises of Democratic Theory: Scientific Naturalism and the Problems of Value* (1973) 159-78; G. Gilmore, *The Ages of American Law* (1977); W. Twining, *Karl Llewellyn and the Realist Movement* (1973); W. Rumble, Jr., *American Legal Realism: Skepticism, Reform and the Judicial Process* (1968); A. Hunt, *The Sociological Movement in Law* (1978) 1-60; Currie, *The Materials of Law Study* (1950-51) 3 J. Legal Education 331; and Currie, *The Materials of Law Study* (1955-56) 8 J. Legal Education 1. Perhaps the precursor to all these is M. White, *Social Thought in America: The Revolt Against Formalism* (Boston: Beacon Press, 1949).

¹³See, e.g., Lyons, *supra*, note 8, and 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, *supra*, note 8.

this seems to be the thrust of Robert Summers' work. A few of the more interesting studies associated with this resurgence examine the phenomenon of legal realism in an historical and social context.¹⁴ Others seek to determine where the apparent predisposition to ethical relativism and consequentialism of legal realism and analytical positivism have left modern American legal scholarship.¹⁵

However engaging and thought-provoking the best of these recent studies may be, they all exhibit a somewhat solipsistic view of legal reality: they are manifestly American in their liberal view of what counts in the world. This disposition is not, in itself, particularly objectionable until it is noticed that a view of law developed in a peculiarly American context in response to peculiarly American phenomena is offered by some of these authors as a near-comprehensive explanation of what appears to be a starkly monolithic idea of law. Professor Summers' contribution on Holmes and American legal realism exhibits marked tendencies in this direction, and in this respect his work is remarkably parochial.

The social and academic conditions of American legal realism will be considered briefly below. For the moment it is sufficient to observe that time and place played a principal role in the development of this body of ideas about law. As a consequence, it is only in a context of time and place that one can and should attempt to understand them. Moreover, the peculiar conditions of the growth of this body of ideas about law make it difficult, if not impossible, to abstract from it any general and universally applicable propositions about law. Quintessentially modern-American ideas about right and wrong, the possibility of human knowledge, and the nature of man and society form the very foundation of the legal philosophy exhibited in American legal realism. In his elaboration of the pragmatic and instrumental aspects of that philosophy, Summers often fails to observe and respect the limits that the cultural contingency of ideas places on their translatability. As I will argue later, Summers' study of American legal realism is marred in general by a failure to examine and come to terms with his own and his subject's epistemological, ethical and social preconceptions.

Summers' enterprise is misdirected in another respect. Pragmatic instrumentalism is incongruously offered by Summers as America's answer to analytical positivism, natural law theory and historical jurisprudence. It

¹⁴See, e.g., Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, *supra*, note 8, and Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, *supra*, note 8.

¹⁵See, e.g., Purcell, *supra*, note 12, and Leff, *Economic Analysis of Law: Some Realism about Nominalism* (1974) 60 Va L. Rev. 451, 453 *et seq.*

is, he claims, "a fourth great tradition in Western legal theory".¹⁶ There is something unfortunate and, as it turns out, particularly foreboding in these assertions. Summers appears to view jurisprudence as a positivist legal theorist might view a legal system, composed of discrete and identifiable units or divisions of thought, which behave like concrete objects in the material world. Accordingly, the realm of juris-consults is populated by analytical positivists who "have analyzed the basic concepts that figure in a system of law", natural law theorists, who "have concentrated on notions of the 'right' and the 'good' to be realized through law", and historical jurists, who "have addressed the factors that influence law's content at any given time, the stages of law's evolution, its modes of growth and change and so on."¹⁷ I found this taxonomy to be disappointing in its dismissive reduction of philosophical and sociological thought about law to three static categories.¹⁸ Behind it lies a positivist's comprehension.

Law, for Summers, is a system of abstract concepts. Positivism defines and delimits the concepts, and describes and critically analyzes the conceptual system in which they are contained. Historical jurisprudence explains the social origins of the "content" of the concepts. Natural law discerns whether the "content" is "good" or "bad", "right" or "wrong". Instrumentalism, the emergent fourth school, teaches its students how to manipulate the legal concepts in judicial and social "space". Thus, in Summers' universe, two schools focus upon content and two schools focus upon form. Such austerity betrays a superficiality in perception which, unfortunately, characterizes much of *Instrumentalism and American Legal Theory*. Even accepting the relevance of the taxonomy, Summers' notion of pragmatic instrumentalism is a species of positivism. It is grounded firmly in the conviction that the "is" in law is entirely distinct from the "ought" and that the analysis of the concepts, or in his case the instruments, in the

¹⁶Summers, *supra*, note 1, 19. One is reminded here of the (perhaps unfair) characterization by Grant Gilmore, *supra*, note 12, 78, of William Twining's thesis:

Indeed Professor Twining suggests, by implication, that Legal Realism was, so to say, a play-off for the Ivy League championship, with the combined faculties of the Columbia and Yale Law Schools taking the field against Harvard.

Twining's thesis can be found in Twining, *supra*, note 12, 10-83, 375-87.

¹⁷Summers, *supra*, note 1, 20.

¹⁸I should emphasize that the taxonomy itself is quite common and, by itself, unobjectionable. Categories and taxonomies are, or at least ought to be, designed for particular uses and purposes. My objection to Summers' use of this taxonomy is twofold: first, he appears to believe that if something is categorized it is comprehended and therefore unworthy of further consideration and, second, he appears to believe that without having articulated the purpose of his list, it is a significant endeavour to attempt to add pragmatic instrumentalism to it.

consequently autonomous legal system is an inherently worthwhile pastime.¹⁹ Moreover, the presentation of this aspect of Summers' thesis is a portent of stylistic things to come. At an early stage in the book the taxonomical list, as the principal vehicle of analysis and demonstration, is first used to testify to the simplicity of jurisprudential thought itself. This vehicle reappears under many guises to perform numerous tasks for which it is not suited.

I. Pragmatic Instrumentalism in American Legal Thought

Pragmatic instrumentalism is the name used by Summers to designate a body of thinking about law that he claims developed in America in the first four decades of the twentieth century. It otherwise might fairly and succinctly be described as American sociological jurisprudence, without the sociology, and American legal realism without the extreme behaviourism and moral skepticism of the likes of Underhill Moore, Herman Oliphant, Jerome Frank or Judge Joseph C. Hutchinson.²⁰ Its central statement is that law is an instrument of social control. In its instrumental aspects the theory wants to ask, chiefly, how law can be made more valuable and useful as a tool in the "hands of officials and practical men of affairs".²¹ The pragmatic complement of this view is the assertion that the law is instrumental to ends that are "fact" or "context" specific. Occasionally, asserts Summers, the "instrumental facets of legal phenomena" are directed towards purposes

¹⁹H.L.A. Hart distinguished at least five meanings of positivism "bandied about in contemporary jurisprudence". Principal among these is the view that "there is no necessary connection between law and morals, or law as it is and ought to be", and the view that the "analysis . . . of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena and from criticism or appraisal of law whether in terms of morals, social aims, functions, or otherwise": Hart, *Positivism and the Separation of Law and Morals* (1958) 71 Harv. L. Rev. 593, 601-2, note 25.

²⁰For an example of the application of behaviourist psychology in law, see Moore, *Rational Basis of Legal Institutions* (1923) 23 Colum. L. Rev. 609 wherein Moore described legal institutions in terms of human behavior, "the happening over and over again of the same kind of behavior". Moore argued, at page 613, that "[t]he study of legal institutions must begin with the motivation of habit formation, stabilization, modification, and obliteration, with the 'drives', whether instinctive or otherwise, which motivate one to behave habitually, and the impulses which push in another direction". Here, he asserted, "the psychologists are ready to assist with formulations and facts". White, *Patterns*, *supra*, note 9, and Rumble, *supra*, note 12, develop the thesis, probably correct, that a strong strain of behaviourist psychology runs through all of the works of the leading realists and serves to mark them off from the sociological jurists who are portrayed by White and Rumble as their historical precursors.

²¹Summers, *supra*, note 1, 20.

that are internal to the law's own functioning.²² More commonly, however, the goals of law are chosen from "outside" law. In the grander version of the pragmatic-instrumentalist view (a version which Summers asserts was not fully explored by the realists or sociological jurists), law is described as a means, an instrument, or a technology that lawyers use to design institutions and to give effect to social purposes formulated through a knowledge of society derived from empirical analysis. Lawyers, on this view, are "social engineers". In a slightly more commonplace and, one might add, more influential version of pragmatic instrumentalism, common law lawyers and judges are exhorted to understand their legal rules by asking how those rules actually function in their social setting rather than whether and how they conform to a logically coherent conceptual order. Legal rules are conceived of as the tools of legal reasoning and not as the maxims of an axiomatic system, and lawyers and judges are regarded as officials manipulating those tools to settle private disputes and arrange or legitimate private affairs.

Instrumentalist thinking in legal theory, as Professor Summers rightly points out, is not at all peculiar to American legal realism or American sociological jurisprudence. Herman Oliphant, for example, in a passage cited by Summers, acknowledged the American realists' debt to Jeremy Bentham: "A century ago, Jeremy Bentham saw law not as an ultimate but merely as a means to an end and argued that it should be scientifically exploited as such".²³ Most of the other realists acknowledged, or would have acknowledged, a similar debt.²⁴ Nor is there much doubt that Rudolph von Ihering had, in this and several other key respects, a similar influence on the development and shape of instrumentalist thinking in American jurisprudence.²⁵ In *The Spirit of the Common Law*, Pound acknowledged that Ihering's

²²Summers, *supra*, note 1, 74 *et seq.* For example, one might want to agree with Summers (and apparently argue against his instrumentalists — Summers, *supra*, note 1, 22) that there are certain goals inherent in the adjudicative process that dictate or establish the goals of adjudicative law. At page 74, Summers says: "The instrumentalists did not explicitly recognize that the law itself can be a source and definer of goals. Rather, most of them appear to have assumed simply that particular forms of law draw all their goals from *external* sources such as democratic processes and the advice of experts in the so-called policy sciences — economics, sociology, political science, social psychology, and the like."

²³Oliphant, *The New Legal Education* (1930) 131 *The Nation* 495, quoted by Summers, *supra*, note 1, 60.

²⁴See, e.g., Llewellyn, "A Realistic Jurisprudence — The Next Step", *supra*, note 9, 29.

²⁵Compare the following indictment levelled at Karl Llewellyn by Lon Fuller in his article, *American Legal Realism* (1934) 82 *U. Pa. L. Rev.* 429, 449, note 46:

The citation of authorities is so often a form of intellectual exhibitionism that one hesitates to criticize a man who is free from this ostentation. Yet it does seem to me that Llewellyn errs too far in the opposite direction. I am particularly distressed at the absence of reference to that great pioneer among "realists", Rudolph von Ihering. There are a number of places in Llewellyn's writings where Ihering's views

conception of law as "a means toward social ends, [his] doctrine that law exists to secure interests, social, public, and individual was of enduring value for legal science".²⁶ But there is an even richer tradition to instrumentalist thinking in law than this. One could cite passages from thinkers ranging from Aquinas to Hobbes to the effect that law is in some ways instrumental to purposes, whether social, human or divine. What is peculiar about America's turn-of-the-century variety of instrumentalism are the assumptions that animated it.

Summers', and America's, version of instrumentalism is pragmatic and utilitarian: it makes law an instrument for the resolution of particular problems in particular contexts to ends that are chosen by means of a felicific calculus. Summers' pragmatic instrumentalism asserts (re-iterating William James' statement that truth is a function of "last things, fruits, consequences") that:

[i]deas are to be tested in terms of the difference they make for possible human experience. Brute facts, not abstractions, have primacy, and the brute facts of experience reveal a social reality that is highly plural. It consists of an immense variety of concepts and functional relationships. Problems arise out of these contexts and relations, and solutions are relative to and dependent upon them.²⁷

The concomitant ethical theory, Summers observes in an elaboration of Holmes' "felt necessities of the time", is that:

the social order should respect the existing wants of the day and that when such wants conflict, choices should be made that will maximize satisfactions all around. Existing wants emerge from discrete contexts. These contexts, not ideology, control value, and specific questions of value can be very largely reduced to empirical questions of fact.²⁸

The social theory informing Summers' pragmatic instrumentalism, although seldom explicitly articulated or investigated by the theorists themselves (or, remarkably, by Summers) is probably classical liberal in pedigree. Law, for example, was not perceived as an instrument of class oppression or a reflection of the economic relations of a class society. Nor was law seen as the instrument of a just or natural social order. Rather, for these theorists law was a decidedly neutral force in the prevailing social arrangements.

almost intrude themselves. Llewellyn seems sometimes to imply that prior to American legal realism it had never occurred to anyone to question the "ideology" of the law, or to inquire whether it coincided with the real motivation of legal rules. Yet most of Ihering's life was devoted to ferreting out the social reality concealed behind the "ideology" of the Roman Law.

²⁶R. Pound, *The Spirit of Common Law* (Boston: Beacon Press, 1963) 205.

²⁷Summers, *supra*, note 1, 31.

²⁸Summers, *supra*, note 1, 32.

This posture seems implicit in the theory's assertion that law ought to be guided in its instrumentality by the "felt necessities of the time": law is mere technology; it implements and facilitates; it does not constitute or generate. Law is the form to which society gives the content. Legal theorists, on this view, are confined in their social theorizing to determining what the "felt necessities of the time" demand of law. In Karl Llewellyn's words:

Law and the law official are not therefore in one real sense what *makes* order in society. For them society is given and order is given because society is given. . . . The law, then, the interference of officials in disputes, appears as the means of dealing with disputes which do not otherwise get settled. Less as *making* order than as *maintaining* order when it has gotten out of order. . . . By and large the *basic order* of our society and for that matter in any society *is not produced by law*. . . . Law plays only on the fringes.²⁹ .

Perhaps another way to put this point is to draw an analogy between the pragmatic instrumentalist's conception of law and the classical liberal economists' conception of economic relations in a free-market economy. Advocates of both views posit an independent object of study — law in one case and economic relations in the other — and both advocate what purports to be a value-neutral, scientific investigation and explanation of their object of study.³⁰ When pressed, advocates of both views assert that the facet of society which each seeks to understand, explain and occasionally justify is truly governed by natural forces — in law, the "felt necessities of the time", in market relations, the utility curves of individual transactors — which are beyond control and manipulation and, most crucially, beyond question.

This posture may seem a rather curious one for a theory whose central tenet is that law is an instrument of social control. After all, one quite legitimately might ask: Who or what is controlling this instrument? Who or what makes it go? It seems that beyond responding, "the felt necessities of the time", America's pragmatic instrumentalists were not interested in

²⁹K. Llewellyn, *The Bramble Bush* (1951) 21, 110. To be fair to Llewellyn, this is somewhat of an oversimplification of his view, but it is representative of at least the thrust of much of what he said and thought about law.

³⁰"Science" is a legitimating word in America. It was frequently on the lips and pens of the realists and their predecessors in American legal thought, the so-called "formalists". Notions of science and scientific inquiry vary from age to age. For example, one can contrast the legal science of Holmes (discussed in Gordon, *supra*, note 8) and the science of Underhill Moore (described in Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, *supra*, note 8) or Cook, *Scientific Method and the Law* (1927) 13 A.B.A.J. 303. But from age to age its truth-conferring function remains the same. To the realists, "science" lent the aura of objectivity and value-neutrality to the version of law they sought to propagate. It continues to do so today for the economics-and-law movement.

pursuing this or related questions.³¹ They were, in spite of their ostensible anti-establishment proclivities and iconoclastic fervour, affirmers and supporters of the social status quo.³² This is, of course, a difficult claim to substantiate. It is asserted on the basis of a near-total lack of social theorizing (as opposed to empirical social research) in the writings of the legal lights of the realist and sociological jurisprudence movement.³³ It is appropriate to ask why these lawyers did not pursue the logic of an instrumental conception of law and reach the obvious questions of whose instrument the law was, or whether the goals pursued through law were, for example, conducive to a just or natural social order. My tentative response (for Summers apparently did not think to ask such questions) is that to have engaged in this inquiry might have led, ineluctably, to an undermining of the theory itself.³⁴ In a utilitarian world-view, law must be a value-neutral, non-ideological and apolitical arbiter of interests, allowing the social order to be

³¹Other American variations on the instrumentalist theme place more substantial emphasis on the relation between social and economic power structures and the instrumentality of law. The work of J. Willard Hurst is a prime example of such a variation, as are the contemporary derivatives of Hurst's scholarship, such as M. Horwitz, *The Transformation of American Law, 1780-1860* (1977).

³²Rather like The Right Honourable Lord Denning of Whitchurch.

³³This, in effect, is substantially the same charge that Llewellyn boldly levelled at Pound: see Llewellyn, "A Realistic Jurisprudence — The Next Step", *supra*, note 9, 708, note 3. Llewellyn observed that, insightful as Pound's scholarship might have been, it ultimately lacked the conviction of its sociological pretensions. Thus, said Llewellyn, "[s]ociological jurisprudence remains bare of most that is significant in sociology."

Similarly, it is difficult to see how, when all is said and done, the realists themselves advanced the cause of exposing the "inter-relation" of law and society. Most of their scholarship was devoted to court-centered analysis of law and the advancement and elucidation of their own peculiar jurisprudential thesis. Perhaps, however, their belabouring the point about the indeterminacy of rules has made subsequent generations of American lawyers question the ideological content of American law. In this respect, the realists might be considered the precursors of the Critical Legal Studies movement: see, *infra*, note 35.

³⁴Lon Fuller's demonstration that a "command" theory of law is a necessary part of any theory of law that posits an absolute distinction between law and morality is pertinent here. Of John Austin's reluctance to abandon that tenet of the positivist creed Fuller wrote in his article, *Positivism and Fidelity to Law — A Reply to Professor Hart* (1958) Harv. L. Rev. 630, 640:

All of these problems [concerning the command theory of law] Austin sees with varying degrees of explicitness, and he struggles mightily with them. Over and over again he teeters on the edge of an abandonment of the command theory in favour of what Professor Hart has described as a view that discerns the foundations of a legal order in certain fundamental accepted rules specifying the essential lawmaking procedures. Yet he never takes the plunge. He does not take it because he had a sure insight that it would forfeit the black-and-white distinction between law and morality that was the whole object of his Lectures. . . .

Similarly, any serious investigation into the goals of law or into the question of who controls the instrumentality of law, of who or what "commands", would as surely result in the undermining of the description of law as "lawyers' means" and the forfeiture of the distinction that the realists, like their formalist predecessors, made between law and morality. In brief, the realists' version of the means/end dichotomy is an incarnation of the law/morality dichotomy. The point of making the dichotomy is to allow legal philosophers to fix their gaze upon the

constituted by the natural mechanisms of market forces. Individuals must be left reasonably free from external constraints so that they can pursue the maximization of their individual interests. To the extent that one admits that law is manipulable by anything larger than "interests in context" (for example, by a social class), one denies the possibility of a social order constituted by natural forces, and, as a consequence, one denies the ideological, or at least political, neutrality of law. To the extent that one admits that law is instrumental in the formation and constitution of social order, one denies its very instrumentality (because tools do not constitute) and therefore its value-neutrality (because in denying its instrumentality, one must also deny the possibility of the complete separation of law and morals). The confinement of law's instrumentality, therefore, to techniques of dispute settlement and the arrangement and design of legal institutions had, for America's pragmatic instrumentalists, the perhaps unconscious intention of fostering the utilitarian facade of a value-neutral, non-ideological and apolitical legal system.

It is worth pointing out at this stage that in this, as in several other key respects to be mentioned presently, realism and sociological jurisprudence, or Summers' pragmatic instrumentalism, did not differ markedly from the so-called (American) legal formalism which preceded it and which served rather conveniently as its whipping-boy. Indeed, if one were looking for continuity in twentieth-century American legal thought, one might find it here. Perhaps the most obvious explanation for what occurred in American legal thought in the 1920s, 1930s and 1940s is that a system of thought was developed which had the ultimate effect and, possibly, end of preserving the apparent neutrality of law.³⁵

means of law to the exclusion of its ends. Seriously reconsidering the ends of law would eventually lead to the realization that the dichotomy is false and that the exercise of focusing merely on the means is misconceived. See Fuller, "Means and Ends" in K. Winston, ed., *The Principles of Social Order* (1981) 47-64.

³⁵As a generalization, I think these observations are true enough of the vast bulk of realist and sociological jurisprudence literature. I do not mean to suggest, however, that this literature is totally devoid of social theorizing, investigations of the relationship of law to society or law and ideology. Karl Llewellyn (see the discussion in Twining, *supra*, note 12, 170-202) and Felix Cohen made significant contributions in this direction. The suggestion is simply that most of these legal scholars, like many of their historians, quite naturally accepted without enquiry the liberal assumptions of their age and their nation. They did not question seriously the role of law in a liberal democracy. Mensch, "The History of Mainstream Legal Thought" in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (1982) paints a remarkably different picture. For her, legal realism stands as the direct intellectual antecedent to the Critical Legal Studies movement in its total annihilation of the pretence that the American legal system was, or could be, objective or value-neutral. My reading of events does not entirely persuade me that legal realism had any such effect. If it did, one might ask why the point has to be made afresh, and with such zeal, in the 1980s. Rather, I suggest that the most significant contribution of realism was the regeneration of court law in America by making legal explanations and justifications more harmonious with the social and economic relations of twentieth-century American society. That is the significance of the "functional" approach to law.

II. From Logical Coherence to Functional Coherence

Once one accepts that the utilitarian model of a legal order — a value-neutral, non-ideological and apolitical system of dispute settlement (the commonplace view) and institutional design (the grand view) — is an intelligent and profitable way to conceive of law, one's focus as an academic lawyer naturally shifts from law as politics, law as morality, or law as ideology to law as "legal system". In turn, one's commitment to law as legal system comes to animate a desire to describe and understand, and occasionally to justify, the integrity of that system. It seems to be the case, or to have been the case, that in America a preponderance of activity in the legal system is undertaken by institutions established to settle private disputes. The bulk of this private dispute settlement is done by courts. Thus most of the projects taken up by academic lawyers operating under the influence of utilitarian theory predictably entail trying to describe and understand the process of court-centered dispute settlement. Such writers often seem to forget that this work is predicated on the acceptance of some rather important assumptions. They even come to regard the mechanisms of dispute settlement associated with courts as "law". A great deal of the writing Summers has tapped to generate his theory of pragmatic instrumentalism, and much of the theory itself, focuses on "law" in precisely this sense. Indeed, although the American legal realists made other important contributions to legal theory, it would not be unfair to observe that the essence of realistic jurisprudence was its vigorous concern with a realistic and, for its time, radical description of the decision-making process of American courts. It is worthwhile, then, to digress briefly into a discussion of the realists' description of court-law in America. Such a digression should be helpful to an understanding of the philosophical underpinnings and historical causes of the germ of thought about law which ostensibly provoked Summers to formulate his theses about legal theory in America.

Like their predecessors, the so-called formalists of Christopher Columbus Langdell's era, American lawyers of the early twentieth century apparently felt compelled to explain and rationalize their own body of court law. By their time such a vast body of decisional law had been generated in the United States that theories which emphasized the formal, logical and rational aspects of the common law decision-making process made limited sense. Such theories no longer were capable of providing an accurate account

of what actually was happening in American common law courts.³⁶ In the face of the rising number of contradictory judicial pronouncements rendered in the late nineteenth and early twentieth centuries, the strategy of the so-called formalists was to deny the validity of aberrant decisions and exaggerate the rational integrity of their positive legal order. In his typically excessive style, Jerome Frank described that survival strategy thus:

Law as he [the "Bealist", Frank's archetypal formalist] and his fellow men encounter it in practical effect — in the decisions of the courts — conflicts with what he desires law to be. Wherefore he strives by the use of empty but mouth-filling words so to represent law to himself that it will be unburdened by what he considers the crude courtroom actualities that thwart his desires. The method of the wishful metaphysician, who so describes the universe by discreet omissions as to satisfy his personal longings, is of a piece with that of Beale & Co. in defining the law.³⁷

According to Frank and other realists, the formalists spurned inconsistent and contradictory decisions in order to maintain and preserve their positive conceptual order.³⁸ The realists, in response, rejected the positive conceptual order in order to accept and explain contradictory decisions.

By the late 1920s and early 1930s the realists became engaged in a full-scale assault on their caricature of the formalist tradition of, first, treating law as a logically coherent and comprehensive body of rules and, second, viewing the judicial decision as a statement of reasons logically deduced from that body of rules. In the former context, they were inspired by Holmes' prediction theory of law and Pound's distinction between "law in books" and "law in action". Enough has been said about this relationship elsewhere to make discussion of it here unnecessary.³⁹ In the latter, they were inspired chiefly by John Dewey's writing on what he called an instrumental or experimental logic, a logic Dewey contrasted critically with the formalists'

³⁶This is Grant Gilmore's thesis: see Gilmore, *supra*, note 12, 68 *et seq.* Johnson, *supra*, note 8, 65-8, suggests that it was the empirical (not juridical) information explosion of the new social and behavioural sciences that caused the crisis.

³⁷J. Frank, *Law and the Modern Mind* (New York: Tudor Publishing Co., 1936) 61. At page 56, Frank excuses his intemperate attitude towards what he referred to as "Bealistic" thought as follows: "The slightly excessive language is to be explained perhaps by the writer's effort to rid himself of Bealistic tendencies to which he, like most lawyers, is subject."

³⁸An interesting question is what the "formalists'" criteria of choice were in their identification of the "anomalous" decisions. I suppose one's answer to this kind of question must depend on the school of explanations to which one subscribes. Do we look for material, economic, ideological, rational, formal, or logical causes to explain how a Bealist might have chosen to incorporate one decision or one rule in his positive legal order, and exclude another? The theories abound.

³⁹Rumble, *supra*, note 12 and Gilmore, *supra*, note 12, 68 *et seq.* See also the articles cited in the second paragraph of note 8.

sylogistic logic of demonstration. Preferring the former to the latter, Dewey described the problem-solving technique of common law lawyers, thus:

No lawyer ever thought out the case of a client in terms of the syllogism. He begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts, to *form* a minor premise. At the same time he goes over recorded cases to find rules of law employed in cases which can be presented as similar, rules which will substantiate a certain way of looking at and interpreting the facts. And as his acquaintance with rules of law judged applicable widens, he probably alters perspective and emphasis in selection of the facts which are to form his evidential data. And as he learns more of the facts of the case he may modify his selection of rules of law upon which he bases his case.⁴⁰

Similarly, Dewey argued that judicial decision-making is best described as the process of using legal rules to reason to a conclusion. Once that conclusion has been reached, the judicial decision-maker sets about the task of justifying his decision and demonstrating its legal soundness by drafting a decision in the logico-deductive mode. Wrote Dewey:

Courts not only reach decisions; they expound them, and the exposition must state justifying reasons. The mental operations therein involved are somewhat different from those involved in arriving at a conclusion. The logic of exposition is different from [the logic of] search and inquiry. In the latter, the situation as it exists is more or less doubtful, indeterminate, and problematic with respect to what it signifies. It unfolds itself gradually and is susceptible of dramatic surprise, at all events it has, for the time being, two sides. Exposition implies that a definitive solution is reached, that the situation is now determinate with respect to its legal implication. Its purpose is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will indicate a rule for dealing with similar cases in the future.⁴¹

This new model of the judicial decision was the necessary corollary of a legal philosophy that denied the central importance of the "law in books"⁴² and assaulted "the Holy Grail of a coherent, comprehensive system of rules and principles".⁴³ It sought to emphasize the indeterminacy of legal rules by describing the common law decision-making process as one of search and inquiry rather than pure deduction, and legal rules as the instrument of that search process. The myth of conceptual certainty in law was replaced by the earnest belief that legal decisions ought to be made by discerning the social functions, purposes or goals (as determined, ultimately, by the felt

⁴⁰Dewey, *Logical Method and Law* (1924) 10 Cornell L.Q. 7, 23.

⁴¹*Ibid.*, 24.

⁴²R. Pound, *Law in Books and Law in Action* (1910) 44 Am. L. Rev. 35.

⁴³This is Frank's colourful characterization for a "common disease of the mind" that afflicted most of his generation of lawyers and law teachers: Frank, *supra*, note 37.

necessities of the time) of the array of possibly applicable rules in any particular situation. The pragmatic assertion that it was a lawyer's job to predict the imposition of state sanctions through courts had the effect of encouraging lawyers to take a harder, more objective look at the way they actually reasoned in law. Together, these related ideas formed the basis of the realist perspective on court law and, together, they form the fundamental inspiration for Robert Summers' theory of pragmatic instrumentalism. Summers has a good deal to offer in the expounding of his theory, including observations in a similarly instrumental vein on the design and operation of legal institutions and institutional structures other than courts. Of this aspect of his book more will be said below. For now, I would offer an observation or two about the significance of these ideas.

It bears repeating that realism and formalism are identical in their assertion that a legal order is value-neutral, non-ideological and apolitical. This observation can be developed by adding that realism and formalism also are exactly the same in their preoccupation with court-law and in their concern with validating the processes of court-law in America. This latter conclusion is indicated in two basic ways. First, despite some of the fearful blustering, it seems doubtful that many of the realists seriously rejected the principle that their law ought to be, in some measure, conceptually coherent and certain. Rather, the seemingly out-of-hand rejection of the "fictitious unity of the law", bolstered by Dewey's model of the judicial decision, was largely mere posturing. It had the convenient rhetorical effect of making American lawyers become aware (again) that their law was, in a very relevant way, connected with the day-to-day affairs of their nation. Second, and more important, even to the extent that the strictures of the realists were considered to have been "radical" by the less sanguine of America's legal academics of the 1930s and 1940s, from the perspective of fifty years the phenomenon of American legal realism seems best characterized as an effort merely to remodel and revamp an outmoded conceptual order that was atrophying from the effects of an overzealous formalism, rather than as the revolution in legal theory that many of its American historians have described.

Faced with the "fictitious unity of the law" the American legal realists sought to regenerate the common law of the United States by advocating a principle of coherence which emphasized the connection between the conceptual order and the daily affairs of their nation. Logical coherence in law was therefore to be invigorated by functional coherence. The realists exhorted American lawyers to look for the unity and intelligibility of their legal rules not in the principles of logical entailment, but in the socio-economic relations upon which the rules operated. Purely logical arguments could no longer be compelling, partly because of their diminished predictive value in the application of state power through the courts, and partly because

the end result of any chain of deductive reasoning was, as Dewey had argued, only as sound as the predetermined conclusion sought to be reached. It also must have been clear to many turn-of-the-century American lawyers that much of the doctrine that sustained the process of formalistic legal reasoning was no longer capable of explaining, let alone predicting, the results by even the most sophisticated notions of legal justice. In their efforts to generate a more realistic description of, and a more functional methodology for, the processes of American court law the realists never intended to call into question the integrity of that system. Indeed, as is often the case with "radical" criticism, the realistic criticism of American law had the ultimate effect of offering a new vindication for the essentials of the established utilitarian legal order.⁴⁴ That new vindication brought the language and reasoning of American lawyers more closely into line with that of their clients, and with the "felt necessities of the time". Legal explanations would make "common" sense not only to those who offered them for sale but also to those who ultimately consumed them.⁴⁵ Perhaps buried in these observations lies an explanation for the ease with which the lessons of realistic jurisprudence have worked their way into the consciousness of Anglo-American lawyers in the fourth quarter of the twentieth century: the change in the meaning of law was, in these respects, merely illusory.⁴⁶

Once the relatively minimal theoretical significance of realism is recognized — the shift from logical coherence to functional coherence — and the practical significance of realism is admitted — the preservation of the integrity of court law in America — perhaps legal theorists can be more "realistic" about realism's historical causes and conditions. Perhaps, for example, one could be so bold as to stand by the claim that the excessive language in much of the realist literature was just the rhetoric one associates

⁴⁴Llewellyn suggested as much in his "Foreword" to the second edition of *The Bramble Bush*, where he said that realism "was and still is an effort at *more effective* legal reasoning" and that it was a mistake to conceive of realism as a "philosophy".

⁴⁵In this respect the realists served a purpose very much like that which Lord Mansfield served in the late eighteenth century. Patrick Atiyah states in his work, *The Rise and Fall of Freedom of Contract* (1979) 122: "On the Bench, Mansfield's objective with regard to commercial law was to make the law more serviceable to the commercial community. That meant that it must become more rational, more intelligible, more predictable, and more just according to the standards of the mercantile world."

It would not be implausible to claim that the Uniform Commercial Code, and, in particular Karl Llewellyn's Article 2 thereof, was the crowning achievement of realistic jurisprudence.

⁴⁶ That the empirical and functional insights of realism have been incorporated into the mainstream of Anglo-American positivist thought is best demonstrated in the seminal contribution of H.L.A. Hart to modern positivism. See H. Hart, *The Concept of Law* (1961) and W. Twining & D. Miers, *How to Do Things with Rules*, 2nd ed. (1982).

with ideologues and academics in pursuit of notoriety and tenure.⁴⁷ Perhaps also legal realism and sociological jurisprudence were animated by related social and political themes of the partisan politics of their day. Thus, there may be something to the thesis that the realists were, or at least were engaged in training, the administrators of Roosevelt's New Deal and that their legal realism was part of a larger array of politically-motivated argumentation designed to dislodge a locus of power in American society that subscribed, by chance or necessity, to an excessively conceptual philosophy of law.⁴⁸

I make no pretense of knowing whether particular ideologies of law are associated by necessity with particular social or political ideologies.⁴⁹ What I would assert, however, is that individuals, and indeed whole schools of thought, do not maintain with any constancy a particular ethical or epistemological premise throughout each field of their opinion making. One effect of this phenomenon is the occurrence of consistencies and contradictions from opinion to opinion in any one individual's thought. In philosophical discourse, demonstrating the lack of such systematic consistency is often the most cogent line of attack on a body of ideas. Philosophers, as a consequence, spend a great deal of energy working out the internal coherence of their ideas. In addition, because they realize that the integrity of their systems ultimately depends on the strength of the argumentation supporting their most fundamental premises, philosophers are usually careful to work out that argumentation in some detail. They are aware that the integrity of their thought depends on the strength of its foundation and the rational coherence of its superstructure. In political discourse, systematic integrity and the soundness of basic premises are not so highly valued. The dynamics of partisan political discourse is, as a consequence, significantly different. Positions are taken and destroyed less on the basis of the soundness

⁴⁷ Purcell, *supra*, note 12, 7, notes that law-teaching as a full-time occupation had only become widely established by the turn of the century. At page 78, Purcell notes that unlike the retired practitioners of old, the generation of young law teachers coming into American law schools in the first decade of the twentieth century (and the next two decades) "was expected to devote [itself] to the dispassionate study of the law and to the improved training of his students." There was a great deal of self-conscious deprecation on the part of this generation of American law teachers, especially when they compared their craft to the social sciences. Llewellyn, for example, spoke apologetically of law as "the most backward of social disciplines", looking over his shoulder, no doubt, at the increasing sophistication of companion social sciences in the university setting: Llewellyn, "Legal Tradition and Social Science Method — A Realist's Critique" in *Jurisprudence*, *supra*, note 9, 77.

⁴⁸This thesis is mentioned in *White Patterns*, *supra*, note 9, 116-35 and in *Twining*, *supra*, note 12, 57-8. It is developed in somewhat greater detail in *Hunt*, *supra*, note 12, 38-40.

⁴⁹Consider Karl Renner's thesis in his work, *The Institutions of Private Law and their Social Functions* (1949) to the effect that political ideology and social structure changed radically in Western Europe from the middle ages to the end of the nineteenth century without at all affecting the form and ideology of Western European law.

of their fundamental premises or their place in a coherent body of ideas, and more on the basis of their mere association with "discredited" opinions or men. The paradigmatic syllogism lurking beneath much partisan political discourse is of the form: (i) Opinion "x" is bad; (ii) Holders of opinion "x" generally hold opinion "y"; (iii) Therefore opinion "y" is bad, or perhaps: (i) Smith holds opinion "x"; (ii) Smith is bad; (iii) Therefore opinion "x" is bad. This state of affairs probably obtains because winning and losing an argument in the "marketplace of ideas" usually depends more on the vagaries of the audience's perceptions, awareness, intelligence and interest, than on the soundness of the views advanced.

It is evident that much of the legal literature produced in the United States in the 1930s and 1940s tended to be in the form of partisan political discourse. So, for example, when one's opponent is a lawyer who objects to workers' compensation legislation ostensibly because it would infringe upon the letter or spirit of America's written constitution, an effective way to advance the social cause of compensation schemes is to ridicule the kind of legal reasoning that its antagonists use to advance their argument.⁵⁰ Similarly, a very effective way to level an opponent in a political argument is to note the similarities between his philosophy of law and those of, say, Hitler or Stalin.⁵¹

The argument advanced by the realists against their caricature of the "formalist" vision of law may thus be characterized as an argument aimed at the weakest point of a whole association of ideas. Destroying the sybaritic conceptualism of "formalism" was essentially an easy and, to read Frank and Llewellyn, enjoyable task. In the political scheme of things, it may have had the intended effect of contributing to the discreditation of the body of political opinions that was associated with it. In strictly legal theory, there did not have to be any substantial difference between James C. Carter and Joseph Beale on the one hand and Karl Llewellyn and Jerome Frank on the other. But in the context, and only in the context, of American society and politics of the day in which these views about law were so vigorously advanced, this relatively insignificant difference in legal theory may have counted for a lot in political debate.

⁵⁰See Pound, *The Need for Sociological Jurisprudence* (1907) 19 Green Bag 609, cited in White, *Patterns, supra*, note 9, 105-7.

⁵¹Leo Strauss' "reductio ad Hitleram". This is in fact what happened to the realists in the end. Their relativistic ethics and positivist conception of law were condemned, by association, with the totalitarianism of Hitler. See, e.g. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society* (1942) 30 Georgetown L.J. 493, and Palmer, *Hobbes, Holmes and Hitler* (1945) 31 A.B.A.J. 569. This aspect of the realist story is chronicled in Purcell, *supra*, note 12, 159-78 and White, *Patterns, supra*, note 9, 211-25.

The argument need not rest here though. Observing that the anti-formalist posture of men such as Pound and Llewellyn was in part motivated by strategy in argumentation is only one aspect of the larger thesis that realism and sociological jurisprudence were as much directed against individuals as against their views. In turn, noticing that there is a largely unexplored political dimension to these ideas about law raises serious questions about their social contingency altogether. It is notorious among non-American observers that Holmes, Pound, Llewellyn, Frank and Colien were quintessentially American in style, tone and substance of argumentation. One therefore wants to know how their ideas about law were affected by the partisan politics and political ideologies of their day, by contemporary and perhaps parallel movements in American art, American literature and American social theory. I think it is true to say that the story of American legal realism and sociological jurisprudence is susceptible of many versions. Unfortunately, however, the version sketched here has seldom been seriously attempted and, in the hands of lawyers discussing "legal theory" (such as Robert Summers), is virtually always ignored.

III. Summers' *Pragmatic Instrumentalism and American Legal Theory*

There are two main theses in Robert Summers' *Instrumentalism and American Legal Theory*. According to the historical theme, a general coalescence of thought that was the Western world's only major example of instrumentalist legal thinking had occurred in American legal theory by the early 1940s. The thrust of Summers' philosophical thesis is that instrumentalism is a fourth category of legal theory which, like the other three, is intrinsically worthy of consideration. In addition to a brief preface, an introduction and a general conclusion, the work under review is divided into four principal parts and is organized, more or less, around these two main theses. Parts one and two, comprising just over one-half of the book, concentrate on a description and critique of the chief features of American pragmatic instrumentalism. Parts three and four, comprising about one-quarter of the whole, contain a more fully-developed instrumentalist theory of law.

For the most part, I found the book to be poorly written. I was frequently annoyed by obtrusive neologisms and awkward expressions — "one-fell-swoopism", "robust predictivism", "negative corollary", "democratarian", "separationism", "deductivism" — by the occasional impenetrable passage and the more frequent pedantic observation — "A theory of value is normative. It sets forth what ought to be the case which may differ from what is actually the case" — by the extensive use of such indeterminate expressions as "general" and by the ubiquitous list. Most annoying is the frequency with which the word "theory" occurs; I would be truly surprised if that

word or one of its derivatives does not appear on every single page. Summers uses it indiscriminately to mean everything from "explanation" to "generalization".

More important than this, however, is the more damning criticism that Summers' two main theses are misconceived. Before elaborating briefly on this point it should be acknowledged that *Instrumentalism and American Legal Theory* offers many useful observations and pertinent and penetrating criticisms of American legal realism and sociological jurisprudence. I grant, subject to several qualifications mentioned below, that an instrumentalist perspective on law can be useful, and that Summers' contributions in this respect are therefore not only quite original but even salutary. The nature of my disagreement with Summers is more fundamental. It concerns the underlying philosophical premises of the book — first, that it is useful to talk about a body of ideas abstracted completely from their social context, and second, that what he calls "pragmatic instrumentalism" is anything other than a species of positivism. I also take issue with the conclusions he seeks to draw, together with those he fails to draw, from his frequently astute observations on the American realists and sociological jurists.

Summers' theory of "pragmatic instrumentalism" is distilled from the work of a core group of American thinkers who lived and wrote between 1897 and 1937: O.W. Holmes, John Chipman Gray, John Dewey, Roscoe Pound, W.W. Cook, Joseph W. Bingham, W. Underhill Moore, Herman Oliphant, Jerome Frank, Karl N. Llewellyn, and Felix D. Cohen.⁵² Although he acknowledges that this list is not exhaustive, he insists that it includes

⁵²Summers, *supra*, note 1, 22-3. According to Summers, pragmatic instrumentalism developed, between these dates, into the predominant mode of legal thought in the United States. The years 1897 and 1937 are particularly important. 1897 is the date of Oliver Wendell Holmes' call to arms in his article *The Path of the Law* (1897) 10 Harv. L. Rev. 457, where Holmes declared that law is the "business" of predicting the incidence of public force through the "instrumentality of the Courts" and in which he looked forward to the day when "political economy" would replace "history" as the principal method of explanation of legal dogma. 1937 is the date of publication of Felix Cohen's *The Problems of a Functional Jurisprudence* (1937) 1 Mod. L. Rev. 5, in which Cohen acknowledged Holmes' seminal contribution in *The Path of the Law* to a forty-year ferment in America's legal thought. In this article, Cohen compared the rise of "functional jurisprudence" and the corresponding decline of "traditional jurisprudence" to the displacement of Euclidean geometry by the geometries of Russian mathematician Nicolai Lobachewski and German mathematician Georg Reimann, or to the effect of Karl Marx and dialectical materialism and the "general doctrine of social evolution" on the writing of history (pages 55-6). Cohen defined functionalism as "the view that a thing does not have a 'nature' or 'essence' or 'reality' underlying its manifestations and effects and apart from its relations with other things; that the nature, essence or reality of a thing *is* its manifestations, its effects and its relations with other things" and described its application to law as leading to "a definition of legal concepts, rules and institutions in terms of judicial decisions or other acts of state-force" (page 8). In these two articles are contained "most of the leading ideas" of pragmatic instrumentalism, according to Summers, *supra*, note 1, 25.

most of what he terms the “classical pragmatic instrumentalists” and, in any event, “as many figures as are needed to provide meaningful substance to [the] analysis of the rise and continuity of [this] important American movement”.⁵³ Summers describes these men as “pioneers” in legal theory to explain the fact that they often held divergent views of law, and to persuade his reader that, although each did not subscribe to all the “tenets and corollaries” of this theory, they all “underwrote” a large majority of the theory’s leading aspects.⁵⁴ Thus, the most obvious instance of a divergence of views — that between Roscoe Pound and Karl Llewellyn — is described by Summers as an “‘inside’ affair”.⁵⁵ Among the “classical” figures excluded from discussion are Charles Sanders Pierce and William James, because, as Summers explains, they did not write on law. Excluded from the club of classical pragmatic instrumentalists altogether are Benjamin N. Cardozo, because he was “distinctive in his own way” and was “often critical of instrumentalists”, and “neo-instrumentalists” Harold Lasswell and Myres L. MacDougal, because their “most important writings were published after 1940”.⁵⁶

Although these passages occur early in the book, and therefore one might be willing to suspend judgment in anticipation of justifications to come, I was struck immediately by the arbitrariness of the choice for inclusion in the club of pragmatic instrumentalists and the capriciousness of the distinction between “classical” and “modern day” or “contemporary” pragmatic instrumentalism. There is little explanation offered, for example, for the sudden break at 1937 with the publication of Felix Cohen’s *The Problem of Functional Jurisprudence*. Admittedly this observation is of no particular moment in itself, but it clearly foreshadows what turns into a substantial failing of the book. In the advancement of his historical theses, Summers almost completely disregards the historical and social setting of the ideas about law generated by the group of individuals chosen for discussion.⁵⁷ The identification of a core group of individuals and the artificial

⁵³Summers, *supra*, note 1, 22, 23.

⁵⁴Summers, *supra*, note 1, 23.

⁵⁵Summers, *supra*, note 1, 23. The famous dispute, which Grant Gilmore, *supra*, note 12, 78, has described as making up “as dreary a course of reading as anyone can hope to find anywhere”, is contained primarily in two articles: Pound, *The Call for a Realist Jurisprudence* (1931) 44 Harv. L. Rev. 697 and Llewellyn, *Some Realism about Realism — Responding to Dean Pound* (1931) 44 Harv. L. Rev. 1222, reproduced in Llewellyn, *Jurisprudence*, *supra*, note 9, 42. According to Gilmore’s account of the controversy, Llewellyn and Frank, contrary to their apparent perception of events, were not the object of Pound’s criticism in *The Call for a Realist Jurisprudence* and thus the whole affair had “a ‘sadly comic’ quality”: Gilmore, *supra*, note 12, 136-7, note 25.

⁵⁶Summers, *supra*, note 1, 22.

⁵⁷For a meagre discussion, see the section entitled “Origins” in Summers, *supra*, note 1, 26-34.

elevation of that core into a "movement" of "classical" thought is the first significant step in that direction.

I was surprised to find that in a book entitled *Instrumentalism and American Legal Theory* only eight pages are devoted to a description of the origins of the theory, a brevity which betrays a lack of interest in the theory's genesis. Thus readers are advised that the theory "was partly a reaction to certain conditions in the world of American law during the last part of the nineteenth and the early twentieth century" and that some theorists "reacted critically to the 'formalisms' that they perceived in judicial reasoning, in legal education, and in legal theory". Other causes, in what essentially is a yet another list, include "a reaction against certain substantive conceptions that underlay formalism, including laissez-faire, the notion that only the fit should survive the competitive struggle, generalized judicial conservatism", the "scientific ethos of the day", the "technological advance of the late nineteenth and early twentieth centuries . . . the automobile, the electric light, the telephone, a whole new range of business machines, and the airplane", and "the philosophy of pragmatism".⁵⁸ These comprise the principal items on the list of causes. The balance of the book contains little reference to the cultural, social, academic or economic origins of the theory; instead, it is comprised largely of exegesis and analysis.

Perhaps Summers' reply to this criticism would be that his principal interest in the book is the development and critique of a pragmatic instrumentalist philosophy of law, and that he is therefore not overly concerned with developing a truly historical description of the body of thought and the group of men he has chosen to study. Perhaps, in short, he is not particularly interested in his historical thesis. One suspects that this may indeed be the case, even though a good portion of the book is devoted to a description of the thought of these men. Nevertheless, to the extent that Summers is interested in an historical thesis, his failure to deal adequately with the social context of the ideas that he discusses is quite serious. Among other things, it contributes to a failure on his part to perceive the fundamental similarity between the school of thought he examines and the schools of American legal thought that preceded and followed it. It results further in an almost naive disposition on Summers' part to take everything his "theorists" said, and in particular, what they said to the formalists, seriously and as indicative of what they literally meant. As an antidote, one has to read but five pages of Jerome Frank's *Law and the Modern Mind*⁵⁹ to realize that he must have been sitting on a tack when he wrote it. There was obviously more to his "instrumentalist theorizing" than mere instrumentalism.

⁵⁸Summers, *supra*, note 1, 26-34.

⁵⁹*Supra*, note 37.

Further, Summers' own account of instrumentalism in American legal theory is analytical and conceptual to a fault. Curiously, the only criticism which Summers anticipates in his book comes from the quarter of analytical positivism. Yet in its discussion of pragmatic instrumentalism and in its construction of an elaborate framework for "instrumental theorizing", the book exhibits all of the faults of the austere rationalism of analytical positivism. Herein lies the great irony of *Instrumentalism and American Legal Theory*: American legal realism's most significant contribution to American common law thought is its advocacy of a more functional approach to law, yet in his elevation of a "classical movement of thought" Summers seems oblivious to the lesson to be learned from this feature of realistic jurisprudence. He does not seem to have understood the realists' point that the social context of an idea can shed light on its substance and on the style of its presentation, that law is an artifact which for its elucidation requires attention to the motives and purposes of its artisans. As a consequence, Summers takes the form, the rhetoric and the apparent content of realism and sociological jurisprudence at its face value.

Leaving aside context to enter the realm of "autonomous legal theory", I wondered, while reading Summers' book, whether his systematic development of instrumental concepts is merely a reincarnation of what some might consider to be the less objectionable facets of legal realism. Much of the book is taken up with criticisms of some of the excesses of realism in order, ostensibly, to preserve the realists' central intuition that law can be conceived of as a means to an end. The theory, it seems, requires the new name — pragmatic instrumentalism — in order to avoid the unpleasant evocations of "realism", although Summers argues strenuously that this is not the case. He claims that pragmatic instrumentalism is a unique theory in that it seeks to give expression to the common philosophical views underlying sociological jurisprudence, pragmatism and only "certain tenets of legal realism" that resulted in the general coalescence of thought referred to above. It is distinct from legal realism, he asserts, not only because it comprehends sociological jurisprudence but also because it excludes the more "extreme" tenets of legal realism such as legal realism's "radical value skepticism and [its] emphasis on nonrational and even irrational factors in the judicial process".⁶⁰ Despite this early avowal, Summers never identifies the theoretical basis of this excising operation except by the unhelpful assertion that the radical elements of realism are radical, and thus untenable.

For example, Summers describes the pragmatic instrumentalists' value-theory as "utilitarian, quantitative, conventionalist and majoritarian in tenor", and then observes that there were a few skeptics about value, alluding to

⁶⁰Summers, *supra*, note 1, 37.

an oft-cited passage from Underhill Moore as evidence of such value skepticism.⁶¹ If what Summers means by "values" is something absolute and fixed, it is difficult to see how the "existing wants of the day" value formula of his pragmatic instrumentalists is any less indicative of a value skepticism than the following passage which he locates from Moore:

Human experience discloses no ultimates. Events are related to events so that each is at once an end and a means. Ultimates are phantoms drifting upon the stream of day dreams. Nor are penultimate ends rational. A rational or logical process is directed towards an end chosen before the process is begun. The process is judging that certain means will tend to that end.⁶²

The other argument offered by Summers for the change in name is that more is comprehended by "pragmatic instrumentalism" than by "legal realism", so that such figures as Holmes and Gray are promoted from mere "precursors" of American legal realism to "progenitors" of "America's only indigenous theory of law". Holmes' legal philosophy and the sociological jurisprudence of Pound would have an altogether moderating effect on the general theory, because, ostensibly, their theories were not (as) value skeptical and behaviourist in orientation. Therefore, the argument goes, if the general theory is to include these views, it must exclude radical realism. To make this argument work, however, one would have to demonstrate positively that the legal philosophies of Holmes and Pound were fundamentally different from the legal philosophies of Moore or Oliphant, and this in turn would require a more substantial discussion of the ethical and epistemological bases of American legal theory than Summers attempts.

Such a demonstration would be a difficult task indeed. It seems obvious that a behaviourist explanation of the judicial process is completely compatible with Holmes' prediction theory. Both views understand lawyering as the prediction of the imposition of state sanctions. Both views are completely result-oriented. Both views maintain a rigid distinction between law and morality, and both views subscribe to a relativistic ethical theory. The only apparent difference is that Holmes might have excluded from his "data base" information about such matters as what a judge had for lunch, or the predisposition of a decision-maker towards Ukrainian defendants.⁶³ But he

⁶¹Summers, *supra*, note 1, 42.

⁶²Moore, *supra*, note 20, 612.

⁶³Indeed, the identification of Holmes with the radical fringe was made in the early 1940s by the antagonists of realism. It was Holmes, more often than not, who was chosen as the archetypal realist, usually by virtue of his extreme positivism. See Lucey, *supra*, note 50.

Pound presents a more delicate challenge, for in many respects his philosophy of law contained substantial elements of natural-law theory. Indeed, there was a fundamental inconsistency between his natural-law inclinations and his subscription to pragmatic explanations in law. This dialectic in Pound's thought has been noted and discussed by others. See *e.g.*, Hunt, *supra*, note 12, 25-9.

could not have given a convincing reason for so doing if all he cared about as a lawyer was predicting the imposition of state sanctions. Only the accuracy of the technique chosen to make such predictions could count as a point of differentiation, and that would be a matter for the quantitative methods of a statistical science only.

My quarrel with Summers on these points is not over the identification of basic similarities in thought among the group of American lawyers which he has chosen at his "classical" pragmatic instrumentalists. There is nothing remarkable or, it should be added, even new about his observations in this regard.⁶⁴ I object instead to his somewhat veiled attempt to resuscitate and rehabilitate American legal realism by calling it pragmatic instrumentalism and by excising what he arbitrarily has chosen as its excesses. Any differences in that legal philosophy's various manifestations in American legal culture were, and still are, merely matters of degree and emphasis. Summers is correct to have noticed that sociological jurisprudence and legal realism share a pragmatic and utilitarian philosophical orientation. He is mistaken, however, in his assertion that the value skepticism and behaviouristic science of the radical realists were not features inherent in this orientation. The only difference between a Holmes or a Pound and a Moore or an Oliphant is that the latter pursued the logic of their pragmatism and utilitarianism to its limits. Any attempt to resuscitate realism must take that extreme view more seriously than merely dismissing it as an aberration. If Summers finds that view unpalatable, as appears to be the case, then it is incumbent upon him to articulate more precisely how he distinguishes his theory from it. The reason he has not done so, I suggest, is that it cannot be done.

In the third and fourth parts of his book, in which Summers develops a more elaborate instrumentalist theory, similar errors manifest themselves more seriously as a fundamental failure to take the utilitarian positivism of instrumentalist theories seriously. The chief identifying feature of all instrumentalist theories is that, in positing a means/end dichotomy in law, they ask their readers to accept the is/ought distinction of positivism and,

⁶⁴Morton White has identified the philosophical basis shared by several strands of American thought. See, for example, White, *Pragmatism and the American Mind* (1973) 41:

Historians of American thought and critics of American culture are only too aware of the kinship among some of our distinctive intellectual currents — instrumentalism in philosophy, institutionalism in economics, legal realism in the law, economic determinism in politics and literature, the new history. From a methodological as well as a political and ethical point of view they unite to form the distinctive liberal *Weltanschauung* of twentieth-century America. No great research is necessary in order to establish the surface connections of these influential patterns of social thinking in their mature forms. . . .

at least, in Summers' and America's version, the additional but complementary utilitarian assumption that law is ideologically and politically neutral.⁶⁵ Summers' erection of elaborate analytical schemes describing the "technique element" of law is fraught with grave danger, precisely because it requires acceptance of these utilitarian and positivist assumptions about law.

There cannot be anything inherently objectionable about distinguishing the law that is from the law that ought to be. Such a categorization is only a provisional statement until it is informed by some purpose in application or until it is permitted, in error, to take on a life of its own. It may be advantageous, for example, to make such distinctions in order to observe (with Bentham) that what *is* the law, *ought* to be reformed, or (with Aquinas) that what is reputed to be law is not law because it is not an ordinance of reason for the common good made by he who has care of the community. One might want to ask, with Summers' instrumentalists: given that a particular social goal is perceived to be desirable, and given that the social goal can be achieved through "law", what is the most effective legal apparatus for such purposes? Or, given that a lawyer has a client who has a particular purpose and given that the client would like to achieve his purpose within the letter of the law, what is the most effective legal tool at the disposal of the lawyer? However, the great danger of modern Anglo-American positivism, instrumental or analytical, is that in its exuberance to identify and describe the law that is, it usually loses track of its purpose and assumptions in so doing. Its apparent passion for an autonomous value-neutral science of social ordering becomes an all-consuming end in itself. It forgets that it has assumed away many of the most difficult questions about law. As a consequence, its knowledge is not only an illusion, it is a dangerous illusion, because by virtue of it law becomes an empty shell capable of undefined use and manipulation — the plaything of analytical jurists, the tool of client-directed lawyers, the "holy grail" of formalists, the object of obedience in its letter only, a vehicle for the advancement of academic careers, the means to a comfortable suburban existence, in short, in Leo Strauss' phrase, the "handmaid of any powers or any interests that be".⁶⁶ As with all positivist theories, it cannot maintain the integrity of law as a normative system because it does not claim the force of moral imperatives.⁶⁷ Hence, although one can sympathize with the need to ask instrumentalist-type questions about law, one wonders about the inherent dangers of an instrumentalist

⁶⁵On the classification of realism as a positivist theory of law, see Lyons, *supra*, note 8; W. Friedmann, *Legal Theory*, 5th ed. (1967) 292 *et seq.* and L. Fuller, *Law in Quest of Itself* (1940).

⁶⁶L. Strauss, *Natural Right and History* (1953) 4.

⁶⁷See Fuller, *supra*, note 34.

or any other positivist posture. This is a danger of which Summers appears entirely unaware.

The author's apparent insensitivity to this problem is the most curious feature of the book. Much of the inspiration for Summers' criticism of pragmatic instrumentalist thought in America comes from the work of Lon Fuller who, in a particularly thoughtful essay⁶⁸ cited several times by Summers, developed the parallel between the means/end and is/ought dichotomies. Fuller's observations amount to a denial of the utility of a bald distinction between means and ends, and effectively demonstrate the essentially positivist basis of much of this reasoning. In several passages in his book, Summers also recognizes that his pragmatic instrumentalists were in error in their exclusive concentration on "means" in law. Yet paradoxically, in parts three and four of his book, Summers' principal thesis is that instrumental theorizing in law is *in itself* a useful occupation. Indeed, this portion of the work is wholly consumed by a detailed elaboration of the law's "instrumentality".

The same kind of confusion occurs in Summers' discussion of the ethical theory underlying the thought of his pragmatic instrumentalists. He criticizes the ethical relativism of Moore and Oliphant by appealing to absolute values. Yet, as pointed out above, Summers is often relativistic in his ethical arguments himself. Ironically, Summers' pragmatic instrumentalism is vulnerable to the same criticism that has befallen the thought of Roscoe Pound in recent years. In the words of one contemporary scholar:

[A] rather less charitable view justifies the conclusion that Pound was unable to advance a consistent ethical theory. In recognizing the deficiencies of both the pragmatic and the idealistic theory, he tried to solve his dilemma by combining the two, and in so doing, produces an inevitable and irresolvable contradiction. This contradiction is a manifestation of the deeper conflict between the two strands of thought, the utilitarian and the idealistic upon the unstable fusion of which he seeks to construct the edifice of sociological jurisprudence; as a consequence, this very edifice itself is inherently unstable.⁶⁹

So, I think, with Summers' pragmatic instrumentalism. At one and the same time, Summers extols the virtues of a thoroughly positivist and ethically relativist theory of law and embraces a natural law and ethically absolutist criticism of the "radical" aspects of legal relativism.

⁶⁸Fuller, *supra*, note 34, *infra*.

⁶⁹Hunt, *supra*, note 12, 28.

Michael Walzer. *Spheres of Justice[:] A Defense of Pluralism and Equality*. New York: Basic Books, 1983. Pp. xviii, 345 [\$19.95]. Reviewed by David Howes.*

The nature of tyranny is to desire power over the whole world and outside its own sphere.

Pascal, *Pensées*

To conceive of "justice" in other than absolute terms would no doubt strike most legal philosophers and human rights advocates as heretical. In *Spheres of Justice*, however, Professor Michael Walzer presents us with an account of distributive justice which is as relative as it is conducive to the establishment and maintenance of a just society. In order to appreciate the full significance of Walzer's overthrow of absolutist theories of justice (discussed below) it is necessary to begin by exploring the genealogy of another concept which has exercised a certain tyranny over contemporary Western thought, the concept of "the individual".

The most basic category of modern Western legal and political thought is that of "the individual". Prior to the eighteenth century, however, the concept of "the individual" as we understand it and the related notion of "equality" (as meaning anything other than equivalence of rank) were unthinkable. A group of people was not "made up" of individuals during the Middle Ages and the Renaissance because the movement of thought was not from the parts to the whole, but from the whole to its constituent parts. This reflects the original meaning of the term "individual", an adjective (not a substantive), which comes from the Latin *individere* or "indivisible".¹

The concept of "the individual" represents the starting point of thought for the modern mind, whereas it used to constitute an endpoint. The social transformation which precipitated this inversion in the meaning of the term was the long drawn-out transition from feudalism to capitalism, or as Maine would have it, "from status to contract".² The feudal social order was undermined by the practise of the idea of "the individual" person as having universal value, as being a complete manifestation of the essence of man

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¹R. Williams, *Keywords: A Vocabulary of Culture and Society* (1976) 133-6.

²Sir H. Maine, *Ancient Law* (1917) 100.

or as embodying, so to speak, humanity in one biological *individuum*".³ Society thus became a vacuum since a man's position within it was no longer determined by his birth into a particular rank or order. In order to fill the vacuum a new set of desires, a new psychology, had to be created. Its architects were Hobbes and Locke. The central axiom of this new psychology (which is also that of economics) was the idea of maximization. Not only are human wants unlimited, but we constantly strive to maximize our satisfactions, or so it was and has come to be believed.⁴ As a result of this transformation in attitudes the market came to be seen as the context, and contract as the medium, through which satisfactions were to be maximized. It is little wonder that it was at this historical juncture that *the* creation myth of liberal democratic society, Social Contract theory, first took shape.

According to Locke's version of Social Contract theory, our ancestors agreed to quit the state of nature and enter civil society for the mutual preservation of their property. This myth misrepresents reality, however, since experience has shown that the market was never designed to "preserve" property in the hands of the many, but to concentrate property (that is, capital and all of the other goods which it entrains) in the hands of the few.

There are those, the "Entitlement theorists", who see nothing wrong with this result. The fact that the market produces and reproduces inequalities in the distribution of goods is fair, providing the appropriations (initial acquisitions and subsequent transfers) are just.⁵ This approach evidently values liberty over equality and accords with the psychology of Hobbes and Locke.

But the new psychology can be invoked to arrive at the opposite conclusion as well. According to such "Rational Choice theorists" as John Rawls,⁶ there are two principles which free and rational individuals placed in the "original position" of our ancestors, each concerned to maximize his own satisfactions, would accept as defining the terms of their association providing that the choice of principles were made behind a "veil of ignorance". The "veil of ignorance" is there to ensure fairness since (Rawls assumes) if the co-contractors were cognizant of their class position in the society to come, or the distribution of such personal qualities as intelligence and strength, Rawls believes each would design principles to favour his

³Dumont, *"The Individual" in Two Types of Society* (1965) 8 Contributions to Indian Sociology 7, 9.

⁴C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962).

⁵R. Nozick, *Anarchy, State and Utopia* (1974).

⁶J. Rawls, *A Theory of Justice* (1971).

particular condition. The principles are, first, that each individual be allowed the most extensive liberty compatible with a like liberty for all, and second, that inequalities in the distribution of goods are permissible if and only if they make the worst-off people better off than they would be in the absence of any inequalities.

Both of the above theories arise out of the attempt to discover a single distributive criterion (free exchange in the first case and limited trade-offs in the second) capable of ordering the allocation of every conceivable social good. Both theories also take the "universalism of the individual" (the individual as embodying humanity) as their point of departure. Neither theory can derive any support from the disciplines of anthropology or history, and for these three reasons, I would argue, we ought to discard them.

To begin with, there can be no "original position" outside society, not even a hypothetical one, because the concept of "the individual", as we have seen, is historically and socially determined. Secondly, we are not just brought together by society to distribute goods among ourselves; first we have to make them and in making them we imbue them with meanings which *determine their distribution*. Rational Choice theorists confine their attention to distributive acts (sharing, dividing, exchanging) and thereby miss the fact that we distinguish ourselves from each other by conceiving and creating, and then possessing and employing goods, in different ways. The distributive act is but one aspect of a process which is cyclical, the process of producing and reproducing those goods which have value for us because they embody a shared understanding of the order of things. Hence, the Rational Choice theorist asks the wrong question when he inquires: "What would rational individuals choose under the abstract, universal conditions of the 'original position'?" Goods and persons are given in history, that is, under particular conditions. Therefore, the real question sounds more like: "What choices have we already made in the course of our common life? What understandings do we (really) share?" Individual choices only make sense when viewed against the backdrop of collective understandings and commitments.

Walzer's *Spheres of Justice* is an informally written and highly thought-provoking attempt to answer the "real question" underlying the distributive justice debate. The book does not put forward "A Theory of Justice", but many, each appropriate to a particular sphere of goods. The distributive spheres which Walzer discriminates include: money and commodities, security and welfare, membership, education, recognition, office, work, leisure, kinship and love, divine grace and, underlying all of the above, political power.

Walzer breaks with tradition by taking these goods and their meanings, as opposed to the (putative) nature of the individual, as his point of departure. Rather than multiplying rights indiscriminately in the name of "equality", Walzer refreshingly attempts to sort out the logic according to which we classify goods as belonging to different spheres. His argument is that a complex equality of persons can be achieved by respecting the autonomy of the spheres.

This sort of inquiry into classificatory boundaries has much to commend it. To take a homely example, earth in the garden is just earth, but when it gets tracked into the kitchen on our boots it becomes "dirt". Dirt, then, as Lord Chesterfield once remarked, is "matter out of place", or matter *outside its proper sphere*. Probing more deeply we find that, "[f]or us dirt is a kind of compendium category for all events which blur, smudge, contradict, or otherwise confuse accepted classifications. The underlying feeling is that a system of values which is habitually expressed in a given arrangement of things has been violated".⁷

Transgressions are like dirt to us: they trigger the same reaction. For example, the buying or selling of ecclesiastical office was regarded as a sin by medieval Christians, the sin of simony. This illustrates what Walzer would call a "blocked exchange", or "illegitimate conversion". Officeholders were to be chosen for their knowledge and piety, not their wealth. Money could no more be converted into office than piety could be invoked to advantage in the marketplace. The pious/impious distinction was a relevant distributive criterion within the sphere of office but not the sphere of money and commodities (the market), which was open to everyone. Simony constituted a transgression of boundaries, an intrusion from another sphere.

Walzer makes much of the aphorism, "There are some things that money can't buy", and the book as a whole may be read as an attack on the contrary maxim, "Everything has its price". The latter phrase reveals the hegemony of the market. The sphere of money and commodities repeatedly threatens to engulf the other spheres because money is the closest thing we have to a universal medium of exchange. But money is a social good like any other; there are boundaries to its distribution, and no other sphere illustrates the limits of commodity fetishism more clearly than that of security and welfare.

Walzer discusses the case of medical care in this connection. During the Middle Ages, "the cure of souls was public, the cure of bodies private,"⁸ meaning that doctors tended to cater to the rich. It is apparent to us now that "care should be proportionate to illness and not to wealth",⁹ but not

⁷M. Douglas, *Implicit Meanings: Essays in Anthropology* (1975) 51.

⁸M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983) 87.

⁹*Ibid.*, 86.

so then, since eternity, not longevity, was *the* socially recognized need. To ensure that every Christian had an equal chance at salvation and eternal life, every effort was made to put a church in every parish, whereas now we find a clinic or hospital in every district. The case of medical care illustrates how in response to a shift in "shared understandings" a commodity (medical care) was excised from the market, one distributive principle (free exchange) was replaced by another (need), and as in post-war Britain, doctors who were professionals and entrepreneurs one year became professionals and public servants the next.¹⁰

The process described above may be defined as the rectification of boundaries. Distributive criteria change in accordance with how our conceptions of particular goods transform themselves, but the principle remains that "different outcomes for different people in different spheres make a just society".¹¹ We do not have to be the same in order to be equal since it is appropriate for inequalities (that is, differences) to exist within each sphere, but not across them, given our pluralist conception of goods. It is in this respect that Walzer differs from the Entitlement theorists who generalize or "universalize" the principle of free exchange and conceive of the subject, "the individual", as retaining his or her unity across the spheres. But under such conditions of complex equality as are latent in the structure of our beliefs and institutions, the category of "the individual" disintegrates (in practice). Persons are defined in different terms according to the sphere in which they operate. In fact, there is injustice wherever a person's position in one sphere is reiterated across the others. The position of women is a case in point. Historically, women were denied the right to vote, hold office, own property, etc., because it was understood (at least by men) that "A woman's place is in the home". As Walzer observes, this meant that "kinship patterns [were] dominant outside their sphere. And liberation [began] outside, with a succession of claims that this or that social good should be distributed for its own, not for familial, reasons" (political power and office by arguing and voting, wealth by bearing risks, recognition by "doing one's job", etc.).¹²

I think that Walzer's account of justice as inhering in differences enables us to explain why the current debate on human rights has arrived at an impasse and seems so sterile. It *would* appear, as Ian Hunter recently stated, that:

The continuing pursuit of equality exacts a price in human liberty. . . . Freedom to contract with whom one chooses, freedom to dispose of property,

¹⁰The current debate over "user fees" is in reality a boundary dispute: "user fees" represent an intrusion from another sphere.

¹¹*Supra*, note 8, 320.

¹²*Supra*, note 8, 240.

freedom of choice over one's tenants and employees — all such decisions have been subordinated to an over-arching public policy of equality [enforced by Human Rights Commissions].¹³

But the opposition between liberty and equality, which is also the opposition between Entitlement and Rational Choice theory, is a false one. All interpersonal relations are mediated by social goods: there is no direct, "immediate" experience of the other. Therefore, to argue that this or that freedom or this or that right inheres in each and every individual is to ignore the crucial sociological fact that it is the dominance (or as Walzer would say, "convertibility") of certain goods that must be restricted. If we respect the autonomy of the spheres, the autonomy of the person will out.

The formula for a just society which Walzer provides us with runs as follows: "*No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x*".¹⁴ Thus, for example, honour (x) should not be tied to office (y), but to a person's performance in that office, because one must deserve recognition, it is not an entailment of office. Similarly, ownership of capital (y) should not be convertible into power over persons (x) as well as things, because there is nothing in entrepreneurial activity which entitles the entrepreneur to rule over the rest of us without winning our agreement. It is important to note that Walzer's formula (unlike Rawls') is an open-ended one: it does not predetermine the end-result.

What a larger conception of justice requires is not that citizens rule and are ruled in turn, but that they rule in one sphere and are ruled in another — where 'rule' means not that they exercise power but that they enjoy a greater share than other people of whatever good is being distributed.¹⁵

There is, however, one result that Walzer aims for above all else, and that is to give renewed meaning to the third principle articulated in the banner cry of the French Revolution: "Liberty, equality and fraternity". In 1789 the concept of "fraternity" had as much force as a moral and legal injunction as the other two principles (whereas presently it is difficult to conceive of fraternity as "a right"). Much of *Spheres of Justice* is accordingly devoted to providing sketches of conditions under which fraternity may flourish. For example, three ways of collecting blood for hospital use — voluntary donation, purchase and imposing a tax — are discussed in terms of which way best "expresses and enhances a spirit of communal altruism".¹⁶ More basically, Walzer is an advocate of decentralized democratic socialism, patronage on a local scale and economic associations along the lines of the

¹³*Liberty and Equality: A Tale of Two Codes* (1983) 29 McGill L.J. 1, 5.

¹⁴*Supra*, note 8, 20.

¹⁵*Supra*, note 8, 321.

¹⁶*Supra*, note 8, 93.

medieval guild. The worker-controlled factory and the kibbutz are held up as model institutions wherein not only the work is shared, but decisions about the work as well. In the final analysis, then, self-respect and citizenly virtue (in the sense of resisting the dominance of corporate wealth and power or challenging the insolence of office-holders) amount to the same thing.

Democratic politics, once we have overthrown every wrongful dominance, is a standing invitation to act in public and know oneself a citizen, capable of choosing destinations and accepting risks for oneself and others, and capable, too, of patrolling the distributive boundaries and sustaining a just society.¹⁷

It would be naive to criticize Walzer for being a relativist because the whole point of *Spheres of Justice* is to show that there are no universal standards by which to judge an act or a society as just or unjust. Cultures cannot be ranked in relation to each other. Moreover, there is one point on which Walzer is very clear and the case of medical care illustrates very well: "what is at stake is [always] the readiness of the community to live up to the logic of its own institutions".¹⁸ Once the boundaries have been drawn, separate and distinct standards of distribution lock into place in each sphere and there can be no half-measures in, for example, the provision of medical care. Of course, the boundaries will always be the subject of conflict and argument, but such disputes are a good thing because they bring our conceptions of the goods at stake into sharper relief.

Walzer is immune from criticism with regard to the standards he articulates, but this is not the case with respect to the spheres he discriminates. Is the list of eleven spheres exhaustive? Can the spheres really be regarded as equal when it is admitted that "what we do with regard to membership structures all our other distributive choices: it determines with whom we make those choices,"¹⁹ etc.? Similarly, political power is not just a good which men and women pursue, it is also used to defend (or revise) "the boundaries of all the distributive spheres, including its own, and to enforce the common understandings of what goods are and what they are for".²⁰ This implies the existence of a hierarchy of spheres: membership and politics are spheres of a higher logical type than the rest. Finally, there is one very obvious problem with a philosophy of justice built up on the shifting sands of aphorisms: appearances tend to get mistaken for reality.

Many of the most basic concepts in *Spheres of Justice* call for further clarification, then, but the book stands as one of the two most important modern treatises on the subject of distributive justice, the other account

¹⁷*Supra*, note 8, 311.

¹⁸*Supra*, note 8, 85.

¹⁹*Supra*, note 8, 31.

²⁰*Supra*, note 8, 15.

being Rawls'.²¹ By breaking the stalemate between Rational Choice and Entitlement theory, and by displacing our attention from the "universalism of the individual" to the "pluralism of goods", Walzer has enabled us to throw off the monolithic theories of the past and begin to see justice in the differences that surround us.

²¹*Supra*, note 6.

Barry Nicholas, *French Law of Contract*. London: Butterworths, 1982. Pp. xxxviii, 253; Lionel Neville Brown and John Francis Garner, *French Administrative Law*, 3d ed. London: Butterworths, 1983. Pp. xvii, 218; Otto Kahn-Freund, Claudine Lévy and Bernard Rudden, *A Source-Book of French Law*, 2d ed. Oxford: Oxford University Press, 1979. Pp. xxviii, 550. Reviewed by Richard J. Cummins.*

Many lawyers and students think of comparative law as a dull subject best left to a few scholars of vaguely foreign background. In fact, it is one of the most exciting areas of the law, combining the need for the best technical skills with the opportunity to study the broadest and most fundamental legal issues. It is certainly a field in which there are fewer scholars and less good writing than there should be. It is a pleasure, therefore, to review three excellent books dealing with French law which have recently appeared in England in original or new editions.

Of the books reviewed, only that by Professor Nicholas¹ is completely new, but it seems nevertheless appropriate to look at them together as presenting a coherent body of work permitting access to French law to the student, practitioner or professor trained primarily in a common law system. Such books are all too rare and often fail to get the international distribution that they merit.²

Thus, it is hoped that this review will help these very useful books get a wider audience outside of England. It also provides a fitting occasion to reflect on the way the student, practitioner or scholar in one system enters into contact with other legal systems, and on the kinds of tools that comparatists must continue to develop to make that contact yet more fruitful and effective.

In a brief but perceptive preface to his *French Law of Contract*, Professor Nicholas addresses some of these issues. The book is described as an "essay",³ a word suggesting a more informal, intuitive approach, a lighter baggage than a treatise or other more formal structure would carry. This is wholly appropriate. Comparative law writing may legitimately be more ambitious than to, in Professor Nicholas' phrase, "enable one to use the index to a foreign law book".⁴ It is, nevertheless, in its approach to the foreign material more art than science in mediating between one more or less coherent intellectual whole and another without being able to achieve the

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¹B. Nicholas, *French Law of Contract* (1982).

²The leading book in the field remains A.T. von Mehren & J.R. Gordley, *The Civil Law System*, 2nd ed. (1977).

³Nicholas, *supra*, note 1, v.

⁴*Ibid.*

purity of structure of either. Anyone who has tried to understand a foreign language and culture well will doubtless know the experience. Absolutes of one culture or system seem to be quite relative in another; communication must be partly in terms of one and partly in terms of the other.

Professor Nicholas' book naturally reflects this tension. French treatises do not treat contracts separately from the general law of obligations, as a discussion starting from English law must do. Even within the law of contracts further conflicts of structure are found. Specific contracts are, for example, more important in French than in Anglo-American systems.⁵ The treatment of case law is equally delicate. An English lawyer will not learn much without reference to the cases, but their role in French legal analysis, although more important than in the past,⁶ is difficult to define and easy to falsify when an author with English analytical habits attempts to treat French materials.

A writer dealing with such a subject is left with a series of compromises which are not entirely satisfactory to the fastidious. The value of such a work is, however, precisely in this mediating function, a task invaluable to the beginner (who will inevitably get less from working directly with French books) and very useful at any stage. Without going any further, it must be said that Professor Nicholas provides, by and large, the most satisfactory and coherent short treatment of the French law of contracts in a long time.

The book does more than teach elementary French contracts; the introduction is particularly valuable,⁷ covering as it does the background of the distinction between common and civil law, the principal characteristics of French law and the basic divisions used in that system. Although all this is done in twenty-seven pages nothing essential to the beginning student is left out.

In dealing with the distinction between common and civil law, Professor Nicholas quite properly points out that the common lawyer's perspective, enabling him easily to perceive the similarity between civil systems, often leads him to ignore their differences. These are much greater after nineteenth-century codification than they were when Roman law was more directly influential.⁸ A page or two on the origins and characteristics of the principal civil systems might have been of interest here.

The discussion of the characteristics of French law will be useful to all but the most sophisticated.⁹ Although it focuses on contrasts with English

⁵*Ibid.*, vi.

⁶See the discussion in J. Ghestin, *Traité de Droit Civil* (1977) vol.1, 316-62.

⁷See Nicholas, *supra*, note 1, 1-27.

⁸*Ibid.*, 5.

⁹*Ibid.*, 4-22.

practice, American and Canadian lawyers will not be hindered. In fact, the codifying approach to legislation in their countries is perhaps more like French than English practice. The court system is described well, and the problem of defining the French approach to case law is tackled admirably. In the brief space allotted to this fascinating and difficult subject, Professor Nicholas shows how the need of any modern judicial system to fill in the gaps in the codes and legislation conflicts with the prohibition in the *Code Civil* against making "pronouncements of a general and normative kind".¹⁰ Case law is often followed in practice, but the principle that it is not a source of law but only an authority in fact leads in his view to a system where results may be less predictable. This is a fruitful area for research, as attitudes in France have evolved considerably in the direction of a greater role for case law,¹¹ and it is to be hoped that some aspiring doctoral candidate will make a thorough study of this subject.

The presentation of the divisions of French law which Professor Nicholas treats next is, necessarily, very brief. The difficult subject of the definition of administrative contracts is, for example, not easy to treat in a few pages.¹²

The discussion of contract law which makes up the rest of the book is admirably succinct, neatly blending French categories with English divisions (e.g. "Remedies for non-performance"). A common lawyer will find this discussion indispensable. Everywhere it is illustrated by French and English cases. It would perhaps have been of interest to include some cases from common law jurisdictions other than England, in addition to the few references to the American *Uniform Commercial Code*.

Professor Nicholas' book contains certain practical aids for the beginner which will make it a good textbook, including a note on sources and literature which provides orientation for the beginner looking for books to buy.¹³ The reference to the new treatise directed by Professor Ghestin, of which three volumes have appeared, is particularly welcome.

In the text of the Nicholas book, frequent reference is made to *A Source-Book of French Law*¹⁴ by the late Professor Otto Kahn-Freund, Miss Claudine Lévy and Professor Bernard Rudden, which is in fact a most useful companion to *French Law of Contract*. Although like the Nicholas work it will be most helpful to the beginner, even the mature scholar will find it

¹⁰*Code Civil*, art. 5; Nicholas, *supra*, note 1, 12-8.

¹¹See, for example, the discussion in Ghestin, *supra*, note 6.

¹²The discussion of this issue in G. Vedel, *Droit administratif*, 7th ed. (1980) covers 50 pages.

¹³Nicholas, *supra*, note 1, xxxiii-xxxv.

¹⁴O, Kahn-Freund, C. Lévy & B. Rudden, *A Source-book on French Law*, 2nd ed. (1982) [hereinafter Kahn-Freund].

useful for its clear organization and wealth of material. In the words of the preface by Professor André Tunc, "it gives an excellent view of the sources, categories and institutions of French law".¹⁵ A collection of readings in French, with ample introductory material and commentary in English, it parallels the Nicholas book in providing both a general introduction to French law and institutions and the elements of the law of contract, but is both wider in scope and fuller in content.

Produced principally for use by undergraduate students at Oxford beginning French law after having studied their own system, its preparation required careful consideration of the goals of such comparative study and the most effective way of entering into it. As Professor Rudden states in the introduction, comparative law is "not a subject at all but — as its French name makes clear — a method, a discipline".¹⁶ The approach chosen required attacking the hard subjects directly, those areas which are, or seem to be, strange and different, and placing strong emphasis on sources and methods.

The section on sources and methods admirably sets the French legal system in its appropriate constitutional context by starting with a large extract from the Constitution of 1958 and doctrinal material relating to it. Constitutions have often been less important in France than in some other countries, but the increasingly active role of the *Conseil Constitutionnel* has changed all that and the emphasis is entirely appropriate. Sections on the function of a code, interpretation of statutes and contracts, the method of using case law and doctrine follow. Each has a selection of readings from statutes, regulations, cases and particularly doctrine, accompanied by helpful clarifying notes and questions which will provoke thought and aid analysis.

While the introduction to the Nicholas book is quite brief, the sources and methods section of the *Source-book* makes up fully two-thirds of that text. It provides a full introduction to the principal issues for a student who will only take one course or a lawyer who has to be satisfied with a basic acquaintance with the issues, and furnishes the background necessary for further study of the great French treatises, Mazeaud,¹⁷ Carbonnier¹⁸ or Ghestin.¹⁹

The well-organized section on contracts provides a fitting companion for the Nicholas book. Professor Rudden is probably right in saying that the law of contracts provides the best material for an introductory course

¹⁵*Ibid.*, xii.

¹⁶*Ibid.*, 1.

¹⁷H., L. & J. Mazeaud, *Leçons de droit civil*, 7th ed. (1983).

¹⁸J. Carbonnier, *Droit civil*, 14th ed. (1982).

¹⁹Ghestin, *supra*, note 6.

in comparative law,²⁰ although it would be interesting to see how a book dealing on the same scale with tort or property law, or even a modern subject like competition law, would look.

As a basic grounding in French law should surely include some introduction to public as well as private law, Brown and Garner's *French Administrative Law*²¹ will be very useful. Based originally on lectures given by each of the authors at their respective universities, it retains some of the marks of the lecture form, making a certain amount of repetition and a somewhat looser organization inevitable. It is nevertheless rich in material and covers the elements of the subject quite thoroughly.

While comparative studies in private law are primarily justified as increasing access to another system because that knowledge is or may be useful, and only secondarily for the light they may shed on one's own system, public law and especially administrative law are principally of interest in helping us to understand the functioning of our own system.

In their introduction, the authors therefore rightly emphasize that the comparative method "is of particular importance in administrative law, because . . . the question of how government can be controlled in the interests of both state and citizen, [is] common to all the developed nations of the Western World".²² In addition, French administrative law has characteristics which make it an interesting subject of comparative study as a civil law system.²³ Unlike French private law it is uncodified, and unlike administrative legal systems in common law jurisdictions, which share both substantive law and courts with the private law, it is a fully developed independent system with its own courts.

An introductory chapter considers the constitutional and administrative background.²⁴ After outlining briefly the expanded role of reglementary power (*pouvoir réglementaire*) as opposed to legislative power (*pouvoir législatif*) under the Constitution of 1958, the authors deal with the *Conseil Constitutionnel* and describe its growing power and confidence before turning to administrative law proper. Basic notions of local government whose activities are, of course, the principal source of administrative cases are also covered.

Two long chapters deal with the administrative courts and their procedures, and especially with the organization, history and operation of what

²⁰Kahn-Freund, *supra*, note 14, 3.

²¹L.N. Brown & J.F. Garner, *French Administrative Law*, 3rd ed. (1983).

²²*Ibid.*, 1.

²³*Ibid.*, 2.

²⁴*Ibid.*, 6-26.

the authors rightly regard as one of the most fascinating of French institutions, the chief administrative court, the *Conseil d'État*.²⁵ Composed of some of the best members of the civil service, it exercises extensive legislative as well as judicial functions. The former include examining the text of all proposed legislation and regulations, and the relative readability and clarity of French legislation and regulations are no doubt to some extent due to prior examination by this expert body.

The judicial function of this institution is perhaps of greater interest to students. The process of examination of cases by the *Conseil d'État* is painstaking and thorough.²⁶ Although it would be hard to say that the *Conseil d'État* has the same public recognition in France as has, for example, the Supreme Court in the United States, its great prestige within the administration and the ruling class generally is a strong guarantee of independence: it has several times succeeded in exercising its influence during severe political crises without endangering its role.²⁷

Two chapters deal with jurisdiction, dividing the subject into parts roughly approximating subject matter jurisdiction and standing in American constitutional law. In the first area, the authors deal judiciously with the very difficult issues involved in grappling with notions like "public service" or "public authority" (*puissance publique*) as the way to define administrative subject matter jurisdiction.²⁸ A further two chapters deal with matters of substantive law, treating administrative liability and problems concerned with the legality of decisions of the administration.

A chapter on the influence of French administrative law outside France (including a consideration of its effect on the Court of Justice of the European Communities) and one evaluating the system's merits and defects close the book. The authors, great admirers of the French system, are very convincing in arguing its merits.

Books like these set a very high standard. It is to be hoped they point toward a revival and expansion of comparative studies.

²⁵*Ibid.*, 41-77.

²⁶*Ibid.*, 58-69.

²⁷*Ibid.*, 31.

²⁸*Ibid.*, 79-83.