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THE NEED FOR A THEORY OF LEGAL THEORIES: ASSESSING PRAGMATIC INSTRUMENTALISM

A Review Essay of *Instrumentalism and American Legal Theory* by Robert S. Summers

Michael S. Moore†

According to the central thesis of Robert Summers's recently published *Instrumentalism and American Legal Theory*,¹ the collection of ideas Summers labels "pragmatic instrumentalism" forms America's only indigenous legal theory. Summers's further thesis is that pragmatic instrumentalism qualifies as a legal theory comparable to three more established competitors: natural law theory, analytical positivism, and historical jurisprudence.

In this review of Summers's book, I shall seek to accomplish four tasks: first, to describe the subject of the book—pragmatic instrumentalism—and to describe in more detail Summers's aims and theses regarding his study of pragmatic instrumentalism; second, to raise certain questions about the methodology Summers uses to achieve his aims; third, to suggest how another theorist might have alternatively conceived the enterprise Summers has undertaken in this book; and fourth, to assess Summers's overall thesis that pragmatic instrumentalism is one of four great traditions in legal theory.

I

PRAGMATIC INSTRUMENTALISM AND THE AIMS OF SUMMERS'S BOOK

"Pragmatic instrumentalism" is Summers's label for a collection of ideas about law to which an influential group of early twentieth century American legal theorists subscribed. From the beginning, Summers is admirably clear about *what* and *whose* ideas he has in mind. Generally speaking, pragmatic instrumentalism combines pragmatism in philosophy with sociological jurisprudence and legal realism in legal theory. More specifically, Summers has in mind the beliefs of John Dewey in philosophy, and John Chipman Gray, Oliver Wendell Holmes, Jr., Ros-

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¹ R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982) (Ithaca, N.Y.: Cornell University Press. Pp. 295. \$24.95).

coe Pound, Walter Wheeler Cook, Joseph Walter Bingham, W. Underhill Moore, Herman Oliphant, Jerome Frank, Karl N. Llewellyn, and Felix S. Cohen in legal theory.²

Summers has organized the beliefs of these theorists into four parts in his book: one on the elements of law; a second on what I would call core issues in contemporary legal theory (theories of precedent, of interpretation, of validity of norms, of change of law, and of the separation of law and morals); a third on the implementation and general functioning of law in our legal system; and a fourth on the efficacy of law and how one judges the success of laws. To understand more precisely what Summers means by "pragmatic instrumentalism," it may be helpful to restructure this four-part organization into three.³ First, there are ideas about law that belong to legal theory proper; second, there are ideas about how law and legal institutions should be studied in the social sciences, i.e., ideas about the sociology of law. And third, there are more general philosophical ideas that underlie both the legal theory and the social science approaches to law. Summers's pragmatic instrumentalism, I think, is best viewed as a combination of a legal theory, a sociology of law, and certain general philosophical positions presupposed by both the legal theory and the legal sociology.

The questions of legal theory Summers believes the pragmatic instrumentalists addressed all relate to what is commonly called today a "theory of adjudication." This is a theory about how judges decide and ought to decide cases. Within the theory of adjudication Summers discusses the legal positivist and predictivist theories of the pragmatic instrumentalists regarding the validity of legal standards;⁴ Summers also discusses the American legal realist theory of precedent which advocates looking at what the precedent court did on the facts before it and not at what it said.⁵ Summers briefly examines the famous legal realist pooh-poohings of logic and plain meaning in legal interpretation.⁶ He then analyzes the well-known predilection of the legal realists for legal reform and the accompanying theory about change in law and the desirability of such change.⁷ Finally, Summers discusses the legal positivist tendencies of Holmes, Gray, and others to regard law as having no essential connection to morals in adjudication.⁸

The second set of questions Summers believes the pragmatic instru-

² *Id.* at 23.

³ It will become clear from the subsequent discussion that this reorganization of Summers's presentation is not neutral concerning certain matters about which there is doubtless some disagreement between Summers and myself.

⁴ See R. SUMMERS, *supra* note 1, chs. 4, 5, respectively.

⁵ See *id.* at 147-53.

⁶ See *id.* at 153-56.

⁷ See *id.* at 83-100.

⁸ *Id.* at 176-90.

mentalists addressed concerns the sociological study of law. Here Summers discusses the instrumentalist view about law, namely, that law is essentially a means to certain social goals; Summers also attempts to map the means-goal structure of our legal system.⁹ Similarly, Summers analyzes structural questions about the legal means available to implement social goals,¹⁰ the nature of the legal personnel who implement social goals,¹¹ and theories about the roles of force and coercion in the law.¹² Finally, Summers includes in this sociological study of law and legal institutions efficacy questions, asking what it means to judge the efficacy of laws and of law, and how one measures it.¹³

The more general philosophical ideas underlying the legal theory and legal sociology just described might be classified collectively as "pragmatism." In various parts of the book Summers usefully subdivides these ideas into more discrete packages. First there is a theory of value shared by the thinkers in question.¹⁴ Summers accurately describes this theory of value as both utilitarian in that it seeks to maximize the preferences of the citizens and conventionalist in that it takes the existing wants of citizens as simply more or less intense preferences to be tallied up when the utilitarian calculation is being made. Such utilitarian/conventionalism, Summers rightly stresses, "largely obliterates the intuitively sound distinction between the wants and interests that citizens in fact pursue and those that they ought to pursue."¹⁵ It reduces morals to a summing of arbitrary (if shared) desires.

Second, the pragmatic instrumentalists defended a theory of meaning that Summers describes as functionalism. This theory holds that the meaning of any word is a function of the consequences of its utterance in certain contexts.¹⁶ The pragmatic instrumentalists thought functionalism applied to both legal words such as *domicile* (the meaning of which one understands when one comprehends the legal consequences at-

⁹ See *id.* at 60-80.

¹⁰ See *id.* at 193-208.

¹¹ See *id.* at 209-23.

¹² See *id.* at 224-35.

¹³ See *id.* at 239-67.

¹⁴ See *id.* at 41-59.

¹⁵ *Id.* at 50 (emphasis in original).

¹⁶ Summers defines functionalism a bit differently than do I. For Summers, functionalism "holds that the true significance of any terms lies in its likely consequences." *Id.* at 32. The meaning of the word "glass" for Summers's functionalist would be in terms of the dispositional tendency glass has to break under certain circumstances. The difference between us lies in the kinds of consequences to which a functionalist looks as he seeks the meaning of a word: my functionalist looks to the consequences of uttering "glass"; Summers's functionalist looks to the consequence of hitting glass (viz, it breaks). Summers may well be closer to the historical functionalism of Felix Cohen (see Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 CORNELL L. REV. 1032, 1051-52 (1981), for an exposition of Cohen's like confusion of operationism with functionalism); yet I choose to characterize functionalism in a way more amenable to contemporary speech-act theory.

tached to its authoritative use) and to words of ordinary speech such as *glass* (the meaning of which one understands when one comprehends the perlocutionary speech acts it is conventionally used to perform).¹⁷

Three other sets of ideas are linked with the theories of value and of meaning of the pragmatic instrumentalists: a general epistemological and metaphysical position known as pragmatism;¹⁸ a political program that was Progressive and reformist;¹⁹ and an empiricism that revered observable facts above both theoretical entities and moral qualities.²⁰

Pragmatic instrumentalism, then, should be seen as a wide-ranging set of beliefs primarily encompassing legal theory and the sociology of law but secondarily encompassing more general positions in philosophy. Pragmatic instrumentalism thus becomes something like a *Weltanschauung* for Summers, a world view that not only includes beliefs on a wide variety of topics but which also coalesces those beliefs into a system or theory.

Although Summers does not make it a major theme in the book, he does present this cluster of ideas as the middle term in a historical dialectic. He briefly sketches an opposing *Weltanschauung* of the late nineteenth century, consisting of a conservative political program, legal formalism in legal theory, Social Darwinism, *laissez-faire* economics, and a natural law theory of ethics. Summers presents pragmatic instrumentalism as a reaction to this conservative nineteenth century vision, and then goes on to trace the twentieth century reaction to pragmatic instrumentalism itself. We are thus to see pragmatic instrumentalism as a kind of way station, a reaction to the excesses of the dominant ideology that preceded it, but a reaction which in turn had excesses of its own that have spawned a new reaction from critics such as H.L.A. Hart, Lon Fuller, John Dickinson, Hans Kelsen, Morris Cohen, and, of course, Summers himself in this book.²¹

In presenting this overview of a wide-ranging set of ideas, Summers enunciates two distinct aims. His "primary aim" is to further "the exploration of the instrumental and pragmatic facets of legal phenomena

17 "Perlocutionary speech act" is a term of art borrowed from the philosophy of language. Speaking is a kind of acting, an insight that generates the phrase "speech act." J.L. Austin divided speech acts into various kinds, one of which was "perlocutionary." A perlocutionary speech act for Austin was an act that included the consequences of speaking in the description of the speech act itself, e.g.: "He quieted the mob with his speech." J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1960). To understand the meaning of the word "glass," according to functionalism, would be to understand the consequences one could cause by uttering that word in various contexts.

18 R. SUMMERS, *supra* note 1, at 31-32.

19 *See id.* at 29.

20 *See id.* at 33, 54-56.

21 Summers names each of these critics (save himself) as the relevant critics he considers as part of the reaction to pragmatic instrumentalism. *See id.* at 38.

. . . ."²² Summers thus intends the book to be a substantive contribution to legal theory; he intends to use the pragmatic instrumentalists not as objects of historical study but as springboards for his own thoughts on legal theory. Because Summers clearly shows throughout the book that he agrees with much of pragmatic instrumentalism, this springboard is *prima facie* an appropriate one for him.

Summers's secondary aim in the book is historical.²³ He wishes to display the beliefs of a set of people in a way that may be unfamiliar to us; he hopes to demonstrate a coherence and unity among them that escaped their critics and sometimes even themselves. Summers aims to reconstruct the world view of the pragmatic instrumentalists and, in doing so, to defend both the hidden unity of their disparate beliefs and the partial correctness of some of those beliefs. This is, in other words, a rehabilitative intervention by Summers on behalf of a group of thinkers he feels have been undervalued as legal theoreticians.

Summers seeks to achieve both the legal-theoretic and historical aims of the book by defending what I take to be the book's central theses: first, a philosophical thesis that the cluster of ideas he has described about law, values, social science, and so forth, pass some minimum threshold of coherence so that they constitute a relatively unified theory of law; second, a historical thesis that the influential thinkers Summers names held enough of the beliefs he has described so that they fairly can be called pragmatic instrumentalists and their influence on legal thought can be attributed to pragmatic instrumentalism; and third, an evaluative thesis that pragmatic instrumentalism is a good legal theory—at least as good as the traditional theories about law (analytic positivism, natural law theory, and historical jurisprudence) that Summers regards as the hitherto recognized "big three" of legal theory—and, in any event, good enough to form an important part of any future synthesis of legal theories that may emerge.²⁴

II

METHODOLOGICAL QUERIES

It is helpful to follow Summers's own division of legal-theoretic and historical aims and to raise questions corresponding to each. I shall deal first with Summers's primary aim of advancing our understanding of legal theory, using pragmatic instrumentalism as a springboard for his own thoughts.

There is nothing wrong with using the ideas of others as a springboard from which to launch one's own thoughts. It is a common heuris-

²² *Id.* at 12.

²³ *Id.*

²⁴ *See id.* at 281 (predicting that "the perfect general theory about law and its use" will include parts of the three traditional legal theories and pragmatic instrumentalism).

tic and persuasive device to present one's own views as the revised, corrected, more balanced or more sophisticated version of ideas advanced by others. Summers's choice of the pragmatic instrumentalists as his vehicle for this purpose is problematic, however. First, the choice led him to emphasize what the pragmatic instrumentalists emphasized as important to legal theory. Thus much of the work in the book that is original asks questions about the sociological study of law and legal institutions for the simple reason that such things interested the pragmatic instrumentalists. Both Summers and the pragmatic instrumentalists assume that the sociological study of law is relevant to legal theory. Although Summers's book may advance the sociological study of law, it leaves this basic assumption unsupported.

The core issues of legal theory concern theories of adjudication, legislation, and citizenship. These theories are both descriptive and normative, telling us how judges, legislators, and citizens do and should perform their roles. Whether describing or prescribing, such theories focus on the legitimacy of the conduct and decisions of the occupants of legal roles. For example, a legal theorist focusing on the legislative role either may prescribe the correct limits to which a legislator should seek to legislate conventional morals or may describe the limits thought by legislators in certain systems to be legitimate.

These questions of legitimacy are distinct from the kinds of questions Summers addresses in chapters 2, 8, 9, 10, 11, and 12. These chapters raise questions properly described as part of a sociology of law: questions about the various implementive devices for furthering social goals available in our legal system, about the efficacy of laws and how to measure their efficacy, and so forth. There is nothing wrong with such sociological questions about law. Summers fails to demonstrate, however, that answering these questions will aid in answering the questions traditionally posed by legal theory.

Summers is not unaware of this objection. In his concluding chapter he helpfully summarizes the sociological questions that interest him²⁵ and recognizes that one might object that "the questions of pragmatic instrumentalist theory are too 'empirical' or too 'sociological' "²⁶ to qualify as part of a legal theory. Summers's response is that legal theory must adopt a sociological approach because of the nature of law itself:

Law, after all, is not religion, not physics, and not just an applied social science. Law is law. We have to know what it is. We have to understand its methods and uses. And we have to consider what it ought to be. Thus, in matters of method, legal theory must be something more than analytic philosophy, something more than moral theory, and something more than descriptive sociology. Indeed, it must

²⁵ See *id.* at 269.

²⁶ *Id.* at 270.

be all of these, yet at the same time more than the sum of its parts. Law has a kind of autonomy of its own.²⁷

If I am right in my own view of the nature of legal theory, Summers's response is unhelpful. All inquiries about law may well involve some factual questions, but such a reminder does not answer the objection that legal-theoretic inquiries do not require the particular facts that interest Summers qua sociologist.

Even if one rejects my view of legal theory as hopelessly parochial, Summers needs to develop his own theory about what legal theories should embody. It will not do to assume that we all know what law is and thus assume that understanding how "it" is used must be part of anything that could be called legal theory. Legal philosophy, like all philosophy, cannot take its subject matter for granted. A legal philosopher must develop a theory of what he is philosophizing about. That might or might not include some of the things that interest Summers. We can assess that case only when it is made. For my own part, much of Summers's sociological work leaves the impression of being an answer to a question that is not asked by any properly focused legal theory.

Elsewhere Summers identifies three themes shared by his sociological questions: (1) "that law is a complex interacting set of means and goals which expresses conceptions of value";²⁸ (2) that "[l]aw must be brought into being by humans, and thereafter identified, interpreted and applied or modified by them";²⁹ and (3) that law is "something *for use* and *in use* in daily life."³⁰ Such vague generalities may apply to the wide range of sociological questions that interest Summers and they may characterize Summers's answers to such sociological questions. They are not a substitute for a theory about the proper concerns of legal theory. Such themes compare poorly with the unified concerns that animate, for example, H.L.A. Hart's theory of law,³¹ Ronald Dworkin's theory of adjudication,³² or Neil MacCormick's theory of legal reasoning.³³ However much Summers advances our understanding of various aspects of law, he has not advanced something recognizable as legal theory.

Summers's choice of the pragmatic instrumentalists as the springboard to further his own views of legal theory presents a second problem: the mushiness of the theses with which Summers is bound to work. Pursuing this heuristic strategy, Summers must begin his discussions with "theories" or "theses" that are, in reality, hardly that. Rather, they

²⁷ *Id.* at 271.

²⁸ *Id.* at 270.

²⁹ *Id.*

³⁰ *Id.*

³¹ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

³² R. DWORKIN, *TAKING RIGHTS SERIOUSLY* chs. 2-4 (1978).

³³ N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978).

are either maxims, slogans, or battle cries of the old legal realist assault on legal formalism, or loosely formulated social science generalizations. For example, Summers begins chapter 2 by examining Karl Llewellyn's slogan that we must "view law as means to ends; as only means to ends."³⁴ Summers then uses this slogan as a springboard into his own discussion of the goal-structures endemic to law. Not surprisingly, Llewellyn's maxim hardly directs Summers's thought here, which is much more indebted to Lon Fuller than to any of the instrumentalists. Similarly, Summers begins chapter 3 with another maxim from Llewellyn, that "[s]ociety is in flux, so law needs re-examination."³⁵ Small wonder that this reduces Summers's own contribution to the palliative that "these thinkers went too far."³⁶ Although these thinkers did go "too far" here as in many other places, correcting their reformist zeal hardly furthers our own understanding of a theory of change in law, the nominal topic of this chapter. Or consider the instrumentalist "thesis" that begins chapter 9: "Instrumentalists tended to emphasize the importance of 'social engineers'—of personnel, particularly judges—in a functioning legal order."³⁷ Summers promulgates a corrective that is as hopelessly bland and vague as this instrumentalist "thesis": "In sum, *both* legal forms (precepts, structures, processes, techniques) *and* the factor of personnel are of vital import in the functioning of a legal system. And so, too, is the interaction between them."³⁸ Surely Summers would not tell us that we need both law and legal personnel to have a functioning legal system if he were not trying to correct the instrumentalists' misplaced emphasis on personnel.

Finally, consider what Summers calls the "'direct action' thesis in instrumentalist writings."³⁹ This "thesis" proclaims that "the actions of officials are overwhelmingly direct rather than indirect."⁴⁰ This thesis launches Summers into a taxonomy of all the ways the law achieves its various ends by indirect means, concluding that "it cannot be assumed that in our own system the means on which we rely are overwhelmingly direct."⁴¹

In each of these instances Summers's discussion begins with a slogan, or a generalization that is so vague that any qualification of it will be at most a matter of emphasis. With enemies like these, a theory has little hope of gaining friends.

One might raise other queries about Summers's work in the sociol-

³⁴ R. SUMMERS, *supra* note 1, at 60.

³⁵ *Id.* at 83.

³⁶ *Id.* at 97.

³⁷ *Id.* at 209.

³⁸ *Id.* at 215.

³⁹ *Id.* at 230-31.

⁴⁰ *Id.* at 230.

⁴¹ *Id.* at 235.

ogy of law that have little to do with Summers's choice of the pragmatic instrumentalists as his springboard for further discussion. In particular, it is striking in reading the sociological chapters (chapter 2, and chapters 8 through 12) how many taxonomies Summers either presents or calls for. Summers apparently considers these taxonomies necessary to a full-fledged legal theory. My own taxonomy of Summers's taxonomies includes:

1. An "inventory of the main types of goals that law may serve in a modern society,"⁴² such as preserving order or promoting health.
2. A taxonomy of goal levels that inform particular legal precepts (immediate goals, intermediate goals, ultimate goals).⁴³
3. A taxonomy of the "basic types of relationships between goals and the means of their realization through law" (external, constitutive, and intrinsic).⁴⁴
4. An "inventory of law's implementive resources."⁴⁵
5. A subinventory of implementive "technique designs" (including private-arranging, grievance-remedial, distributive, regulatory, and penal).⁴⁶
6. A subinventory of implementive devices.⁴⁷
7. An inventory of the legal tasks "that personnel of various kinds must regularly perform within a going legal system."⁴⁸
8. An inventory (explicitly adopted from Bentham) of direct and indirect means of implementing legal goals.⁴⁹
9. "A typology of five basic types of uses of law."⁵⁰
10. An "inventory of general factors that may operate to limit the effectiveness of a use of law."⁵¹

Summers himself anticipates one objection to this armchair social science, namely, that it is done in the armchair rather than in the field with empirical data.⁵² Summers properly rejects any such across-the-board criticism of his sociological method. There is nothing illegitimate about theoretically-oriented social scientists creating taxonomies of variables that can be studied. Intelligent empirical research in social science surely requires such preliminary categorization of what one is studying.

Although a blanket objection to Summers's sociology by taxonomy is inappropriate, his book does not clearly demonstrate the usefulness of some of the taxonomies it provides, even if they were to be continued

⁴² *Id.* at 64.

⁴³ *See id.*

⁴⁴ *Id.* at 69.

⁴⁵ *Id.* at 200.

⁴⁶ *Id.* at 199-200.

⁴⁷ *See id.* at 196.

⁴⁸ *Id.* at 209.

⁴⁹ *See id.* at 231-32.

⁵⁰ *Id.* at 259.

⁵¹ *Id.* at 261.

⁵² *See id.* at 266.

and elaborated according to Summers's proposals. Some of these lists strike one as "philosophy by distinction," a legal zoology whose purpose is not always clear. In this category, for example, I would place the inventory of the main types of goals that law may serve in a modern society.⁵³ It is true, as Summers notes in defense of this taxonomy,⁵⁴ that rational basis review of statutes under the equal protection clause requires a court to keep in mind the intelligible goals that a law may serve. Yet such knowledge of values is part of our cultural heritage.⁵⁵ Our ability to apply that cultural heritage in understanding particular laws probably exceeds our ability to develop an explicit taxonomy of all such values. If this is so, it is doubtful that the general taxonomy could aid us in deciding particular cases under the equal protection clause.

Summers offers more compelling justifications for other of his taxonomies. In supporting his inventory of legal tasks,⁵⁶ for example, Summers urges that "[i]t would open up avenues of fruitful reflection on the basis of which general factors of inefficacy might be independently identified" and that "it would provide a set of functional categories around which the various general factors that limit the effectiveness of law could be organized."⁵⁷ Summers hopes that his inventory of legal tasks will aid in organizing his inventory of ineffectiveness factors in the use of law. He further hopes that such knowledge can then be related to his typology of the basic uses of law to form further generalizations about when law is ineffective.⁵⁸ Summers may be a bit optimistic here, for we might be skeptical about whether such large or universal generalizations exist about law's inefficacy. Nonetheless, the taxonomies Summers here creates have the provisional justification of all such categorizations in social science: if the categories are necessary in order to frame fruitful generalizations, then they are justified.

Such heuristic and hypothesis-generating justifications do not accompany all of Summers's taxonomies, unfortunately. Too often throughout the book Summers presents his taxonomies in the same way as did Bentham (whom Summers greatly admires); he presents these taxonomies without indicating their intended uses. At times Summers gives the impression that he may share Bentham's view that taxonomies inevitably generate worthwhile understanding and can be spun out without great worry about their exact purpose. Unfortunately this is not the case. If a theorist is going to lead us through some labyrinth of distinctions, we need some advance reason for taking the journey.

⁵³ See *supra* note 42 and accompanying text.

⁵⁴ See *id.* at 66.

⁵⁵ For a discussion concerning the intelligibility of values, see Watt, *The Intelligibility of Wants*, 81 MIND 553 (1972).

⁵⁶ See *supra* note 48 and accompanying text.

⁵⁷ R. SUMMERS, *supra* note 1, at 262-63.

⁵⁸ See *id.*

Turning to Summers's historical aims, the most obvious query concerns the nature of pragmatic instrumentalism: to what extent is pragmatic instrumentalism a historical phenomenon (as opposed to construction of a theory that Summers is willing to advance). As discussed earlier, Summers does nothing illegitimate in constructing his own legal theory over the abandoned ruins of legal realism, sociological jurisprudence, and pragmatism. But to satisfy his historical ambitions, and not just his legal-theoretic ambitions, Summers must convince us of more than the philosophical thesis about the logical coherence of the various ideas he has set forth. In defending the philosophical thesis, Summers need only show that certain ideas (ideas in the sense of timeless propositions) stand in certain logical relations to one another. The ideas must be free from contradiction and must be coherent.⁵⁹ To defend his historical thesis and thereby satisfy his historical ambitions, however, Summers must show that certain historical persons actually had these ideas (ideas in the sense of beliefs, mental states that exist at a time in history) and that these ideas influenced one another (influence here meaning a *causal* relation between belief states and not merely a *logical* relation between the contents of such beliefs).

By separating his historical from his legal-theoretic aims, Summers shows that he recognizes these two distinct tasks. He has also thought about what he must do to convince us that pragmatic instrumentalism constitutes a historical phenomenon. Unlike some contemporary legal theorists interested in intellectual history, Summers names the thinkers whose work he discusses, gives a bibliography of their relevant works, and copiously quotes them as he constructs his historical thesis. He attends carefully to what the instrumentalists said as the best evidence of what they believed, and alertly notes differences among the thinkers he is considering whenever they disagreed in their relevant beliefs.

These methodological virtues of Summers's work would be too obvious to praise if it were not so common in contemporary legal scholarship to slight them. Critical legal studies scholars, for example, commonly referee a tournament between ideas without making it clear exactly what the ideas are, or who supposedly adhered to them. When pressed with historical counterexamples, such scholars will respond that their work is not intellectual history, but rather an attempt to show logical relationships between ideas as timeless propositions. When pressed with logical arguments about the incoherence of grouping certain ideas, these scholars can claim immunity because they are seeking a pure history of ideas, arguing that any logical incoherence reflects the contradictions in the thought of the historical subjects of study, not the faulty

⁵⁹ Exactly what sort of a relation "coherence" may name is a matter of dispute in philosophy. See, e.g., M. WILLIAMS, *GROUNDLESS BELIEF* 104-05 (1977). By "coherence" I mean some relation stronger than consistency and weaker than mutual entailment.

analytic abilities of the historian. When pressed that these two responses are inconsistent, these scholars offer a third. They claim that the ideas they discuss are *neither* contemporaneous belief states in causal relations with other belief states, *nor* are the ideas timeless propositions logically related to other propositions. Rather, these scholars bid us see the critical enterprise as involving unique entities with unique relationships with one another, entities and relations that we can only glimpse but not really comprehend because of our own historical limitations.⁶⁰

In such a climate of legal scholarship, it is thus no small praise to say that Summers rigorously pursues the task of recreating historical beliefs in the persons he names, and that his results are thorough and honest.

Despite Summers's thorough exposition, some queries remain having to do with the book's historical thesis that pragmatic instrumentalism was the legal theory held by the influential persons Summers names. Summers easily brushes aside one such query early in the book:⁶¹ the objection that the thinkers in question did not call themselves "pragmatic instrumentalists" nor did they see some of the similarities (of a pragmatic and instrumentalist sort) that lead Summers to so name them. Of course, Summers, as any historian, is entitled to divine similarities among the beliefs of his subjects that they themselves did not see, and he is equally free to name the resulting collection of beliefs in any way that reasonably describes the similarities so discovered.

A related query about Summers's historical thesis merits more serious attention. First, as Summers himself carefully points out, not all of the writers in question held all of the views Summers considers definitive of pragmatic instrumentalism. Second, many of the views these thinkers did share were unfinished: without further elaboration we would not think these ideas complete enough to constitute a *theory*.⁶² Third, the thinkers in question often did not think of themselves as propounding a theory of law as such, however much they may have thought of themselves as propounding the more particular views from which Summers extracts the theory of law he calls pragmatic instrumentalism. These three points together might raise doubts as to whether Summers can truthfully attribute pragmatic instrumentalism to the persons he names.

As Summers himself notes, such considerations force him (even qua intellectual historian) to do some rational reconstruction of the views of his historical subjects.⁶³ Such reconstruction should not be limited to

⁶⁰ As a prominent example, see R. UNGER, KNOWLEDGE AND POLITICS 12-16 (1975).

⁶¹ R. SUMMERS, *supra* note 1, at 20-22.

⁶² Summers himself concedes that there is "some substance to this objection." *Id.* at 273. This problem is discussed at length in the next section of this essay, which uses the incompleteness of the instrumentalists' theory of adjudication as an example.

⁶³ *See id.* at 25.

finding hidden similarities among stated views, and giving a new name to the aggregate of beliefs so related. The reconstruction must also include a weeding out of the unimportant ideas in those being studied; a fleshing out of incompletely developed ideas; and even an outright exclusion of some thinkers' ideas on those subjects where consistency (among the ideas of one thinker, or among thinkers) demands it. The query that arises at this point is whether this kind of intellectual history by rational reconstruction truly differs from the legal-theoretic aim of Summers, i.e., the advancement of what he believes to be the right legal theory.

This last query is only a query, and not a conclusive objection to Summers's reconstructivist intellectual history. For Summers's attempted systematization of the beliefs of the pragmatic instrumentalists may be a history of their ideas, and not necessarily a defense of his own. Even if Summers ultimately ends up with a total set of beliefs that none of the thinkers in question would avow as his own, he may yet legitimately claim that such beliefs were that thinker's beliefs, in the sense that such beliefs represent the best reconstruction possible of the total set of that thinker's beliefs. We all engage in this kind of reconstructivist belief attribution when we say such things as "she says she opposes all abortions on moral grounds, but she really does not"—when we know that she does not because we know she has other, more general beliefs that imply the opposite of her stated position on abortion.⁶⁴

The upshot is that Summers will have made out his historical thesis if indeed the system of beliefs he attributes to the pragmatic instrumentalists is the best reconstruction of the whole of their known beliefs. That is a large question requiring detailed consideration of alternative reconstructions. Without having made such comparisons, my own impression is that Summers has made a persuasive case for his theory of their beliefs.

My complaint about Summers's historical method is quite different than the just discussed fear that he has put his own views in the mouths of his historical subjects. Rather, on one crucial point Summers needed to step away from the views of his subjects and to impose his own ideas. That point concerns the nature of legal theory itself. This point is crucial both to Summers's efforts to establish his historical thesis that these persons actually held the pragmatic instrumentalist legal theory and his evaluative thesis that pragmatic instrumentalism is a good legal theory. Summers should have developed his own theory about what a legal theory is. Unfortunately he chose to adopt his subjects' views on that topic as his organizing principle.

⁶⁴ For a defense of the general necessity of this kind of holistic approach to belief attribution, see D. DAVIDSON, *ACTION AND EVENTS* (1980).

Admittedly, there are two differing views on how to do intellectual history, one that I shall call "modest" history and the other that I shall call "imperial" history. A modest intellectual historian will attempt to follow faithfully his subjects' own second-order beliefs about the character of their first-order beliefs. If the historian is composing a history of medieval religious beliefs, for example, he will organize his discussion around his subjects' own second-order beliefs about their first-order religious beliefs. A modest historian, in other words, will use his *subjects'* concept of religion to organize and limit his discussion. In contrast, an imperial historian will use his own concept of religion in order to organize and limit his discussion of the religious beliefs of his historical subjects. He will regard their beliefs about what constitutes a religion as just another belief to be taken into account; he will not regard those beliefs as having any special status and will not feel constrained to adopt his subjects' concept of religion as his polestar.

Summers, who is suitably imperial when it comes to reconstructing the first-order beliefs of his subjects, becomes unfortunately modest when it comes to imposing his own concept of what a legal theory should be. Rather, as Summers admits, the "entire book is organized around the themes that interested the American pragmatic instrumentalists."⁶⁵

Some may think that Summers *must* be modest on this point if he is to do intellectual history at all.⁶⁶ Under this view, Summers and his audience could not gain a true understanding of the pragmatic instrumentalist legal theory unless Summers adopts those theorists' own concept of what a legal theory is. We could not place ourselves within their system of thought, could not empathize with their views, unless we were modest intellectual historians.⁶⁷

This defense of Summers's modesty (and it is not Summers's defense) is surely overstated. We *can* impose our views of what a legal theory should be on legal theorists of an earlier time, and the result will still be a history of *their* ideas—organized in ways they might find alien, but a history of their ideas nonetheless. What imperial historians lose in empathetic understanding of another set of ideas they more than gain by relating those ideas to contemporary concerns. If religious beliefs interest us, our interest will relate to *our* idea of what religion is; if legal theory interests us, our interest will relate to *our* idea of what legal theory should be. A modest history of such beliefs relegates them to a scrapbook of historical curiosities. An imperial history of such beliefs relates

⁶⁵ R. SUMMERS, *supra* note 1, at 12.

⁶⁶ See, for example, the well-known argument (along these Weberian and Wittgensteinian lines) in P. WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958).

⁶⁷ For a sympathetic contemporary summary of such views, see G. VON WRIGHT, *EXPLANATION AND UNDERSTANDING* (1971).

them to our own concerns and enables the ideas to speak to us in a way that we can understand. Imperial history reorganizes the beliefs of historical subjects in a way that allows them to compete with contemporary ideas. In that sense imperial history takes the beliefs of historical subjects *more* seriously than does modest history, even though imperial history ignores one of the central beliefs of its subjects.

If Summers had articulated his own view of what a legal theory should contain and had organized his discussion by his own categories, we would be able to understand the pragmatic instrumentalists in a way that would make their theory come alive for us. We would know more readily their thoughts on each of the crucial issues of contemporary legal theory. We would even know if these thinkers had no thoughts on certain subjects because they did not think that these subjects were an important part of legal theory. We would then be able to judge the correctness of Summers's historical thesis that these influential people had a legal theory called pragmatic instrumentalism; we could also judge Summers's evaluative thesis that these people had a *good* legal theory. Without imposing our own ideas of what a legal theory is onto the beliefs of the pragmatic instrumentalists, it is difficult to see how we could judge either of these theses.

It is possible that Summers believes that the pragmatic instrumentalists held the *right* views about what a legal theory should be; in that case his book should be seen as educating us to such a view of legal theory so that we can properly make the historical and evaluative judgments. However, this is not Summers's apparent position. Rather, Summers urges that "we must not assume that there is, within the field of legal theory, a widely accepted convention governing what can count as a sufficiently unitary general theory."⁶⁸ Rather than taking this state of affairs as an invitation to develop his own concept of a legal theory and then organize his discussion of pragmatic instrumentalism around it, Summers contents himself with the modest historical position that allows his subjects' beliefs to organize his discussion.

III

PRAGMATIC INSTRUMENTALISM AND THE THEORY OF ADJUDICATION

In this section, I shall attempt the always dangerous task of following my own advice, which means I shall attempt to use my own notions of what legal theory should be to organize my discussion of both pragmatic instrumentalism and Summers's response to it. Rather than attempting to articulate a complete legal theory, I focus on what I earlier called the theory of adjudication. Several reasons support this limita-

68 R. SUMMERS, *supra* note 1, at 270.

tion to the analysis. First, selection of *some* subtheory within legal theory makes the discussion more manageable. Second, this book review has largely ignored this particular part of legal theory despite the extensive attention devoted to it in part II of Summers's book. Finally, this subtheory tests the validity of my point about the desirability of imperial history, because Summers does discuss much of what I discuss herein; thus a reader of this review and of Summers's book can more easily assess whether imposing a theory of adjudication onto the pragmatic instrumentalists, and forcing them to answer *our* questions, is preferable to Summers's modest historical approach.

A theory of adjudication answers the questions of how judges decide cases and how they ought to decide cases.⁶⁹ It is thus a theory of judicial reasoning. As such it should contain a number of subtheories within it: (1) a theory of law proper that tells judges what standards their office obligates them to consider when they decide cases; (2) a theory about facts and about descriptions of facts that legitimates the use of some descriptions, but not others, of "what happened" within the legal decisional process; (3) a theory of interpretation legitimating only some interpretive premises in a judge's attempt to apply the law to the facts; and (4) a theory about logic and the place of logic in legal reasoning.

A theory of adjudication should contain each of these subtheories, at a minimum, because every judicial decision necessarily requires a judge to ascertain the relevant law, to find the facts of the case, to connect the law to the facts via the meanings of the terms employed in the law, and to use logic to justify deductively the result reached. A formalist or value-free theory of adjudication, for example, would contain: (1) some version of a legal positivist theory that maintains that there exists an exclusively factual (value-free) test of law with which to pedigree the decisional standards a judge is obligated to consider; (2) some theory that urges that our perception and description of factual matters is uncontaminated by value judgments; (3) either some "plain meaning" theory of interpretation, according to which the meaning of legal predicates exists in the conventions of ordinary or legal usage, or some intentionalist theory of interpretation, according to which the relevant intentions can be discovered and applied in a value-free manner; and (4) some theory of logic and of its place in legal reasoning that sees logic as universal and value-free.

Because of the wild implausibility of thinking that adjudication can be value-free in the way just sketched, any theory of adjudication needs a fifth subtheory: a theory of value. Such a theory should answer three questions: (1) whether there are right answers to moral questions; (2) whether judges should incorporate such right answers in their legal deci-

⁶⁹ For purposes of this abbreviated discussion, I ignore the functional division of labor present in a jury system such as ours.

sions, or whether they should use the conventional morals of their time and place instead; and (3) regardless of whether judges use conventional or real morals, just where it is in the processes of legal reasoning that the deciding judge should use knowledge of values.

With this thumbnail sketch of what a fully articulated theory of adjudication should contain, we can ask whether the pragmatic instrumentalists formulated anything that could reasonably be called a theory of adjudication. We shall consider first, as Summers does in detail,⁷⁰ their theory of law proper.

Summers accurately sees a "deep ambivalence in the instrumentalists' position on standards of legal validity."⁷¹ The ambivalence Summers notes is between the traditional legal positivist view that there is a factual test for all valid legal standards, and the legal realist view, originating with Holmes, that valid law consists of predictions of what courts will do in particular cases. Many legal theorists would also agree with Summers's detailed criticisms of both the traditional legal positivist view⁷² and the legal realist or predictivist view.⁷³ But what a more imperial historian might have said here is that the instrumentalists were bound to be deeply ambivalent and deeply wrong because they never even saw the right question to ask. If we impose our ideas of what a theory of adjudication requires, we should perceive the need for a sub-theory—a theory of law proper—that allows a judge to ascertain the valid legal standards with which to make his decision. The predictivism of American legal realism simply cannot provide an answer to that question because, as Summers⁷⁴ and many other legal theorists have noted,⁷⁵ a judge's prediction of his own decision can hardly provide him with a standard with which to justify deciding one way or the other. Judges may on occasion predict their own decisions, but even to have something to predict they must also decide them.

Admittedly this criticism imposes our question on the pragmatic instrumentalists' answer. But we care about our question precisely because the best theory of adjudication we can devise mandates that we ask and answer the question of how one finds out what the valid legal standards are. The instrumentalists' failure to answer this question properly may well be due to the fact that predictivism came from concerns oblique to the development of a theory of law; nevertheless, we must force their answer to be an answer to our question if we are to under-

⁷⁰ R. SUMMERS, *supra* note 1, chs. 4, 5.

⁷¹ *Id.* at 116.

⁷² *See id.* at 102-11.

⁷³ *See id.* at 121-35.

⁷⁴ *See id.* at 132.

⁷⁵ *See, e.g.,* Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 17 (1937).

stand to what extent they had a good theory of adjudication, or even a theory of adjudication at all.

In our system, a theory of law proper must include a theory of precedent. Despite Bentham's well-known protestations,⁷⁶ common law rules form an important part of the standards we call law. Accordingly, we need some theory about how judges and lawyers should discover authoritative formulations of common law rules.

The instrumentalists had a well-known answer to this question: a deciding judge should attach precedential significance to what the preceding court *did* on the facts before it, and no significance to what it *said*.⁷⁷ Summers recognizes this as the instrumentalist theory of precedent,⁷⁸ but curiously fails to criticize the weaknesses of the "what was done" theory of precedent. Even contemporary instrumentalists such as Felix Cohen recognized that the "what was done" theory of precedent was woefully incomplete.⁷⁹ Given his aims of assessing instrumentalist legal theory, Summers should have pursued Cohen's point and demonstrated that the deficiencies could or could not be remedied. This would not require Summers to impose our question on the instrumentalists—because our question about formulating common law rules was approximately their question—but would simply require Summers to assess the adequacy of the instrumentalist answer in light of more contemporary discussions of precedent.⁸⁰

Summers curiously omits entirely any discussion about the second subtheory of a comprehensive theory of adjudication, a theory about facts. This omission would be unusual for an imperial historian of ideas because such a theory is necessary in a complete theory of adjudication. Such an omission is curious even for a modest historian of ideas because on this topic some of the instrumentalists asked exactly the questions that needed to be asked. Jerome Frank, for example, proclaimed himself to be a "fact skeptic," meaning that he doubted the ability of legal fact-finders even to approximate the truth about past facts in adjudication.⁸¹ Similarly, Walter Wheeler Cook wrote of the multiplicity of descriptions of facts and the consequent impossibility of sorting out those descriptions in the ways contemplated by the rules of pleading and evidence; Cook thought that one could not just "state the facts" in either pleading or in testimony without presupposing some of the opinions of

⁷⁶ A.W.B. Simpson nicely summarizes Bentham's distaste for the common law in *The Common Law and Legal Theory*, in 2 OXFORD ESSAYS IN JURISPRUDENCE 77 (A. Simpson ed. 1972).

⁷⁷ See Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928).

⁷⁸ R. SUMMERS, *supra* note 1, at 147-49.

⁷⁹ See Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 205-19 (1931).

⁸⁰ Julius Stone, for example, has pursued Felix Cohen's criticism of the legal realist theory of precedent in J. STONE, *LEGAL SYSTEMS AND LAWYERS' REASONINGS* ch. 7 (1964).

⁸¹ J. FRANK, *LAW AND THE MODERN MIND* xi-xix (1949 ed.).

the pleader or the witnesses.⁸²

Such concerns about facts and factual descriptions in adjudication did not predominate in instrumentalist literature.⁸³ Yet those concerns existed and deserve coverage in an assessment of pragmatic instrumentalism as a theory of adjudication because concerns about facts are a legitimate part of any full-fledged theory of adjudication. In this instance, imposing our own question (how can we pedigree some factual descriptions but not others in adjudication) onto the instrumentalists might allow us to see that it was their question too.

The theory of interpretation is the third pertinent subtheory. Summers barely mentions this theory.⁸⁴ The lack of emphasis is not justified. Even a modest historian of instrumentalist literature has to consider the major source of instrumentalist skepticism about the ability of courts to conduct value-free adjudication: the skepticism of rules proclaimed by Frank and many others, a skepticism about the ability of courts to find value-free meaning to the words appearing in legal rules. Moreover, a more imperial historian would see that Pound, Frank, Llewellyn, and others correctly devoted their attention to this issue. The theory of interpretation is crucial in assessing the degree to which values enter into legal reasoning.⁸⁵

In fairness, Summers urges that "interpretation and construction may overlap with the application of standards of validity. There can be no sharp line between these."⁸⁶ Summers may thus think that having spent so much time discussing the instrumentalists' theories of validity he need not duplicate the discussion by an equally extended critique of the instrumentalist theory of interpretation.

I suspect that Summers is correct about the unimportance of this distinction under the modest view of intellectual history. The instrumentalists probably did not draw any clear line between the question of how a judge validates certain standards as law and the question of how a judge interprets those standards. For a more imperial historian, however, there should be an important distinction between validating some standards as authoritative and interpreting the standards already validated as authoritative. The distinction is as basic as that between the syntax and the semantics of natural languages. A language's syntax tells us what strings of symbols form meaningful sentences; the language's semantics interpret those strings of symbols. A theory of law is thus a kind of legal syntax and tells us what authoritative strings of symbols

⁸² See Cook, *Facts and Statements of Fact*, 4 U. CHI. L. REV. 233 (1937).

⁸³ For a recent survey of the concern about facts of the legal realists and others, see Twining, *Taking Facts Seriously*, 34 J. OF LEGAL EDUC. 22 (1984).

⁸⁴ R. SUMMERS, *supra* note 1, at 153-54, 189-90.

⁸⁵ See Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

⁸⁶ R. SUMMERS, *supra* note 1, at 110.

judges must consider; a theory of interpretation is a kind of legal semantics and tells us how to interpret the authoritative strings of symbols.

If we impose this distinction on the instrumentalist literature, we can see that the instrumentalists were interested in giving antiformalist answers to both questions. We can see this even if they did not clearly perceive the distinction between the two questions. But we gain such an ability to assess the adequacy of the instrumentalist theory of interpretation only if we impose on them one of *our* distinctions.

If we do impose this syntax-semantics distinction onto the instrumentalists and examine their theory of interpretation more closely than does Summers, we find that the instrumentalists largely failed to articulate a theory of interpretation. Summers accurately explains that Pound and others condemned the "mechanical jurisprudence" of interpreting statutes by their "plain meaning" without considering the purposes that might plausibly have motivated the enactment of those statutes.⁸⁷ Yet nothing in instrumentalist literature matches the Hart-Fuller debate⁸⁸ and its progeny in describing how a good theory of interpretation should blend ordinary meaning, purpose, and moral knowledge. Rather, the instrumentalist literature often ended in a kind of functionalism that ignored *any* preexisting meaning (ordinary or otherwise) of legal standards, and instead *assigned* such standards a meaning in light of the desirable consequences attainable by that assignment.

The fourth subtheory, a necessary part of any complete theory of adjudication, is a theory about logic and its place in legal reasoning. A theory of logic in this context might address three subjects: first, the nature of logic itself—whether it is simply a set of inference patterns adopted by convention, or whether the logics of Aristotle and of Gottlob Frege should be seen as progressively better theories of logical truth; second, whether legal reasoning uses any distinctive logic; and third, the extent to which logic is involved in legal reasoning.

Summers again devotes limited space to these issues. He briefly considers Dewey's attempt to develop a "logic of inquiry" that differed from the traditional logic of demonstration, a logic the instrumentalists thought useful in investigating the likely effects of legal policies.⁸⁹ Summers also discusses some of the more famous instrumentalist attacks on "too much logic" in legal reasoning,⁹⁰ rightly concluding that logic was the wrong whipping boy for the evils the instrumentalists had in mind. These two topics are all that is said about logic in legal reasoning.

Summers gives limited attention to this important topic in legal

⁸⁷ See *id.* at 154, 190.

⁸⁸ Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

⁸⁹ R. SUMMERS, *supra* note 1, at 34.

⁹⁰ See *id.* at 154-55.

theory presumably because the instrumentalists themselves had little of value to say about it. As Summers notes, "most of these thinkers . . . were not highly conscious of the precise canons of deduction or of the content of the phrase 'logically entailed' as it is utilized within the abstract discipline of formal logic."⁹¹ Yet in assessing the completeness of the instrumentalists' theory of adjudication this is a failing that needs to be stressed. That they had no theory about logic or of its place in legal reasoning is an important omission. Here again their idea of the necessary components of legal theory simply bypassed crucial issues. When we apply our ideas about the issues that a subtheory of logic should address to the work of the instrumentalists, we find that they failed to contribute much to the theory.

The fifth and last subtheory of the theory of adjudication is a theory of value. Here Summers does what he elsewhere avoids: he relies on his own theory about what a legal theory must include to organize his discussion. Summers (as do I) believes that "any general theory of law that fails to address issues of value is fundamentally incomplete,"⁹² and therefore he devotes a chapter to reconstructing the instrumentalists' theory of value, something that did not truly interest those thinkers.

The reconstruction of an instrumentalist theory of value forms one of the best chapters in the book. Summers addresses each of the three issues I earlier identified as part of a theory of value in this context⁹³ and describes the instrumentalists' ideas about each issue. First, the instrumentalists' meta-ethical stance tended towards skepticism. Summers qualifies this unlikeable attitude: "Extreme skepticism about value is not an essential or natural corollary of any of the general directions of instrumentalist thought. Nor can it be said that such skepticism was widely shared."⁹⁴ This last statement is hard to square with Holmes's or Frank's well-known, trenchant skepticism about values; Summers's first statement quoted does not give due weight to the skeptical implications of pragmatism as a general epistemological position. Still, Summers correctly indicates that the instrumentalists at least wavered in their skepticism, particularly when they had to espouse a substantive ethical theory.

In discussing the second issue earlier distinguished as part of a theory of value⁹⁵—whether judges should incorporate right answers to moral questions in their decisions or instead use the conventional morals of their time and place—Summers accurately describes the instrumentalists as favoring conventional values over true values. Skepticism certainly generated some of this conventionalism: if no true values existed,

⁹¹ *Id.* at 155.

⁹² *Id.* at 41.

⁹³ *See supra* pp. 1003-04.

⁹⁴ R. SUMMERS, *supra* note 1, at 52.

⁹⁵ *See supra* pp. 1003-04.

conventional values are the only values that could be used in adjudication. Certainly Holmes's skepticism generated his conventionalism as the quotes on which Summers relies clearly illustrate.⁹⁶ In other instances, the preference for conventionalist values stemmed from majoritarian considerations: the majority, as represented by their conventional morals, have the right to be wrong. However conventionalism was motivated, Summers accurately assesses instrumentalist value theory as thoroughly conventional and thus opposed to any form of natural law adjudication.

The weak link of the chapter on value theory is Summer's treatment of the third issue necessarily addressed by a complete theory of adjudication—the ways in which knowledge of values (conventional or real) combines with knowledge of other things such as the meanings of words, brute or institutional facts, to form an overall theory of adjudication.⁹⁷ Summers does identify the nature of the substantive ethical theory held by the instrumentalists—utilitarianism. His conclusion that instrumentalist policy analyses are usually instances of utilitarian reasoning is persuasive. Summers identifies less clearly how these utilitarian values combine with other things to produce an overall theory of adjudication.

Summers's inability to state precisely how values enter a theory of adjudication may reflect the instrumentalists' confusion on this issue. To proclaim, for example, that values enter into all legal interpretations, as the instrumentalists frequently declared, should not deny a role to other items, such as the ordinary meanings of the words appearing in the rules to be interpreted.⁹⁸ Yet the instrumentalists were notably weak in specifying the role of such formalist ingredients in adjudication. Frank and the early Llewellyn sometimes seem to argue that legal decisions are nothing but value judgments, that the existence of legal rules makes no difference to legal decisionmaking except in the rhetoric employed after the fact to rationalize a decision reached on other grounds. The instrumentalists' neglect of this important part of constructing a positive theory of adjudication provides no reason that Summers should gloss over that failure, a failure as judged from *our* perspective on what an adequate theory of adjudication must include.

⁹⁶ For example, Holmes declared: "I am so skeptical as to our knowledge about the goodness or badness of laws that I have no practical crit[erion] except what the crowd wants." R. SUMMERS, *supra* note 1, at 46 (quoting 1 HOLMES-POLLOCK LETTERS 163 (M. Howe ed. 1961); see also Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (further elaborating moral skepticism of Holmes and other legal theorists).

⁹⁷ Nevertheless, Summers's discussion in other chapters (chs. 4-7) does contain some suggestions regarding this question of mixing morals with other ingredients in a complete theory of adjudication.

⁹⁸ I argue for this at some length in Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV., No. 2 (Jan. 1985) (forthcoming).

When channelled in each of these ways the instrumentalist literature can answer the questions of contemporary legal theory. If rechannelled in these ways, can it be said that the instrumentalists produced a theory of adjudication? In particular, is Summers correct in his claim that pragmatic instrumentalism is "a full-fledged and distinctive jurisprudential tradition?"⁹⁹ Of course, the instrumentalists had a full-fledged jurisprudential theory in the sense that they had *something* to say on each of the major subparts of an overall theory of adjudication. Yet surely quality is relevant here. Even when welded together to form a comprehensive theory, their disparate ideas do not add up to a complete and cohesive theory. Most of the instrumentalists were not philosophers. With the exception of Dewey and Felix Cohen, they knew little of logic, ethics, epistemology, or the philosophy of language—areas of philosophy that could have helped them formulate the various subtheories necessary to a full-fledged theory of adjudication. As Summers concedes, some of the instrumentalists were so antiphilosophical that they proudly proclaimed their lack of even a philosophy of law.¹⁰⁰ It is thus not surprising that the theory of adjudication that results from piecing together their views is philosophically unsophisticated. In addition, most of the instrumentalist insights about adjudication are to be found in their attacks on formalist modes of legal reasoning. Their positive theory is accordingly quite sketchy, because developing a positive theory was not their primary concern.

Given both of these factors, and applying our own theory about what a theory of adjudication should contain, it is difficult to agree with Summers's view that the instrumentalists propounded a new and important type of legal theory. I will concede that I have only tested the case for them having propounded such a theory by examining that subpart of legal theory known as jurisprudence, or the theory of adjudication. Still, the test seems a fair one, for these issues in adjudication greatly concern both Summers and the instrumentalists; if the instrumentalists failed to propound much of a theory here, they have failed where Summers must claim they have succeeded if he is to support his thesis that pragmatic instrumentalism represents a major type of legal theory worthy of our respect.

CONCLUSION

To a certain extent, Summers's philosophical thesis is accurate: the various views Summers discusses can be systematized into a unified legal theory. Indeed, the last section outlines the way in which I would unify the various views of the instrumentalists into a recognizable theory of

⁹⁹ R. SUMMERS, *supra* note 1, at 14.

¹⁰⁰ *Id.* at 273.

adjudication. Two points should be kept in mind, however. First, one must be rather charitable in one's requirements of completeness to concede that the instrumentalists even had a "full-fledged" theory of adjudication. Second, Summers has a broader ambition here than merely to show that the instrumentalists had a theory of adjudication; he wishes to demonstrate the hidden unity of *all* of the instrumentalists' views he discusses in his book, including those in legal sociology as well as those in legal theory. As I have argued, lumping these two things together necessarily results in something that is rather lumpy. For there is no common question to which the legal theory and the legal sociology provide the links of a unified answer. The questions asked in legal theory concerning the legitimacy of reasoning in certain ways are different from the questions asked in sociology regarding, for example, the efficacy of laws. Summers's attempt to unify the instrumentalists' views with three broad themes¹⁰¹ does not, as Summers believes, "provide as much unity as is usually found in general theories of law."¹⁰² Such thematic similarity in answers to different questions cannot provide the unity needed for anything to be called a theory of law. The needed unity must be provided by asking the same question about the same thing.

Regarding Summers's historical thesis, I have little disagreement with his assessment that the theorists he names held the views he ascribes to them. If one allows Summers the freedom to engage in a "rational reconstruction" of the instrumentalists' combined views—and one should allow any intellectual historian such a course—Summers's attributions of their beliefs seem accurate and informative. Summers's additional historical point, that the ideas of the pragmatic instrumentalists heavily influenced our contemporary legal theory,¹⁰³ also seems undeniable. However, that part of Summers's historical claim characterizing their system of beliefs as a legal theory is more problematic; without applying some theory regarding what a legal theory must include, it is difficult to assess whether the totality of the instrumentalists' views about law amounts to a legal theory, much less *the* legal theory of the period.

This last point hinders Summers's evaluative thesis as well. Summers makes the general evaluative claim that pragmatic instrumentalism is a good legal theory. He also makes two more specific evaluative claims: first, that pragmatic instrumentalism is as good a theory as analytical positivism, natural law theory, or historical jurisprudence; and second, that it is good enough to contribute to any final synthesis of the various types of legal theory.

Assessing these evaluative claims is difficult because Summers does

¹⁰¹ See *supra* text accompanying notes 28-30.

¹⁰² R. SUMMERS, *supra* note 1, at 270.

¹⁰³ See *id.* at 274-78.

not give us much guidance on what for him constitutes a *type* of legal theory. Summers does tell us that “[a] general type of legal theory is to be characterized mainly by the objects of its focus, and the questions it addresses.”¹⁰⁴ Thus natural law theory qualifies as a major type of legal theory because it studies “the nature of human beings and the human condition, with their implications for legal ordering”;¹⁰⁵ historical jurisprudence qualifies because it examines “the general modes, forms and sources of legal change and development over time and in different places”;¹⁰⁶ and analytic positivism qualifies because it investigates “the nature and varieties of legal norms, their status as law, their hierarchical ordering, and the analytic relations within and between these and other fundamental legal notions.”¹⁰⁷ Similarly, Summers urges, pragmatic instrumentalism qualifies as a major type of legal theory because the “instrumental and pragmatic facets of law qualify as important objects of theoretical study.”¹⁰⁸

I do not think that Summers can be this tolerant of what qualifies as a type of legal theory and retain significance for his specific evaluative claims. Using Summers’s criterion, any approach that studied any general facet of law would qualify as a type of legal theory. For example, comparativists and anthropologists could have a distinct “theory of law” because they study comparative facets of legal phenomena. This tolerant reading of what comprises a type of theory also makes it difficult to see how the four major theories about law could be combined in the way Summers envisions. He believes that “the perfect general theory about law . . . will partake of the best in all four of the great traditions.”¹⁰⁹ It is puzzling how any such unification of disciplines that study different things could occur. It is also unclear how Summers can believe *both* that pragmatic instrumentalism is a major type of legal theory because it studies something quite different than do the other three types of legal theories, *and* that pragmatic instrumentalism can nonetheless be combined with the other major types of legal theory into an amalgamated theory about some one subject.

A less tolerant view of what constitutes a type of legal theory would individuate types not by their subject matters but rather by their differing views on the nature of the same subject matter. Different types of legal theory must genuinely compete with each other about the nature of some aspect of law. A natural law theory of adjudication, for example, should be seen as a genuine competitor with a positivist theory of adjudication, because both concern the same thing even though they

104 *Id.* at 268.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* at 281.

each give different answers as to the nature of that thing. Since the theory of adjudication (of any type) is a large part of any general legal theory, natural law and positivism should be seen as major types of legal theory.

According to this criterion, pragmatic instrumentalism could qualify as a major type of legal theory only if it is about the same thing as are other major types of legal theory and only if it gives distinctive answers about the nature of that thing. Using the theory of adjudication as an example, one might consider pragmatic instrumentalism a type of theory, depending on how one resolves the issues raised in the third section of this review. I believe that the instrumentalists lacked the necessary detail and philosophical sophistication to qualify the amalgam of their views as a distinct theory of adjudication. One can make this judgment (or Summers's opposite judgment) only by analyzing the beliefs of the instrumentalists under one's own theory about what a theory of adjudication must include. Using my own theory in this regard, I do not think pragmatic instrumentalists worthy of the exalted position to which Summers's book would elevate them. In the absence of any other theory about what such theories must contain, that leaves me with the old Scottish verdict on Summers's evaluative claims: "not proven."