Discussion

JUDITH W. DECEW

REALITIES ABOUT LEGAL REALISM*

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.
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> Oliver Wendell Holmes, Jr., *The Common Law*, p. 1.

1. INTRODUCTION

A familiar theme in legal theory is the debate over whether law is best understood as a settled and self-contained set of nearly complete and consistent doctrines separate from political and moral values, or as a tool for changing existing reality by implementing policies aimed at accomplishing social goals. These positions, broadly construed as formalist and instrumentalist respectively, have usually been defended in conjunction with a variety of additional theses about legal reasoning, sources of law, and

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judicial power. Instrumentalists such as Oliver Wendell Holmes Jr., Karl Llewellyn, John Chipman Gray, Jerome Frank, and Roscoe Pound, maintained that law should serve practical purposes by maximizing prevailing desires and interests (as opposed to interests *worthy* of desire, a distinction they often neglected). This could only occur, they argued, if legal creativity has a vast scope, allowing judges as well as legislatures the opportunity to make law. On their view new law should be in accord with social realities, so is best based on (often massive) sociological data concerning the impact of alternative policies. Thus law is and should be constantly changing due to the rapid flux of society.

In *Instrumentalism and American Legal Theory*, Robert Summers wishes to provide a "comprehensive framework within which ... to make instrumentalist theorizing ... more intelligible and coherent than it has been previously" (13) by unifying and criticizing this multitude of often neglected claims which he labels "pragmatic instrumentalism." Summers seems generally sympathetic to the basic ideas underlying the views he discusses: the instrumentalist attack on formalism, the teleological focus on goals, a modified version of the utilitarian decision method, the importance of the social and natural sciences for formulating law, and at least some activist role for judges. Although he believes that instrumentalists failed to complete their defense, Summers claims that "the work of the American pragmatic instrumentalists qualifies as a full-fledged and distinctive jurisprudential tradition worthy of a place alongside analytical positivism, natural law theory, and historical jurisprudence..." (13–14). Summers' own criticisms indicate this claim may be too strong. Yet he makes an impressive case for the patterns and uniformities among views of the different instrumentalist authors he studies. I shall discuss some central themes in Summers' book (section 2), and will point out serious problems with instrumentalism that he dismisses (section 3). Nevertheless, I shall argue (section 4) that there are even more powerful reasons than he mentions why those views are worth continued study.

The instrumentalist views and theorists described above are

better known as part of the American legal realist movement prominent in the early and middle twentieth century. Summers urges, however, that "pragmatic instrumentalism" is more descriptively accurate and less misleading than the term "legal realism", because on his view "realism" designates only part of the body of legal thought termed "instrumentalist" (36). "Legal realism" is often used more broadly than he allows, however, and despite his protestations to the contrary Summers does tend to focus on the American instrumentalists associated with realism. Perhaps his aversion to "realism" derives from his desire to avoid the negativism associated with the doctrine.[1] In any case, I shall refer to realists and instrumentalists interchangeably, since I address their common themes.

2. SUMMERS ON PRAGMATIC INSTRUMENTALISM

Summers' exposition and critique is generally sensible, evenhanded, and filled with excellent references. Anyone hoping for bold stands, however, will be disappointed. Moreover, because he examines instrumentalist thought through so many overlapping themes, there is a great deal of distracting repetition. Much of Summers' overview is familiar from the instrumentalists themselves as well as their critics, notably Lon Fuller, Morris Cohen, and even Pound after 1930.[2] Using the perspective derived from

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[1] One commentator has said that the realists were considered to uphold "an unsound and often dangerous attitude." Edward A. Purcell, Jr., *The Crisis of Democratic Theory* (The University Press of Kentucky, 1973), p. 81. According to another, "During the 1930's, the Realists presented themselves, and were generally perceived, as the profession's enfants terribles – debunking cherished legal myths with devastating effects." Bruce A. Ackerman, *Reconstructing American Law* (Harvard University Press, 1984), p. 5. It is interesting that those part of the neo-realist or critical legal studies movement now occupy a similar position. See Roberto Unger, 'The Critical Legal Studies Movement,' *Harvard Law Review* 96 (1983): 563 and the special issue of the *Stanford Law Review* on critical legal studies, January 1984.

[2] For example, Lon L. Fuller, 'Means and Ends,' *The Principles of Social*

relating their ideas, however, he hopes to show which theses are untenable and which, though sketchy and incomplete, are insightful. Summers is at his best on such topics as the origin and influences of realism, realist views about the scope of judicial authority, legal validity, and efficacy as a test of the success of law, and the consequences of the realists' oversimplifications and overindulgence in technical metaphors.

The rich variety of factors contributing to the rise of pragmatic instrumentalism is carefully documented by Summers. The most well known, of course, is the reaction to formalism (sometimes called conceptualism or doctrinalism) in legal reasoning and education. Summers is careful to emphasize that formalism is not a single theory but marks one side of a wide range of contrasts (158). In general, however, a formalist sees legal reasoning as value-neutral because it proceeds syllogistically from rules and concepts clearly defined historically and logically. On this traditional conception, a judge discovers the correct preexisting principles governing a case, applies them to the new facts, and deduces the decision.[3] The formalist view is reflected in the case method of legal study, based on the idea that close scrutiny of past decisions will reveal basic doctrines and concepts of law dictating future decisions.[4] The reaction struck deeper than condemning literalism in favor of purposive interpretation, however. Opposition also focused on substantive conceptions underlying formalism such as laissez-faire economics, social darwinism, and a generalized

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Order, ed. Kenneth Winston (Duke University Press, 1981); Morris R. Cohen, 'Justice Holmes and the Nature of Law,' *Columbia Law Review* **31** (1931): 357; and Roscoe Pound, 'The Call for a Realist Jurisprudence,' *Harvard Law Review* **44** (1931): 697.

[3] Purcell, *op. cit.*, p. 75. Lon L. Fuller, 'Williston on Contracts,' *North Carolina Law Review* **18**, (1939): 1. Compare Charles Fried, *Contract as Promise* (Harvard University Press, 1981).

[4] Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts*, (1879), Preface to the first edition, and 'Teaching Law as a Science,' speech reprinted in *American Law Review* **21** (1887): 123 and *Law Quarterly Review* **3** (1887): 124.

judicial conservatism inherited from Blackstone and others.

Positive influences on instrumentalism included work by Bentham, Austin, and von Ihering stressing law as a means of maximizing satisfaction of desires to accomplish political ends, as well as the progressive movement in American politics urging reform by using law to serve social goals. Concurrent technological advance supported the view that the social order could be transformed by human effort or "social engineering." The scientific ethos of the day and the philosophical pragmatism of Pierce, James, and Dewey were also influential. Both enhanced the outlook of law as a pragmatic instrument and encouraged reliance on empirical data for developing and assessing law, leading to a tendency to reduce value questions to factual ones.

Summers applauds several realist trends as healthy responses to formalism: (i) testing legal actions and decisions by probable consequences instead of retrospectively weighing their consistency and coherence, (ii) introducing empirical data to develop law as a practical and flexible means for social improvement rather than seeing law as a self-justifying system of logical precepts ("No case is an island" (160)), and (iii) refocusing on particulars and not merely general principles. Although Summers suggests that "the instrumentalists' most important contribution may have been their critique of formalistic legal method" (223), he chastises them for going too far. They overstated the need for scientific and social facts, underestimated the limitations of social science, and ultimately brought about neglect of general principles and lack of a reasonable role for logic in legal decision-making (94, 159).

Legal realists are also well-known for stressing that judges both do and should have broad law-making powers, the most extreme version claiming that since statutes and sources of law are so vague, "in truth, all the Law is judge-made law."[5] Summers agrees with realists that because of gaps and inconsistencies in legislation, and because of changing social facts and scientific or technological

[5] John Chipman Gray, *The Nature and Sources of Law* (Beacon Press, 1963), p. 124.

developments, new legal needs regularly generate opportunities for judicial creativity. Moreover, he reviews a wide range of cases which persuasively show that judges *do* address substantive issues and make law (148–152). While praising realists for unmasking the reality of judge-made law, however, he criticizes them for providing no set of norms governing when and how judges should make law, and for not even addressing the issue of limits on the scope of judicial authority. He argues, in addition, that the claim that judges *always* have real choices was an overreaction. Realists' approval of judicial readiness to overrule, modify, and make new policy revealed an insufficient regard for the justifying force of precedent and those parts of law that are determinate and binding (163). By failing to recognize much law as stable, they undermined the accompanying values of security, consistency, and predictability. Finally, Summers itemizes the varied legal tasks our system requires beyond adjudicative procedures and details important roles of both private parties and administrative agencies in defense of his view that "the instrumentalist preoccupation with courts was hardly justified" (218).[6]

Given the care with which Summers supports these conclusions it is surprising that he gives no explanation why he endorses two significant positions. First, he accepts not only the descriptive thesis that judges do make law but also the normative claim that "judges are as well suited as legislatures to make some kinds of law – indeed better suited" (141). Second, he states that instrumentalists did "demonstrate that even in a democracy judicial lawmaking is not inherently unjustified" (86). That judges generally have access to more factual detail than legislators with which to make decisions hardly shows they are politically justified in going beyond using discretion by formulating policies into new law.

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[6] This is reminiscent of Hart's critique of American jurisprudence as almost obsessively concentrated on judicial process. H. L. A. Hart, 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream,' *Georgia Law Review* **11** (1977): 969–989.

There are, on Summers view, far less successful associated doctrines in the instrumentalist program. For example, instrumentalists gave two accounts of valid law, which Summers correctly shows are not equivalent. The first, that "any rule or other precept acted upon or laid down by an authorized official is valid" (102), is a source-based and ironically "formalistic" test. It is also severely defective according to Summers. It provides no account of how to resolve inconsistencies between official actions. It also gives no standard of validity independent of the judicial or legislative decision to explain the possibility of error or to serve as justificatory resources. With a wealth of examples Summers shows that denying a role for substantive valuation is at the least descriptively inaccurate of American standards of legal validity. The second account, that "valid law consists of predictions of what courts will do" (102) suffers from these same difficulties, and others as well. It introduces the problem of determining what counts as law if a prediction is incorrect, and it does not adequately account for that portion of the law that is determinable (even if it is not easy to determine). Most seriously, it gives an "impoverished conception of the lawyer's role" (127). In particular, "the predictivist view of legal validity makes it impossible for a lawyer or commentator to argue that a prospective decision would be legally incorrect, even though this is recognized as a powerful and distinctive form of argument in our system" (123).

Perhaps there are good arguments for a standard of validity based on both the source and content of laws. Unfortunately, however, here and elsewhere in this discussion Summers conflates two different sets of standards: those for determining whether a law is valid and those for judging whether a law is correct in the sense of being morally and legally justifiable. It was H. L. A. Hart's insight that separating these may be an asset rather than a difficulty for a legal theory.[7] Yet even if source-based tests of validity are defensible, it is clear that the realists' criteria are problematic

[7] H. L. A. Hart, *Concept of Law*, Oxford University Press, 1961, ch. VI and IX.

for the other reasons given above.[8] And as Summers notes, their court-centered tests are not generally accepted in the United States. Nevertheless, more needs to be said about why this is so given that the judicial decision is what actually *binds* both parties.

In other instances instrumentalist work was even more shallow. For example, Summers exposes their simplistic treatment of means and goals ("Law is only a means" (72)) by demonstrating that goals may be specific or general, immediate or long-term, public or private, communal or individualistic, procedural or substantive, etc. He also shows that goals may have internal as well as external sources, and are not as clearly separable from means as instrumentalists appear to have thought.

Closely related to this, instrumentalists urged that the success of a use of law should be judged "by the extent to which its effects actually serve goals set for it at the outset" (239). But, argues Summers, the realists' failure to develop this future-oriented efficacy test with systematic critical attention led them to ignore its difficulties. They tended to assume goals were clearcut and explicit. They also seemed naively optimistic about the ability to determine effects. They failed to address how to balance other costs or goals conflicting with the most effective solution, or how to weigh long-term and short-term effectiveness. Nor did they acknowledge any need to judge the value of means and goals independently of their efficiency.

Characteristic of instrumentalist writings is a generous use of technological metaphors. Law is referred to as an "instrument," "tool," "engine," or "machine" that "social engineers" use to "implement" goals. Yet it becomes clear that this pseudo-scientific view of law is at best naive consequentialism. A more charitable interpretation would urge not that law is itself a science but that it can be studied as a science (broadly construed). Such an inter-

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[8] For a fuller discussion of the difficulties attending the predictive analysis of the concepts of law, rights, and duties, see Martin Golding, 'Principled Judicial Decision-making,' *Ethics* 73 (1963): 247–254 and *Philosophy of Law*, (Prentice-Hall, 1975), pp. 37ff.

pretation would account for the instrumentalists' emphasis on empirical data in legal decision-making as well as the attempt to reduce normative legal concepts to descriptive ones.[9] While Summers documents respects in which the law/technology analogy is legitimate, he also points out its inaccuracies and isolates several of its unfortunate developments. It leads to a focus on means over goals and heightens the view that only technocrats or experts are qualified to make decisions. More intangibly, it can erode the democratic ideal that citizens are "autonomous, choosing individuals with some responsibility for and control over their government and its uses of law" (208).

As this discussion illustrates, underlying Summers' sympathy for many aspects of the instrumentalist's work, he is critical of their generality, omissions, and lack of follow-through, often due to their reliance on slogans. Throughout his book he attempts to provide the detail they missed or to describe what remains to be investigated. We might wonder whether or not Summers has presented a fair representation of the instrumentalists and whether it is sometimes Summers' work that is simplistic and sketchy, for example, in his discussions of philosophical pragmatism and utilitarianism. I shall not pursue that question, however, for despite his voluminous criticisms, the picture he hopes to have painted is of a potentially reasonable (given suitable modifications) but unfinished jurisprudential theory. In light of this it is striking that Summers passes over other serious problems with instrumentalism.

3. FURTHER PROBLEMS FOR REALISM

I have already mentioned that Summers appears to dismiss one anti-democratic critique of legal realism, namely that it is contrary to a representative democracy for judges who are neither elected nor responsible to the electorate (as legislators are) to make new law.

[9] See also Martin Golding, 'Holmes' Jurisprudence: Aspects of its Development and Continuity,' *Social Theory and Practice* 5 (1979): 182–207.

This charge is widely viewed as a central difficulty for judicial activists generally.[10] Moreover, concern is aggravated since standard responses to the objection, such as justifying judicial originality as a check on potential tyranny of the majority, are not open to an instrumentalist with a theory of value based on maximal satisfaction of desires.

A related worry is that the subjectivity of judicial decision allowed by instrumentalists cannot be squared with the doctrine that free citizens should be subject only to known and established law. If all or even some law is retroactive – at worst an *ex post facto* rationalization – as some realists openly acknowledged was a consequence of their views,[11] this democratic ideal is unattainable. Summers does not even mention this as a limitation of instrumentalism. He praises the instrumentalist theory for reinforcing democratic values such as consideration of the needs of the many over those of the few, and maximal satisfaction over private gain. It is thus curious that he neglects these other two ways in which instrumentalism appears to conflict with democratic principles.

Clearly law and morals do not fully overlap. And Summers points out that "nearly all instrumentalists subscribed to some version of a thesis that law and morals are 'separate' " (176), though often for different reasons. Apparently most applauded Bentham's distinction between law as "that which is" and law as an ideal of what ought to be. But it is difficult to make sense of the instrumentalists' discussion of this topic. Unfortunately Summers provides little assistance. It is particularly noteworthy that he fails to discern its incompatibility with other theses of

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[10] Theodore Benditt, *Law as Rule and Principle* (Harvester Press, 1978), p. 20; Purcell, *op. cit.*, chapter 5; Ronald Dworkin, 'Hard Cases,' *Taking Rights Seriously*, (Harvard University Press, 1978), pp. 84–85 and 123ff.; H. L. A. Hart, 'American Jurisprudence...,' *op cit.*, p. 971; John Hart Ely, *Democracy and Distrust* (Harvard, 1980); Raoul Berger, *Government by Judiciary* (1977).

[11] John Chipman Gray, 'A Realist Conception of Law,' from *The Nature and Sources of Law, op. cit.*, and reprinted in Feinberg and Gross (eds.), *The Philosophy of Law*, second edition (Wadsworth, 1980), p. 43.

the realist approach. Holmes wrote that law is objective, concerned with external human behavior, whereas morality is subjective, focusing on the internal, private, and mental. Moreover, Holmes, Llewellyn, and others urged that concepts of justice and ethical right had to be ignored when analysing the operations of law. Such "natural law" considerations would merely add confusion, they claimed, since only existing realities were relevant to those processes. On the surface this view is understandable as part of the instrumentalist critique of existing law as being a self-contained formal system out of touch with society. But to close the gap between extant law and social needs, instrumentalists needed to rely on some conception of society based on an assumed consensus of values. Any such general conception, accurate or not, led them to favor choices of particular goals in cases of conflict. The result was no more value-neutral than the formalistic decisions they attempted to expose as ultimately containing hidden political tilts and biases. Although this supports their claim that law is inevitably value-laden, it is difficult to reconcile with any thesis on the separation of law and morals. Moreover, it is ironic that the instrumentalists' standard for reform, for judging what the law ought to be, ultimately centered on what is in fact the case, thereby violating the distinction they had endorsed. Their reliance on the status quo reveals a deep conservatism in a movement conceived in rebellion.[12]

A recurring theme is Summers' dissatisfaction with instrumentalism for avoiding consideration of values in questions of legal validity, method, and justification. Summers holds to the contrary that values are "essential determinants of law's content" (59). It is of course basic to our Constitution that there are values beyond majority views and current political trends. But Summers is no

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[12] Ackerman also claims that "with a half-century's hindsight, Realism has come to seem profoundly conservative," but he gives a different explanation from the one presented here. Ackerman, *op. cit.*, p. 5. For a fine critical review of Ackerman's book see George L. Priest, 'Gossiping About Ideas,' *Yale Law Journal* 93 (1984): 1625–1639.

more specific about what values should be utilized or to what extent it is appropriate to use them. In general he gives no resolution for this tension between pragmatic instrumentalism and natural law. We are left wondering if this is evidence that Summers himself is an instrumentalist who has not fully recognized the depth and intractability of one of its central problems.

In part, the difficulty Summers must have in mind is that instrumentalism precludes criticizing laws or decisions as legally or morally justifiable. Instrumentalism need not be simply Benthamite utilitarianism. But as Summers has described the view, it appears the emphasis on fulfulling social policies leaves no room for a) the importance of past legislation or judicial decisions and b) standards of moral valuation not part of the legislative goals. One can only assess the instrumental value of the law.[13]

Another way of understanding Summers' concern is to view it as a worry about how to account adequately for the protection of individual rights. There is scant textual evidence for this interpretation. If this is not at least part of his worry, however, he has ignored a major recent objection to instrumentalism. The objection is most often associated with Ronald Dworkin, but is also raised from the political left by Roberto Unger and from the political right by Freidrich Hayek.[14] Summers notes that predictivism generally leaves no room for rights and duties as we generally perceive them (134–5). But of course the predictivist

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[13] Compare Martin Golding's discussion in "Realism and Functionalism in the Legal Thought of Felix S. Cohen," *Cornell Law Review* 66 (1981): 1041, where he argues that a fundamental defect in realist theory is the failure to grasp the normative character of law. See David Lyons' 'Legal Formalism and Instrumentalism – A Pathological Study,' *Cornell Law Review* 66 (1981): 954, 966–7, for a careful explanation of the deep conflict between instrumentalists' utilitarianism and their understanding that courts are bound by other authoritative decisions.

[14] Roberto Unger, *Knowledge and Politics* (The Free Press, 1975). Friedrich Hayek, *The Constitution of Liberty* (1959) and *Law Legislation, and Liberty*, vol. 1 (1975), vol. 2 (1976), vol. 3 (1979).

account of legal validity could be abandoned with little amendment to other instrumentalist theses. It is not merely predictivism but focus on judicial action as a test of law that seems problematic. We believe and act as if we have rights and duties independently of whether they are enforced in court. The question is when and how often such beliefs are justified. Summers also mentions that substantive rights of the Constitution are incompatible with the satisfaction of wants view he associates with instrumentalism (52). Surely this is a much more serious difficulty, and it is astonishing that it is dismissed as a remediable problem for the instrumentalist theory of value. We have instead two starkly contrasting views of social justice: one insists that only careful study of consequences can generate fair decisions, the other demands stringent protection for claims of individuals over social welfare. Given that pursuit of social goals is paramount for instrumentalism, it seems clear that on such a view the State *is* justified in invading or sacrificing individual rights more than we normally think is reasonable. That is, instrumentalism does not acknowledge, much less place any limits on what may be done to individuals to accomplish institutional reform. In cases of conflict, general interests *will* override individual claims, as Pound advocated (45).

4. SURVIVING EFFECTS AND VALUES OF REALISM

The claim that pragmatic instrumentalism is a fourth major jurisprudential *theory*, which Summers goes to great pains to defend, seems to me to miss the point. Most realists were not philosophers, but a generation of young law school teachers and legal scholars. Thus it may be best not to judge their work as a systematic jurisprudence but to view it as a way of talking about the law or perhaps as the legal manifestation of a political movement. It is sufficient to agree that realism encompasses a body of issues worthy of further study and examination. Despite the numerous difficulties discussed, I wish to argue that this is clearly true for interesting reasons not mentioned by Summers.

Summers focuses on the critique of formalism as the most

important contribution of pragmatic instrumentalism.[15] He documents many of its effects on the legal profession as described in section 2. One further result of this critique concerns the question of how relevant and useful general principles and guidelines can be in the law. Holmes' observation that "general propositions do not decide concrete cases" was an extreme statement. But its influence is clear. In particular, the American Law Institute's formulation of Restatements of the law of torts, contracts, and most other areas in the early 1900's can be viewed as a formalist attempt to counter realism. Apparently the assumption underlying the Restatements was that the legal rules preexisted in some form or could be derived from a consideration of cases. The job of the Institute was to discover them by logical analysis and write them down. Their enterprise in turn refueled the realist movement.[16]

We would do well, however, not to overemphasize the importance of the realist critique of formalism. For it is doubtful that anyone held a strict deductive or "slot machine" formalism of the type often criticized by realists. Jerome Frank,[17] for example, ridiculed "formal law" as a theory of decision-making that could be symbolized in a crude mathematical form which cannot fairly be attributed to Langdell, Williston, or Beale.[18]

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[15] This is a common view. For example, see Morton White's account of Holmes as representing the "revolt against formalism" in law. *Social Thought in America* (Viking Press, 1949). One commentator who disagrees is David Lyons, *op. cit.*

[16] Some theorists see a continuing effect of the realist critique in differences between the First and Second Restatements, prepared (in general) before and after the Second World War respectively. Ackerman, *op. cit.*, p. 12 and Duncan Kennedy, 'Form and Substance in Private Law Adjudication.' *Harvard Law Review* 89 (1976): 1685.

[17] Jerome Frank, 'What Courts Do In Fact,' *Illinois Law Review* 26 (1932): 645.

[18] Ronald Dworkin also makes this point in 'The Model of Rules,' *Taking Rights Seriously, op. cit.* David Lyons goes even further. He gives an interesting explanation of why formalism, even if never developed as a systematic body of doctrines, cannot be understood as it was portrayed by the instrumentalists, and he shows ways in which it is strikingly similar to instrumen-

A second significant contribution of legal realism, as Summers notes briefly, was that it exposed the extent to which judges and legal personnel other than legislators were in fact making law. At worst the judge gave a wholly subjective and arbitrary decision. At best the decision was an innovation as well as impartial, deliberative, and compatible with existing law. The contrary ideal, that judges merely apply existing law to new cases, is more intuitively appealing but obviously inadequate for explaining cases involving issues legislators could not have foreseen. It was the realist insistence that judicial originality did not merely occur in reinterpreting extant law to fit new facts, but often involved major modifications or additions to precedent, that made its mark. Common appeals to "what public policy demands," "unconscionability," and "unequal bargaining power" are just a few examples of realist-inspired phrases whose elasticity assured great opportunity for judicial activism.

It is a measure of the importance of this realist challenge that both H. L. A. Hart and Ronald Dworkin, for example, can be viewed as responding to it. Realists claimed that established rules did not bind judges and hence they failed to acknowledge the existence of cases where rules are controlling. Hart and Dworkin attempt to mediate between the views embraced by realists and the extreme formalism they rejected, by giving contrasting accounts of the extent to which judicial decisions *are* guided by rules or other aspects of law. Hart argues that judicial decisions are usually determined clearly by statutes and precedents although judges must use discretion, constrained by impartiality and consistency, in those few penumbral cases when vague terms require interpretation. According to Dworkin, in those cases where enactments or precedents give incomplete, ambiguous, or conflicting guidance, judges do not make new law by choosing between alternative social policies outside of law. Rather, they

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talism. He concludes, "If my original suspicions were sound, formalism is a non-theory, developed by instrumentalists who see themselves as battling theory-laden judicial practice that ignores human values." *Op. cit.*, p. 971.

characteristically discover the preexisting individual rights governing the case from general principles of justice and fairness presupposed by positive rules of law. Judges are not confronted with a choice, as Holmes thought, but must seek the correct resolution to the case by acting on the best evidence of what the law already is.[19] Consequently, to the extent the realist assessment of judicial power was and is correct, it undermines Hart's and Dworkin's descriptive theses about what judges do.

Anyone familiar with Dworkin's work knows that he is defending a liberal theory of law as an alternative to the ruling positivist and utilitarian theory. Although his political conclusions are liberal, his jurisprudence is conservative insofar as it emphasizes discovery of the relevant underlying principles and rights. Thus other features of his discussion can be fruitfully examined as a reply to the realists, whom Dworkin refers to as nominalists![20] Most obviously, Dworkin defends judicial decisions based on rights arguments rather than arguments of policy. By arguing that protection of individual rights does and should take priority in most cases over implementation of social goals, he is explicitly rejecting the instrumentalist view of law. Second, justified or not, he endorses and perpetuates the realist emphasis on the role of judges as central to jurisprudence. Moreover, he argues specifically that challenges to judicial originality based on its incompatibility with democratic ideals are far less a problem for his rights-based theory than for an instrumentalist policy oriented approach to law. And if we interpret

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[19] H. L. A. Hart, 'Positivism and the Separation of Law and Morals,' in Feinberg and Gross, *op. cit.*, pp. 54–55; H. L. A. Hart, *The Concept of Law, op. cit.*, pp. 128–140; Ronald Dworkin, *Taking Rights Seriously* (Harvard, 1978); H. L. A. Hart, 'Law and the Perspective of Philosophy: 1776–1976,' *New York University Law Review* 51 (1976): 538–551.

[20] Philosophers may be frustrated at Dworkin's use of the term "nominalist" here. Yet it is appropriate if we think of realists as those who deny the existence of a comprehensive set of legal rules, doctrines, concepts, and principles. Cf. Purcell, *op. cit.*, p. 85. The term "realist" then appears more philosophically confusing. It apparently reflected their concern to bring law in touch with social reality.

Dworkin as arguing that law is not just a system of rules but also of background principles the courts are not free to disregard, then we might view him as embracing part of the realist critique of positivism while generating a different positive theory about what judges can and should do.[21]

Muddled or sketchy as the realists' work was, these considerations show its effects on legal theory can be documented. Whether its conclusions stand or fall will have ramifications for all post-realist jurisprudence. Nowhere is this more striking than in relation to the economic analysis of law, according to which (roughly) judges do and should base their decisions on what will be economically most efficient. The economic view is instrumentalist in its acceptance of pursuit of a particular social goal, economic efficiency, as the basis for judicial decisions. And it is committed to realism in the sense that it is essential to the enterprise that judges be free to decide cases in accordance with the dictates of efficiency rather than in accordance with any set of preexisting claims litigants might have against one another.[22]

Most commentators, including Summers, have characterized legal realism as encompassing two aspects: (1) an exciting critical aspect attacking the insularity of formalism and demonstrating the value-laden character of law, and (2) a more disappointing constructive aspect urging implementation of public policies and emphasizing judicial decision as determinative of law. Criticisms have discredited the overriding consequentialism realists advocated. And judicial decision-making is surely only one part of the legal process. Yet I have tried to show that despite generalizations and

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[21] Compare the following: "These realistic sensibilities have, by now, been assimilated by all lawyers – though of course some attempt to suppress them and reassert the possibility of finding *the* correct doctrinal answer, while others glory in their post Realist freedom to intuit their way to justice." Ackerman, *op. cit.*, p. 13. The former reference is to Dworkin, and the latter to the critical legal studies movement (see note 1).

[22] For a detailed explanation of the theory see Jules L. Coleman, 'Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law, *Ethics* 94 (1984): 649–679.

omissions, the realists' focus on the judicial role is no less important and exciting than the critical themes. It has crucially shaped subsequent legal theory. Hence it both illuminates and is central to an assessment of major theories such as Hart's, Dworkin's and the economic analysis of law.

Department of Linguistics and Philosophy
Massachusetts Institute of Technology
Cambridge, MA 02139
U.S.A.