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# BLAME THIS MESSENGER: SUMMERS ON FULLER

Paul A. LeBel\*

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

Publication of the fourth volume in the *Jurists: Profiles in Legal Theory* series,<sup>1</sup> and the first devoted to an American legal philosopher, provides an occasion for consideration of more than just the merits or deficiencies of this particular work. A comparison of Professor Summers' addition to the series with the earlier volumes lends itself to reflection on the opportunities and responsibilities of the series' contributors, and the comparison may also reveal something about the nature of legal philosophy in this country. Accordingly, the plan for this review of Summers' tribute (p. vii) to Lon Fuller is first, to indicate the role that the *Jurists* series can play, second, to suggest some of the ways in which the Summers book fails to fill that role, and third, to offer a very general critique of the agenda that American legal philosophy has set for itself.

## I

The historian of philosophy of law confronts at the outset a methodological choice between different principles upon which to structure his presentation. A philosopher-centered approach will focus on those figures who have made major contributions to jurisprudence, while an idea-centered model develops the core jurisprudential concepts along broad thematic lines.<sup>2</sup> Each of the options carries with it certain risks. The former approach, often chronologically ordered, can all too easily lapse into a tedious account of the "and then, after Aquinas died . . ." variety. As the parade of philosophers passes before the reader, the impact of the most significant thinkers can be blunted, and the perception of conceptual unity and clarity can be impeded. The idea-centered

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1. The previous volumes were A. KRONMAN, *MAX WEBER* (1983), N. MACCORMICK, *H.L.A. HART* (1981), and W. MORISON, *JOHN AUSTIN* (1982).

2. Books of readings for law school jurisprudence courses are often susceptible to categorization along these lines. For an example of a book that primarily takes the philosopher-centered approach, see G. CHRISTIE, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* (1973). F. COHEN & M. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* (P. Shuchman ed. 1979), is predominantly an idea-centered anthology, as is LORD LLOYD OF HAMPSTEAD, *INTRODUCTION TO JURISPRUDENCE* (4th ed. 1979).

approach, on the other hand, can misleadingly convey jurisprudential ideas as full-blown entities at the expense of an understanding or appreciation of incremental developments in the process of "doing" jurisprudence, *i.e.*, of thinking about the nature of law.<sup>3</sup>

In structuring each of the early volumes of the series around a single figure,<sup>4</sup> *Jurists* offers a promising alternative to the superficial surveys that are currently available. There are, however, a number of questions that need to be addressed if the series is to achieve its full potential as the most important contemporary secondary source on jurisprudence readily accessible to the nonspecialist reader. In this section of the review, I will identify some of the questions that appear not to have been satisfactorily resolved to date, including: what is the audience for the series, what is the mission of the individual volumes, and how should the match between subject and author be made. While I offer tentative suggestions about the lines along which answers could be developed, more comprehensive responses must await the attention of those scholars with a deeper and wider background in the field.

### *What is the audience of the series?*

The choice of the subjects and authors for individual volumes and the substance of the individual volumes necessarily depend on the underlying conception of the audience to which the series is addressed. In suggesting that the volumes "are intended as reflective essays rather than as comprehensive monographs," Professor Twining, the general editor of the series, may be trying to reach the reader with some sophistication in the field while still offering the neophyte a "short, authoritative, reflective introduction[ ]."<sup>5</sup> However admirable the goal of providing something for everyone, either the series as a whole or particular volumes could fall into the gap between those two potential readerships.

The series got off to an impressive start, and set a correspondingly high standard for future volumes, with the MacCormick study of H.L.A. Hart.<sup>6</sup> One may wonder how a study of the philosopher who rescued legal positivism from the immature perspective of the imperative theorists such as John Austin and from the internal inconsistencies of Hans Kelsen could go astray, but I suspect that MacCormick's

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3. The standard texts for student use attempt to incorporate both approaches, but run a considerable risk of doing neither very well. See, e.g., E. BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* (rev. ed. 1974); E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* (1953).

4. Later volumes may not be structured in this way. In his General Preface to the series, Professor Twining stated: "The conception of the series is sufficiently broad to include studies of groups of thinkers and even of single works." Twining, *General Preface*, in N. MACCORMICK, *H.L.A. HART* (1981).

5. *Id.*

6. See N. MACCORMICK, *supra* note 1.

work has something in common with the play of the greatest athletes: they make the difficult look easy, and thus may create the risk of being under-appreciated. To a presentation of Hart's major themes that is both lucid and faithful to the original, MacCormick has added a succinct and cogent appraisal as well as an extension of some of Hart's major ideas.<sup>7</sup> The student beginning the study of jurisprudence could use the MacCormick volume to test his or her own understanding of Hart, while the reader with a more fully developed critical attitude toward Hart can easily benefit from an exposure to MacCormick's insights.

The next two volumes in the series played a somewhat different role. MacCormick's reflections on Hart were a valuable complement to the original work, but the ultimate force of the volume was centrifugal, pushing the reader outward toward study of the works of Hart. The Morison and Kronman volumes have more of a centripetal force, and can be viewed more as substitutes for, rather than complements to, direct study of the original work of their subjects. The primary work of both Austin and Weber is, I suspect, too often either read in abbreviated excerpts or ignored entirely in the basic jurisprudence course.<sup>8</sup> Lengthy exposure to Austin's major work<sup>9</sup> is undoubtedly deterred by what Lon Fuller has described as "what may well be the dreariest prose ever penned by man."<sup>10</sup> Weber is not sufficiently a philosopher of law *qua* law, and his theory of law is either so scattered across the range of his work or so buried in the "dense prose" of the *Sociology of Law*,<sup>11</sup> that the reader without a broad base in philosophy and sociology may be reluctant to venture onto what appears to be treacherous ground. Although not wishing to be cast in the role of encouraging reliance on secondary works as a substitute for careful scrutiny of the original work of important scholars, I suspect that each of these volumes, albeit in different ways, interjects into the basic study of jurisprudence a more rigorous explication of these scholars' contributions than their work might receive on its own.

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7. In so doing, MacCormick has made accessible to a wider audience the significant scholarship contained in his earlier work, *LEGAL REASONING AND LEGAL THEORY* (1978).

8. Of the works cited at note 2 *supra*, the Cohen and Cohen book has a 20-page excerpt from Austin, F. COHEN & M. COHEN, *supra* note 2, at 8-28, but nothing from Weber. Lloyd includes 17 pages from Austin, LORD LLOYD OF HAMPSTEAD, *supra* note 2, at 19-21 & 223-37, and none from Weber, although Weber is given a brief textual discussion. *Id.* at 350-51. In keeping with his practice of providing the student with lengthy excerpts from the philosophers who are included in his book, Christie provides over 120 pages excerpted from Austin, G. CHRISTIE, *supra* note 2, at 471-594, but nothing from Weber.

9. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed. 1954).

10. L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 103 (temp. ed. 1949).

11. See A. KRONMAN, *supra* note 1, at 1.

*What is the goal of the individual volume?*

These remarks on the earlier volumes in the *Jurists* series indicate that the purpose of the individual volumes is dependent upon, and should vary according to, the extent to which the original work of the subject is (a) inaccessible and (b) likely to require such an interdisciplinary background as to present a forbidding facade to the uninitiated reader. When the barriers appear to be formidable, the authors of *Jurist* volumes have an opportunity to carve out handholds that facilitate surmounting the barriers, thus opening up intellectual terrain that might otherwise go unexplored. By adding to the richness and variety of the encounter with jurisprudential matters, series volumes that widen the scope of the reader's exposure serve a valuable purpose.<sup>12</sup>

Authors of series volumes about writers such as Fuller, whose work is readily available to contemporary audiences and is written in a manner that invites rather than deters comprehension (p. 15), are in large measure relieved of the path-breaking tasks imposed on authors who address the more obscure, if not obscurantist, works of legal philosophers. Although path-breaking may not be a necessary function when writing about the more accessible figures, indicating a route through a body of work may still be an important contribution to a wider and deeper understanding of the work, particularly when it covers a broad spectrum of topics.

Certain general responsibilities are inherent in writing for an audience composed in part of readers who may be using a volume in this series to guide an initial exploration of the work of a legal philosopher. Professor Twining has noted his request that contributors "set their subjects in the context of their times and specific concerns," and "be scrupulously fair in interpretation but not . . . inhibited in expressing their own opinions."<sup>13</sup> Both backward- and forward-looking evaluation may be beyond the capability of the reader drawing initially on his or her own resources. Identification of the intellectual currents out of which the subject's work emerged, and from which it diverged, is a service the author needs to provide, along with a demonstration of how the work has affected, or is likely to affect, the future course of developments.

*What qualities should be sought in the authors?*

The tasks described in the preceding section call for a variety of skills. The *sine qua non* is, of course, a thorough mastery of the work of the subject of the volume. Without a firm grasp of the full *oeuvre* of

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12. The goal of expanding the range of tools with which the reader thinks about law and legal problems suggests that as the series includes volumes that are not philosopher-centered, a promising line to pursue would be some of the "law and . . ." subjects, chief among them being law and economics.

13. See Twining, *supra* note 4.

the subject,<sup>14</sup> the author of even these short reflective introductions<sup>15</sup> will be unable to appreciate how the diverse strands of the work might form a pattern that will make it easier to assess the significance of the subject's thought.

Nearly as important as an understanding of the work of the subject is a familiarity with the milieu in which the work took place. An author would be seriously handicapped in trying to explain Hart without at least a basic appreciation of the linguistic and analytical philosophy being done at Oxford,<sup>16</sup> or in attempting to assess Austin's significance without locating his work within the utilitarian circle that influenced and supported that work.<sup>17</sup>

This series demands more than just reporting or paraphrasing if it is to achieve its full potential. The authors must bring to bear on their subjects an independent intelligence that Professor Twining describes as "sympathetically critical."<sup>18</sup> Synthesizing various themes, rerouting lines of argument around pitfalls, carrying an argument through the next stages of development — these tasks require that the authors be substantial scholars in their own right.

## II

Measured against the level of performance of the first three volumes in the series, or evaluated in terms of the questions raised in the preceding section of this review, Professor Summers' contribution is a seriously flawed work that will not enhance the reputation of the *Jurists* series. Perhaps the most striking feature of the volume is the choice of Summers as the author of a volume on Fuller. For at least two major reasons, Summers would not appear to be an obvious candidate for the role. First, as Summers himself acknowledges at the outset of the book (p. vii), a sympathetic account of Fuller's work marks a departure from his earlier treatment of Fuller.<sup>19</sup> Second, Summers'

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14. Writing about living legal philosophers presents obvious difficulties that are not present when the body of work is closed, but it may present opportunities as well. An active scholar may become so focused on details that not only does the forest disappear, but the recognition of the trees as well might be prevented because of an inability to see anything but individual leaves. An objective evaluation of one's work to date has the potential of providing an illuminating perspective that the scholar might not otherwise receive from critiques that are as much directed at the details as is the work being evaluated.

15. See note 5 *supra* and accompanying text.

16. See N. MACCORMICK, *supra* note 1, at 12-19.

17. See W. MORISON, *supra* note 1, at 38-60.

18. See Twining, *supra* note 4.

19. Compare Summers, *Professor Fuller on Morality and Law*, 18 J. LEGAL EDUC. 1 (1965), reprinted in R. SUMMERS, MORE ESSAYS IN LEGAL PHILOSOPHY: GENERAL ASSESSMENTS OF LEGAL PHILOSOPHIES 101 (1971) [hereinafter cited as Summers, *Morality*], with Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978) [hereinafter cited as Summers, *Dominant Philosophy*].

views of American legal philosophy<sup>20</sup> are sufficiently idiosyncratic that one might view with some suspicion his selection as a contributor to a series such as *Jurists*. Neither one of these points necessarily disqualifies Summers from contributing a volume on Fuller to the *Jurists* series. Nor do I mean to suggest that there is not a good deal that is of value in this book. However, a consideration of these two points reveals, and perhaps explains, a number of the major flaws in *Lon L. Fuller*.

As noted before,<sup>21</sup> Professor Twining has asked contributors "to be sympathetically critical" of their subjects. Summers refers to his account as "*decidedly* sympathetic,"<sup>22</sup> and describes a rereading of the entire body of Fuller's work (apparently as part of the preparation of his *Instrumentalism* treatise)<sup>23</sup> as provoking a heightened regard for Fuller's contribution to legal theory (p. vii). In theory, at least, this process of undergoing a growing appreciation for the work of the subject offers an opportunity for the reader of this book to experience second-hand the observations and insights that raised Fuller's stature in the eyes of the author. But such a process holds out that opportunity only at the price of creating a pair of risks that Summers is not always able to avoid.

The first and more serious risk is that the author who, over time, comes to a conclusion different from one he had held at an earlier date will overreact to the change in position. The critic converted to supporter may assume the mantle of the hagiographer. While Summers usually keeps his enthusiasm under restraint,<sup>24</sup> there are instances of gushing overstatement that raise at least some warning signs about Summers' ability to present an objective appraisal of his subject. In his concluding chapter, Summers refers to Fuller as "the greatest proceduralist in the history of legal theory" (p. 151). While philosophy of law does not seem to me to be an activity that lends itself to the kinds of comparisons more appropriately made about left-handed pitchers, one who makes statements of this sort at least ought to recognize how the evaluation is undercut by other statements he has made. For example, Summers earlier states:

Fuller did not develop a systematic account of the purposes that are essential to the definition of each basic process. Nor did he explain very fully how far a necessary purpose may fail of embodiment or implementation before we can say the process no longer exists, or has become

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20. See R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

21. See notes 13, 18 *supra*.

22. P. vii (emphasis added).

23. See note 20 *supra*.

24. Summers qualifies many of his assessments of Fuller. Fuller is described, for example, as "[i]n his time . . . the leading standard-bearer of secular 'natural law' theory in the English-speaking world." P. 1 (emphasis added).

some other kind of process. But he did offer many remarks on the purposes of different processes . . . . [Pp. 31-32.]

There is quite a gap between offering "remarks" on process and being the greatest proceduralist in history, and in chapters devoted to Fuller's work on legal processes, Summers simply fails to sustain Fuller in the exalted position to which the concluding chapter elevates him.

The other risk that is presented in an account by a convert is that the process of conversion can be glossed over, with the new understanding or appreciation presented as a *fait accompli*. I suspect that the reader would have benefited from a more thorough explanation of what deficiencies the author had previously identified in Fuller's work, and precisely how the rereading changed or corrected the earlier views, or made the earlier objections less significant.

In an earlier appraisal of the first edition of Fuller's *The Morality of Law*,<sup>25</sup> Summers concluded that Fuller had failed to establish that a set of legality principles had to be characterized as moral principles.<sup>26</sup> That criticism, if well supported, should strike at the heart of Fuller's development of "the inner morality of law."<sup>27</sup> In this book, Summers apparently has come around to the view that Fuller's purported morality *is* a morality (pp. 33-41), but Summers' method of arriving at that conclusion is not a service to Fuller or to the reader trying to grasp the significance of the morality designation.

Summers first collapses the idea that legality principles can constitute a morality into the idea that the legality principles "necessarily translate into principles or values of moral worth" (p. 37). Then, while acknowledging that the move is his rather than Fuller's, Summers identifies the citizen's "fair opportunity to obey the law"<sup>28</sup> as the moral value that is secured by compliance with Fuller's principles of legality. Summers attempts to reinforce this argument from fairness with an argument from legitimacy. If a "lawgiver violates the principles of legality, . . . the lawgiver . . . necessarily forfeits some governmental legitimacy. . . . Legitimacy is itself a moral value" (p. 38). Left unstated is the basis on which the values Summers identifies assume the guise of *moral* values.

The arbitrariness of Summers' bridging of the gap between legal principles and moral principles is demonstrated by his consideration of a criticism that was directed at Fuller's principles. Summers cites an exchange between Fuller and Wolfgang Friedmann in which Fuller resists Friedmann's characterization of Fuller's principles as "mere

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25. L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969) (1st ed. 1964).

26. Summers, *Morality*, *supra* note 19, at 127-30.

27. L. Fuller, *supra* note 25, at 42.

28. P. 37 (emphasis in original).



conditions of efficacy' ” (p. 37). Yet Summers himself had earlier written:

A further reason for refusing to apply the halo word “morality” to the author’s principles of legality is that there is an apposite alternative: They may be viewed as “maxims of legal efficacy” and maxims of this nature are not, as such, conceptually connected with morality. If a person assembles a machine inefficiently, the result is inefficiency, not immorality.<sup>29</sup>

If Summers’ facile equation of the fairness of an opportunity to obey the law and governmental legitimacy with morality is sufficient to turn Fuller’s principles into a morality of law, then the obvious step to have taken would have been to state simply that inefficiency is immoral.

Labelling something moral is no more persuasive when done at one remove, as Summers does, than when done directly, as Fuller did. Summers recognizes in passing that the notion of “what ought to be” is a notion “of some appropriate person or body” (p. 34), but the standard of appropriateness is not provided. Furthermore, recognizing that “legal standards of content *are* frequently moral in character” (p. 35) tells us nothing about *which* standards have that quality. Summers’ hypothesis that a necessary connection between validity and morality exists “[w]henever a rule, to qualify as valid law, must satisfy tests of moral worth specified in standards of legal validity” (p. 35) displays the twin failings of his attempt to protect natural law theory from inanity: the ignoring of the necessity of human agency in the formulation of a standard of validity that includes tests of moral worth, and the overloading of the definable concept of legal validity with indefinite notions of morals.

The danger that is associated with this moral overloading of validity is inadvertently displayed by Summers’ attempt to extend the necessity of moral value to legal processes. Summers refers to “genuine legislative processes of a democratic kind” as apparently including a “right of parties potentially affected by a proposed law to a legislative hearing in which they may try to influence the content of the legislation” (pp. 40-41). For at least seventy years, no such “right” has been recognized in this country.<sup>30</sup> The question that is necessarily posed to those who would infuse morality into validity concepts is whether the legislative process in this country is thereby rendered immoral and/or invalid. Summers’ designation of the moral values that are secured by the principles of legality is of little help in answering this question. A hearing right has no effect on a “*fair* opportunity to obey the law,”<sup>31</sup> but such a right arguably could be part of the contractarian “understanding” that gives a government legitimacy (pp. 38, 84).

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29. Summers, *Morality*, *supra* note 19, at 129.

30. See *Bi-Metallic Inv. Co. v. Colorado*, 239 U.S. 441 (1915).

31. P. 37 (emphasis in original).

Summers' view raises a number of questions. What makes an opportunity to be heard by a legislature a right? Is it a right because a hearing would be moral? I suspect that we would be better off if we followed Fuller's lead and identified this procedural step as something that *ought to be* provided. In that way, the proponent of a legislative hearing would be able to make the instrumental arguments for the desirability of a hearing, and those arguments could be evaluated on their merits, without the distraction (and the potential failure) of a leap from the undesirability to the immorality of proceeding without a legislative hearing.

Even if we were to accept Summers' implicit conclusion that a legislative process that did not afford a hearing to affected parties is in some sense immoral, the consequences of that conclusion are not at all clear. Are the enactments of that legislative process invalid, immoral, or both? If the members of the legislative body in fact consider all the matters that would have been raised in legislative hearings, isn't the hearing directed at another goal, namely, the inclusion of the citizenry in the process of legislating? Are we then in the position of having to add yet another statement to Summers' list of what is moral (e.g., "legitimacy" (p. 38)) and immoral (e.g., "injustice" (p. 37)), to the effect that inclusion is a moral value?

Both Fuller and the reader would be better served by an introductory essay that is able to convey a deeper understanding of precisely what Fuller was trying to do and why it was important. In overcoming his earlier objections to Fuller in the way that he displays in this book, Summers proves to be unable to save Fuller from the force of those and other objections in any meaningful way.

The criticisms of the book that center around Summers' blossoming enthusiasm for Fuller as a pivotal figure in jurisprudence provide only part of the reason why Summers seems not to have been the ideal choice to contribute a volume on Fuller to the *Jurists* series. A different set of criticisms, derived from Summers' attempts to develop a unified view of American legal theory, raises equally serious questions about the Summers book.

During the course of the past decade, Professor Summers has developed at considerable length,<sup>32</sup> and with no small degree of sophistication, his hypothesis that the work of many prominent American legal theorists of the first half of this century<sup>33</sup> reflects a sort of prototheory of law which he labels "pragmatic instrumentalism."<sup>34</sup>

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32. See R. SUMMERS, *supra* note 20.

33. See *id.* at 22-26.

34. I do not understand Summers to be suggesting that a fully developed theory of law can be found in the work of those theorists he identifies as pragmatic instrumentalists. Indeed, such a suggestion would fly in the face of such disclaimers as that issued by Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). What Summers appears instead to be doing is identifying certain concerns common to this set of theorists, and

His fresh perspective on a group of scholars who have usually been categorized as the American legal realists is bound to produce both a renewed interest in this group of theorists and a heightened awareness of the need to explore the responsibilities and consequences of operating at the level of metatheory.<sup>35</sup> However one might agree or disagree with Summers' work on pragmatic instrumentalism, jurisprudence as a whole should benefit from his efforts.

When Summers turns from his pet theory to the work of someone who by all reasonable reckoning was outside of the movement, a potential trap is set for the reader who is unaware of the peculiar perspective from which Summers views American legal theory. In his 1978 essay on Fuller and the pragmatic instrumentalists, Summers noted the desirability of accommodating Fuller's views within that theory of law.<sup>36</sup> Four years later, Summers described Fuller as a major critic of American pragmatic instrumentalism.<sup>37</sup> Now, in a book purporting to be about Fuller, Summers states that "Fuller stood . . . on the side of the instrumentalists," but he simply "did not belong to the realist wing of American pragmatic instrumentalism" (p. 4). The reader who is attempting to obtain an understanding of Fuller must consider the possibility that Fuller's views have undergone at least some distortion in order to enable Summers to bring Fuller into a non-realist "wing of American pragmatic instrumentalism."<sup>38</sup> Without further warning or background, the reader is unable to separate what is uniquely Summers' from a more mainstream depiction of the legal and philosophical environment in which Fuller participated and against which he reacted.<sup>39</sup>

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then developing on his own "something that qualifies as a *general theory*." R. SUMMERS, *supra* note 20, at 11 (emphasis in original).

35. Compare Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988 (1984), with Summers, *On Identifying and Reconstructing a General Legal Theory — Some Thoughts Prompted by Professor Moore's Critique*, 69 CORNELL L. REV. 1014 (1984).

36. See Summers, *Dominant Philosophy*, *supra* note 19, at 433.

37. See R. SUMMERS, *supra* note 20, at 38.

38. Even if the change has occurred in Summers' conception of his theory, if all he is doing is conflating instrumentalism with antiformalism, Summers achieves the integration of Fuller into the instrumentalist camp only at the debasement of the theory. Ironically, this is a risk that Summers appears to have recognized in 1978. See Summers, *Dominant Philosophy*, *supra* note 19, at 433. Fuller can be classified as an instrumentalist, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 4 (1977), but even that term begins to lose its significance if it begins to be used so that it encompasses anyone who thinks law has a purpose.

39. I do not mean to suggest that Summers should be precluded from offering his own insights into Fuller's work, particularly insights that reflect Summers' development of the pragmatic instrumentalist theory. Both MacCormick and Morison provide good illustrations of how carefully developed original insights can add to the depth and sophistication of the reader's understanding of the subject. See, e.g., N. MACCORMICK, *supra* note 1, at 96-102, 111-20; W. MORISON, *supra* note 1, at 178-205. What is essential for an introductory treatment of the sort proper for a volume in this series is a demarcation of the line between the views of the subject and the views of the author that is discernible by the reader who lacks a familiarity with the works of both.

The most serious (and the most inexcusable) shortcoming of Summers' book lies in his description of the major legal theory which Fuller opposed and as an alternative to which he offered his version of a natural law theory. No account of Fuller that purports to place Fuller "in the context of [his] times and specific concerns"<sup>40</sup> can avoid at least a general description of legal positivism. Indeed, Summers undertakes a description of this view of law even prior to his presentation of Fuller's own theory of law, in the belief that "this view as Fuller conceived it will help us to understand why this general issue was such a live one for him, and why his own theory cannot be dismissed as platitudinous" (p. 16).

However, no book that is likely to find its way into the hands of a reader who is relying on the book as part of an initial exposure to jurisprudence ought to be permitted to present such a distorted view of legal positivism as Summers provides here. Even when the distortion is Fuller's,<sup>41</sup> one of the responsibilities of the author of an introductory text such as this is to correct the misperceptions of the terms of the dispute created by the subject's misstatements and oversimplifications of the opposing view. Otherwise, Fuller's theory would need to be rescued not from dismissal as "platitudinous" but rather from the charge that the theory is a trivial response to a positivist straw-man with no realistic counterpart in contemporary legal thought.

At the heart of Summers' distortion of legal positivism is an inexplicable failure to comprehend the meaning that positivists attach to the term "validity." Summers argues that a "source-based" test of validity fails to capture the extent to which content is actually relevant to the validity of "a lower-tier precept" (p. 44). As evidence of this failure, Summers describes the apparent conflict between the source-based validity and the content-based validity of an unconscionable contract, a will that conflicts with state governmental policy, an arbitrarily discriminatory statute, and a judicial precedent that is not "good law" (p. 45). Setting aside for the moment the last example, which is subject to its own peculiar difficulties,<sup>42</sup> each of the so-called

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40. See text at note 13 *supra*.

41. In his initial description, Summers states that he is presenting a look at positivism "as Fuller conceived it." P. 16. In his later, more fully developed treatment, Summers attributes to Fuller the thesis that "the positivist quest for a general criterion by which the law could be identified and differentiated must fail," and states that because "Fuller did not develop the [thesis] as fully as he might have," Summers will attempt "to elaborate it here faithfully to his evident intuitions (and also in a manner largely consistent with the anti-positivism of Dworkin)." P. 42.

42. The meaning Summers assigns to the phrase "good law" displays some of the difficulties of his attempt to portray the theory of judicial decisionmaking in a negative, antipositivist mold. Earlier in the book, Summers appears to be including the test of "a precedent for minimal 'goodness' ('Is that good law?')" within those content standards which are based on morality. P. 35. There and at this point in the book, Summers seems merely to be misusing the term "good law" as a synonym for binding precedent that provides the solution to the dispute before the court. However, Summers shortly thereafter makes it clear that the apparent confusion is in fact delib-

content-oriented tests of legal validity is itself dependent on what a positivist would have no difficulty describing as a source-based legally valid rule. Contracts are unenforceable because of a legal rule of unconscionability,<sup>43</sup> wills violate state governmental policy embodied in properly enacted statutes,<sup>44</sup> and statutes are set aside as discriminatory under a federal or state constitutional provision.<sup>45</sup> Summers fails to distinguish between the validity of *rules*, which positivists purport to be able to determine on a source-based standard, and the validity of public and private *acts*, which must of course include reference to content-oriented standards, but to such standards as are found in or inferable from legally valid rules.

The more significant conceptual and practical questions turn on the issue of how legal decisionmakers can and should select the content for specific rules and decisions. Presenting this issue as part of an antipositivist agenda (pp. 54-57) entangles the reader in a law/morality dichotomy that need not be part of either the positivist or the natural law program. Summers describes the impossibility of differentiating legal argumentation from moral argumentation (p. 55). A differentiation can, of course, be made, but the questions become why one would want to make the differentiation, and what one has sought to prove by the distinction.

The distinction I would draw is based on use rather than content. Legal argumentation consists of reasoning offered to affect a decision by a legal decisionmaker. Within such argumentation, reasons derived from various sources will have room to operate depending on the particular hierarchy of persuasiveness that has been established within the system. If the reason for distinguishing legal from moral argumentation is to suggest that positivists ignore the latter, the suggestion is absurd. It is true, however, that within the sphere of legal argumentation, reasons will have different weights, and decisionmakers will have varying degrees of freedom to follow certain reasons. Without an understanding of the hierarchical structure of rules within a legal system, both the observer and the participant will be totally unequipped to

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erate, that "the standard of sufficient goodness is largely determined by moral notions," and that the legal validity of a precedent depends on its becoming "settled" by passing a test that is based in part on "general moral ideas of sufficient goodness 'outside the law' on which such standards must continuously draw." P. 55. This exercise might have some point if Summers were approaching the issue that contemporary legal philosophers have joined under the headings of the meaning of judicial discretion and whether legal questions always have right answers. See, e.g., R. DWORKIN, *supra* note 38, at 31-39, 81-130; Dworkin, *No Right Answer?*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58-84 (P. Hacker & J. Raz eds. 1977). Summers indicates, however, that this is not Fuller's primary concern, p. 51, and thus the purpose seems to be simply to offer a further attack on the positivist straw-man whose theory of legal validity is unconcerned with content. P. 54.

43. See, e.g., U.C.C. § 2-302 (1972).

44. See, e.g., T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 135-38 (2d ed. 1953) (discussing the policy underlying statutes setting restrictions on charitable and religious devices).

45. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1146 (1978).

understand to whom arguments should be addressed and along what lines they should be structured in order to be most effective.

Summers' attempt to use the experience of the common law as proof of the failure of the positivist quest involves him in a convoluted tangle of uses of the word "law" that might well be better abandoned than sorted out. The steps in the argument (p. 50) are essentially these: (1) Common-law rules owe their status as law to "general acceptance and rational appeal," rather than to their "having been laid down by prior judges;" (2) common-law rules are "sufficiently good to become 'settled' law and therefore truly law" when their rational appeal "to subsequent judges and to the legal profession at large" gives them a certain level of acceptance;<sup>46</sup> (3) common-law rules have the status of law even before a judicial decision because (and here Summers must be quoted lest the reviewer be accused of intentionally parodying his views)

in my view, the grounds on which interpretational notions, custom, and common law are received *are* very largely generalizable, *are* in fact so generalized, and *are* widely understood within at least the legal profession. Thus for the law to be knowable in advance, it is simply not necessary to have the kind of system for which so many positivists seem to have yearned — a system in which law is identifiable preferably by reference to the antecedent and authentic stamp of some authoritative originator. Law can be sufficiently identified by other means.<sup>47</sup>

Summers' argument can be tested by taking a fairly common situation and seeing where the steps of his reasoning lead. Driver *A* and driver *B* are in a two-car collision, in which *B* struck *A*'s car from the rear, and *B* wishes to sue *A* for damages for the personal injuries and property damage suffered in the accident. The supreme court of the state in which the accident occurred has consistently held to a common-law rule of contributory negligence. In recent years, nearly two-thirds of the states have replaced contributory negligence with one of three different forms of comparative negligence. The legislature of our hypothetical state has considered but not enacted a comparative negligence bill in each of its last three sessions. In such a state of affairs, it is difficult to believe that anyone could seriously contend that "the law" in this jurisdiction is anything other than the most recent pronouncement to have received the "antecedent and authentic stamp of some authoritative originator." If the state supreme court were to decide tomorrow to adopt a system of comparative negligence, would that be the law of the state because of its "general acceptance and rational appeal"? Would it become "good" or "settled" law only when its rational appeal "to the legal profession at large" has pro-

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46. This point is developed in a much more sophisticated manner by Ronald Dworkin as a matter of the "gravitational force" of common law precedents. See R. DWORKIN, *supra* note 38, at 110-23.

47. P. 50 (emphasis in original).

duced an (unspecified) level of acceptance? And before the court announced the comparative negligence rule, did that rule have the status of law because it was "knowable in advance" at least within those segments of the legal profession which could see it coming?

Summers sketches a view of law by Gallup poll and horoscope. If this be the alternative to positivism, give me positivism! I may thereby reveal that I am deluding myself that I am "value-neutral" (p. 52), show myself to be a moral skeptic (pp. 52-53), and demonstrate that I am unhealthily preoccupied with a theory that does not fit the facts (p. 53). But I also know how *B*'s case is going to be decided by a trial court, to whom *B* should address arguments for change, and the binding effect of the change if it should occur. Failure to adopt Summers' open-ended view of law does not in any way concede that the role of a judge is "simply to do or die and seldom to reason why; his is generally to be an uncreative role" (p. 60). Yet that creativity takes place within limits and subject to constraints. The distorted view of positivism Summers offers here is a poor substitute for a reasoned exploration of the nature and location of those limits, and serves not at all the important task of introducing the reader to what is significant in Fuller's rejection of positivism.

### III

The portrayal of Lon Fuller as one of the most influential American legal theorists of this century calls for some concluding thoughts on what Fuller's work indicates about the agenda that American legal theory addressed during the period of Fuller's work. In order to assess the accomplishments of legal theory as represented in Fuller's writing, a distinction between the reactive and the positive segments of that work will be useful.

To the extent that Fuller's writing is reacting to what Summers sees as a scientific mindset (pp. 53, 57, 63), it displays an essentially sterile strain of American legal theory. The late nineteenth-century legal science movement in this country was fundamentally different from such later developments as Kelsen's pure theory of law. The American legal scientists were essentially not concerned with the nature of law as a philosophical or intellectual phenomenon. Rather, they were developing a formalistic method of legal decisionmaking that would confine the decisionmakers within the parameters of syllogistic reasoning from a major premise that could be located in the relevant statutory or appellate case law. The realists reacted strongly and effectively to that concept of decisionmaking. American legal philosophy outside of the "realist wing" (p. 4) makes no significant contribution if all it does is belabor the same point made by the realists.

Even the secular natural law which Fuller could have offered as an alternative to the more sophisticated positivism of the post-realist era

is essentially negative in character. Fuller's inner morality of law enables us to identify putative legal systems that are not what they seem to be (p. 71), but neither the observer nor the participant is otherwise given standards against which to measure the validity of particular enactments or pronouncements about individual laws. The barrenness of Fuller's natural law is most apparent when compared with the creative work of a natural law proponent such as Ronald Dworkin, addressing the nature of judicial decisionmaking in light of a constructive model for reaching correct results.

Fuller's impressive studies of processes are a positive contribution to our understanding of the possibilities and the limits of different decisionmaking and ordering techniques. Such work, however valuable and illuminating it may be, is only tangentially jurisprudential in nature, unless the concept of jurisprudence is so broadened that it includes all discussion of conflict resolution and resource allocation. Fuller's views on custom, for example, undoubtedly increase our appreciation of how individuals behave, but to say "that he expanded our very concept of law" (p. 78) is to perpetuate the antipositivist dilemma, *i.e.*, if we cannot and should not distinguish law from non-law, who can object to the proposition that everything is law?

Summers' over-playing of the antipositivist vein in Fuller's work creates a risk that Fuller and the bulk of midcentury American legal theory will be dismissed as irrelevant. As long as American legal theory concerns itself excessively with attacks on a legal positivism resembling the simplistic notions of Austin (pp. 48-50), and offers only an amorphous and indeterminate "morality" as the reference criterion for decisions of difficult and controversial issues (chs. 3-4), the philosophy of law generated in this country is likely to lag considerably behind its British and Continental counterparts.

In his earlier text on American legal theory, Professor Summers distinguished the fox from the hedgehog, and adopted the stance of the hedgehog which knows one great thing or which has the best trick of all.<sup>48</sup> Considering the fundamentally unsound nature of Summers' introduction of the work of Lon Fuller, I suspect that both the subject and the readers of the *Jurists* series would have been better served had the hedgehog stuck to his pragmatic instrumentalist trick.

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48. See R. SUMMERS, *supra* note 20, at 13. The image is developed with considerable richness in I. BERLIN, *RUSSIAN THINKERS* 22-81 (H. Hardy ed. 1978).