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Paul A. LeBel

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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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\* Associate Professor of Law, Marshall-Wythe School of Law, College of William and Mary. A.B. 1971, George Washington University; J.D. 1977, University of Florida. — Ed.

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-

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).



# THE MORALITY OF OBEDIENCE

*Joseph Raz\**

A THEORY OF LAW. By *Philip Soper*. Cambridge, Mass.: Harvard University Press. 1984. Pp. ix, 190. \$16.50.

Over the past few years Professor Soper has published several articles displaying an acute power of analysis, a fair-minded treatment of the views of theorists for whom he has little sympathy, and a capacity to cut through the detail of complex arguments and reach to their heart.<sup>1</sup> In them he was moving towards an independent stance. This elegantly written book contains the fruit of this search.

The book can be divided into three parts. The first, mainly in chapter one, discusses method in legal philosophy. The second, consisting mainly of chapters two and five, unravels Soper's views on the nature of law. The third, mainly in chapter three, is a completely new argument for the existence of an obligation to obey the law — any law, be it good or bad, just or unjust. Chapters four and six interpret and support defenses of the novel doctrines advanced in the rest of the book. Each of the main themes is introduced through a discussion of the work of some of the theorists Soper disagrees with. The book in all its parts is Soper's response to the challenge he addresses to all legal and political theorists: What is the difference between law and a merely coercive order? All other theories are found wanting. Either they fail to identify the difference or they fail to explain it, they fail to see its point. Soper's ambition is to remedy both defects. I will not try to summarise the book, but will concentrate on the main message conveyed by each of its parts.

## I. PROBLEMS OF METHOD

Soper's novel theory of law belongs to the recently fast-expanding family of theories holding that the answer to the question "what is law?" depends at least in part on evaluative considerations. But perhaps uniquely among adherents of this approach, he believes in the viability of the alternative approach. It is possible, he implies, though pointless, to inquire into the question "what is law?" in a way that is devoid of evaluative presuppositions. It is here, I shall argue, that he

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\* Fellow of Balliol College, Oxford. D.Phil. 1967. — Ed.

1. See, e.g., Soper, *Legal Theory and the Problem of Definition* (Book Review), 50 U. CHI. L. REV. 1170 (1983); Soper, *Metaphors and Models of Law: The Judge as Priest*, 75 MICH. L. REV. 1196 (1977); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977).

goes astray. Perhaps paradoxically, this mistake leads him to misidentify and exaggerate the role of evaluative considerations in a theory of law.

Trouble starts with the first introductory chapter. Soper raises the question which has always proved to be the Achilles' heel of philosophy: What is it good for? His answer is that there is no possible point to legal philosophy if it is not to answer the question "what ought one to do?" From this he concludes without further ado that its task is to answer the question: "What is law that I should obey it?" Indeed he sees this as no more than a restatement of "what ought I to do?" (p. 7). The question "what is law?" which is addressed in the rest of the book is understood as a quest for such a description of the law which will make obedience to it obligatory. The first step towards a theory was accomplished. One fundamental tenet of law was discovered: Necessarily, law is such that it is obligatory to obey it.<sup>2</sup> I shall call this Soper's basic maxim.

Chapters four and six show that he does not regard the methodological argument for the basic maxim as sufficient. While the basic maxim is one of the main props for his theory of law, its own acceptability depends on the acceptability of his legal and political doctrines. The whole argument of the book hangs together. One result of this is that my strictures on the basic maxim depend on the cogency of my rejection of the other theses of the book. Still one has to start somewhere, and what better place can there be than Soper's own starting point.

Soper is quite modest about his claim. He thinks that at the end of the day whether or not the law is such that it is necessarily the case that one has an obligation to obey it is like the question whether the drawing which can be seen as either duck or rabbit is a drawing of a duck or of a rabbit.<sup>3</sup> It is not clear, however, whether Soper is really seeing a duck or a rabbit. Let us assume that the purpose of legal theory is to advance the inquiry into what we ought to do. Does it follow that describing the essential features of law as a political system of authoritative rules, determining, among much else, when the use of force is permissible, prejudices the issue (p. 10)? On the contrary, there can be no progress in deciding what is to be done in the political sphere except by focusing attention on the prominent features of social institutions, features which may make a difference to the issue of obedience.

If the law is to be obeyed it is because of its character as a system (contributing to) organizing social relations by special means or

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2. This conclusion is implicit in Soper's revised statement of the question: What is law *that I should obey it*? See also p. 13 ("I believe that the phenomenon of prima facie obligation is universally associated with the institution of law . . .").

3. P. 14. See generally ch. 6.

through the operation of special institutions. If it ought not to be obeyed then this too is due to those same facts. By identifying the law at the outset as a system we are obligated to obey, Soper does not advance the inquiry. He does not provide us with any considerations which may determine what ought to be done. We are offered by him the advice: If an act is required by law, then, other things being equal, we are obligated to perform it. But we pay a high price for it. We lose our grip on the question "what is required by law?" We thought, and Soper appears to endorse this thought (p. 2, and elsewhere), that at least the answer to this is clear. Law is a system of rules which are recognised and used by some or all of its subjects. We have ways of identifying the ways they do so. We may travel to Outer Mongolia, to Chile, to South Africa, to Uganda, or to any other country in the world. While being ignorant of many nice questions concerning its law we will find it rather easy to identify its central legal institutions and regulations.

Not so if we accept Soper's basic maxim. This will require us first to establish whether those regulations ought, morally speaking, to be obeyed. Only if we are duty-bound to obey them (or perhaps only if that country's citizens are so obligated) are they law. The question of the existence of a moral obligation is not one we can answer simply by observing which are the country's legislative and judicial institutions. It is not a matter on which we can take the word of the country's lawyers or citizens as settling the issue. Even if they accept Soper's theory of law we cannot assume that their judgment of whether they are living under a legal system is trustworthy. It is quite possible that the vast majority of those subject to Nazi rule thought that Nazi rules ought to be obeyed. It is more than possible that if they did, they were badly in the wrong.

If we follow Soper we will find that legal theory does not tell us what is the law of Germany or France or of any other country, for that is not its job, nor does Soper claim that it is. But equally the views and conduct of the legal officials of those countries, the opinions and actions of its legal profession and of its citizens, will not determine what is its law. If the identity and content of the law of a country cannot be determined by reference to the opinions and conduct of the population, the legal profession and the legal institutions of that country, then we are as far from knowing what we ought to do as we ever were. Soper's basic maxim, far from advancing our understanding of what we ought to do, blocks our way to answering that question.

Where then did Soper go wrong? Why did he not see that the road to an answer to his main question, "what ought to be done?", goes through solving a whole series of subsidiary questions each of which advances us some of the way? We need to know the economic concomitants and the emotional make-up of monogamous marriages

before we can judge whether we ought to get married or not. We must establish the consequences of training in academic institutions and of apprenticeship methods of training before we can judge which form of training to prefer for ourselves or for others. Similarly, we ought to establish the prominent features of law as a political system before we can decide whether it ought to be obeyed.

The methodological separateness of the question "what is the law?" from the question "ought it to be obeyed?" does not mean that the answer to the first does not advance the second. On the contrary, the first must be separate from the second in order to advance it. As I mentioned at the outset, Soper's mistake is to think that if the questions are separate they are unconnected. For him the view that one can provide a theory of what the law is without advance commitment to a particular answer to the question "ought it to be obeyed?" means that the theory of law is not in any way tied to the normative quest. This is a deep mistake. A theory of what the law is strives to identify its central, prominent, important features. What makes a feature prominent or important or central is inescapably and inevitably an evaluative question. It is important if it bears on what matters. In large measure it is precisely the fact that certain features are relevant to what one ought to do which marks their importance.

It is crucial to remember, however, that we can and often do know that a feature of a scheme or an institution is relevant to its evaluation without knowing whether it makes it good or bad. The fact that primary education is compulsory is recognised by all as important to its evaluation, regardless of whether they take it to be one of the strengths or a weakness of our educational arrangements.

In recent publications I have argued for a theory of law based on these methodological perceptions.<sup>4</sup> But they are far from new. While not all the theorists generally identified as legal positivists endorsed them, they stood at the cradle of legal positivism. Bentham never disguised the fact that his utilitarianism was the spring of some, though not of all, of his main jurisprudential doctrines. His doctrine of the individuation of laws and his views on the natural arrangement of the law, for example, are directly dependent on his utilitarian faith. Significantly, both are designed to bring out aspects of the law which are of practical concern, without prejudging whether they show the law to be good or bad.<sup>5</sup>

A theory of law is, as Soper and others claim, tied to the normative quest. But the tie to be productive must be partial and indirect. Gen-

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4. See *THE CONCEPT OF A LEGAL SYSTEM* 213-16 (2d ed. 1980); *THE AUTHORITY OF LAW* 37-52 (1979); *Law, Authority and Morality*, *THE MONIST*, forthcoming July, 1985; *The Problem about the Nature of Law*, 21 *W. ONTARIO L. REV.* 203 (1983).

5. See J. BENTHAM, *A FRAGMENT ON GOVERNMENT* (2d ed. London 1823) (1st ed. n.p. 1776).

eral evaluative considerations inform us what features are relevant to the question "what ought one to do?". We then look to the law, as a social institution familiar in our culture, the likes of which is also to be found in other countries of different cultures, and see how it fares in terms of these features. Once that is done we have answered the question "what is law?" in a way which advances our ability to decide whether we ought to obey it, without prejudging it.

## II. MISUNDERSTANDINGS

The above simplified account of the way the normative quest affects the theory of law is much too crude. But it serves to vindicate my opening remark that Soper's failure to see that the theoretical inquiry into the nature of law is indissolubly impregnated with evaluative presuppositions leads him to misconceive the role such presuppositions should play in it. It also prevents him from seeing the force of theories he is most concerned to criticize. While I do not wish to comment in detail on Soper's review of the leading theories of today, it is necessary to show how the distortion embedded in the basic maxim sometimes leads to misinterpretation.

The task of criticism is discharged in chapter two. Its first half deals in some detail with several major tenets of Austin's, Kelsen's and Hart's legal theories (and with some views of mine). The second summarises his critique of theories of this kind, introduces his own view and dismisses in a rather summary fashion both Fuller and Dworkin.

Of the two the first half is by far the better. It displays the full power of Soper's mind, his penetrating insight which fastens on to essentials, uncovers unstated presuppositions, and highlights connections and continuities in the various philosophical traditions. He writes for those familiar with the work of the theorists under consideration. All those who have the required knowledge to appreciate his arguments will find the works discussed illuminated by the penetrating beam of Soper's searching gaze. And yet, unfortunately, even that impressive discussion is marred by some important distortions and misunderstandings. Let me give a few examples.

Soper claims that Hart must justify his view that acceptance of the rule of recognition by the officials is a necessary feature of law by showing that this feature is important given human concerns and interests. He thinks that Hart's answer "is the suggestion that the puzzled or ignorant person might want to conform to society's expectations regardless of accompanying sanctions" (p. 24). By this Soper means conformity for conformity's sake. This greatly distorts Hart's meaning. His point is that to understand society one has to see it as members of that society see it. Legal officials do not see themselves as gunmen writ large. They accept the system. That fact is understood in the society at large. This is not an empirical generaliza-

tion but a conceptual truth. Law is a public institution the general features of which (*i.e.*, the features which make it law) are known to the public (though the public may not think of them as the features which account for the legal character of the law). Hart does not spell out but takes for granted that we all know that the difference between an institution resting on acceptance and one resting on the threat of resort to physical force is relevant to many human concerns. Clearly whether one wishes to judge (morally or otherwise) the behaviour of the officials, or to judge the viability of the institution, or to judge its likely response to various contingencies, one would be greatly influenced by whether it rests on acceptance or on force.

Soper is right to say that the difference will be important to those subject to the law who wish to decide whether they ought to obey it. But Hart does not suggest that the difference is more important to the ignorant than to the wise, nor that it is relevant only to those whose instinct is to follow the herd. He was merely pointing out the existence of such people. Because they do exist an account of law is correct only if it makes room for them. An account based on a stronger notion of recognition, one which claims that the law exists only if its subjects believe in moral reasons for the validity of its rules, is vitiated by not making room for such people.

Soper's mistake is typical, for it shows how his single-minded concentration on the question of why one should obey the law blinds him to the existence of wider human interests. Similarly, his implied assertion that according to Hart it is desirable that both officials and subjects have "normative allegiance" to the law<sup>6</sup> is a lapse which may betray a fundamental misunderstanding of Hart's theory. Hart does indeed say that acceptance of the rule of recognition by officials is a necessary feature of law. But he neither says nor implies that it is desirable that they or other members of the community should have this attitude. To say so is, according to Hart, not to *explain* the concept of law but to *commend* the existence of law and to commend obedience to it wherever it exists. For all we know from Hart's theory of law he may be a radical anarchist who regards any attitude of normative allegiance as thoroughly immoral.

Similar misunderstandings plague the second part of chapter two as well. They are aggravated by Soper's tendency to lump all the theories he disagrees with into one or two archetypes. Soper's adversary is the legal theorist or the positivist. It turns out that the positivist thinks that an obligation to obey cannot exist without coincidence of normative outlook (p. 40, and elsewhere). Soper agrees that this cannot mean that the positivist believes that the law is to be obeyed only if it has some moral merit. Coincidence of normative outlook means agreement in judgment about the merit of a law; it means that one is

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6. See p. 38 (toward the foot of the page).

obligated to obey only laws which are just and good. I know of no one who held such a view. All the political and moral theorists I have any acquaintance with held that either consent or the fear that disobeying bad laws may lead to breakdown of law and order are grounds of obligation.

It also appears to Soper that "the legal theorist's determination to remain neutral" on the question whether there is an obligation to obey "equates belief with reality: all that is necessary for a system to be normative in the appropriate legal sense is for officials to display the appropriate normative belief, however false or even insincere" (p. 49). If the appropriate legal sense of normativity means a moral obligation to obey the law then anyone who says that belief in an obligation entails its existence is indeed guilty of confusing belief with reality. But he could hardly be accused of neutrality on the issue whether such an obligation exists. If, on the other hand, the legal sense of normativity is that the law is normative because it rests on acceptance, and not on force, then the theorist is neutral but far from confusing belief with reality he is at pains to keep them apart.

Misunderstandings of the same kind appear elsewhere in the book. One example will serve. Soper seems to attribute to Kelsen the view that law differs from organised coercion because it rests on the general belief of the subject population in its justice (pp. 31, 95). But Kelsen was anxious to dissociate himself from such views.<sup>7</sup> The beauty and subtlety of Kelsen's view is that he believed that, like beauty, normativity is in the eye of the beholder. Those who interpret a coercive system as a system of law regard it as normative. They presuppose the basic norm, *i.e.*, the rule that the law is valid and ought to be obeyed. Kelsen is uncommitted as to whether all or any of the law's subjects make this presupposition. It is not part of the conditions for the existence of law that they do, and certainly not that they should.

### III. A THEORY OF LAW

I have claimed that the foundations of legal theory are necessarily value-laden and that this fact was recognised by some of the founding fathers of legal positivism. It was recognised by Bentham, who also saw that evaluative considerations may well lead to the endorsement of a value-free criterion for the identification of the law. What is law and what is not is a matter of fact. That it is a matter of fact is determined, in part, by evaluative considerations. Soper, I have claimed, makes the existence of law a moral question, and thus he contradicts his own view that what is law is determined by the views, attitudes and actions of those subject to the law. Examination of this point is neces-

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7. See H. Kelsen, *PURE THEORY OF LAW* 7, 218 & n.83 (2d ed. 1967).

sary to vindicate my comments in section one, and will lead us into the heart of Soper's theory of law.

Soper is aware that a theory of law which defines it as necessarily moral, that is, a theory of law based on what I described as his own basic maxim, is untenable. He distinguishes between his own theory and some other natural law theories: "Instead of defining law to ensure that it always obligates, one seeks an account that explains why it has any tendency to obligate at all. In this way an independent concept of law is preserved, distinct from that of morality" (p. 59). I shall refer to this as Soper's methodological principle. As Soper himself observes, it is essentially the approach which I dubbed "the derivative approach":<sup>8</sup> "That is, my claim is not that 'law' is itself a moral concept, like 'justice,' but that, like 'promise,' it is identified by nonmoral features (supreme force and belief in justice) which necessarily have moral worth" (p. 92).

Soper then proceeds to suggest that I reject the derivative approach. This is a mistake. While discussing various conditions that the derivative approach must meet, my purpose was neither to criticise nor to endorse it<sup>9</sup> but to point out that it is compatible with some of the tenets of legal positivism. Indeed it is compatible with the only essentially positivist thesis that I was willing to endorse, namely the "sources thesis." The sources thesis asserts that the identification of the content and existence of the law is a matter of fact. This is precisely Soper's own assertion, or implication, in the two previous quotations from his book. If his theory lived up to his own aspirations it could join the list of other natural law theories, like those of Fuller and Finnis,<sup>10</sup> which are compatible with the sources thesis, thus vindicating my claim that it is a mistake to think that the legal positivist and the natural law traditions are inherently incompatible.

By endorsing the basic maxim Soper contradicts his own description of his own theory. He endorses the definitional approach which precisely does "define law to ensure that it always obligates." The tension between these two incompatible methodological positions shows at the heart of his explanation of law.

The book contains a one page section entitled "A Theory of Law." Its distilled message is: "Legal systems are essentially characterised by

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8. The derivative approach regards the existence of law as a matter of fact and proceeds to argue that, given valid moral premises, the facts necessary for the existence of law assure it of some moral value. Whether or not this claim, strictly interpreted, is true, the thought of a legal system devoid of all moral merit is no less fantastic than the thought of a legal system which is perfect beyond improvement. It is surely the case that all legal systems have both merits and demerits. My objection was to the belief that if all legal systems have some moral merit then it follows that there is an obligation to obey them. See J. RAZ, *PRACTICAL REASON AND NORMS* 165-70 (1975).

9. See *id.*

10. See generally Soper, *Legal Theory and the Problem of Definition*, *supra* note 1 (review of J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980)).



the belief in value, the claim in good faith by those who rule that they do so in the interests of all . . . Law combines the organised sanction with the claim to justice by those who wield the sanction" (p. 55). I shall follow Soper and will refer to the quotation as Soper's theory of law. Is this theory inconsistent with legal positivism as Soper claims? Since belief in value may be misplaced, since what a person believes is essentially on the factual side of the fact/value divide, the theory appears to be a positivistic one making the existence and contents of law depend exclusively on matters of fact.

Compare, for example, Soper's theory of law with my views on the matter (which he regards as a species of positivism). I am not the first to have argued that "the law claims authority. The Law presents itself as a body of authoritative standards."<sup>11</sup> Soper's theory seems to differ from my view in two respects. First, he claims whereas I do not that a system of rules is a legal one only if the people in authority believe in the claim to authority which the law makes. Second, he attributes to those in authority, and I do not, the belief that they govern in the interest of all. Of these (and the context of our respective remarks makes clear that they are the only) differences between these views of ours, the first is real but apparently insignificant, and the second, significant but apparent only. Let me explain.

Whatever mileage Soper hopes to make out of the first difference in constructing his argument for an obligation to obey the law, its real significance is minimal. He agrees that ordinary common sense is unlikely to deny a legal system that status on the ground that its officials are all too often hypocritical in their profession of belief in the value of the system they operate.<sup>12</sup> It would be readily admitted on the one hand that a legal system all of whose officials are entirely and systematically hypocritical is a most unlikely possibility, and on the other hand that it is more than likely that in many countries some legal officials are hypocritical. Either way, whether it is an essential feature of law that its officials believe in its value or merely that they claim that they do, both properties are on the factual side of the fact/value distinction. Thus, the first difference between Soper and myself is apparently rather insignificant and fails to show where he deviates from well-tested positivist paths.<sup>13</sup>

Soper's assertion that law exists only if the rulers claim to rule in the interests of the governed marks a more substantial disagreement between us. In arguing that a claim to a right to rule is a mark of law, I was mindful of the possibility of theocratic states whose governments govern in pursuit, as they see it, of divine commands and interests which may radically conflict with the interests of the governed. The

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11. J. RAZ, *THE AUTHORITY OF LAW* 33 (1979).

12. *See, e.g.*, pp. 154-61.

13. But see p. 742 *infra* for my explanation of why this appearance is misleading.

latter may be regarded as immaterial except when they coincide with the higher interests or happen to serve them. I was also aware of the theoretical possibility of a government coming to the conclusion, as did Moses regarding the whole generation of the Israelites in the desert, that the interests of a whole generation have to be sacrificed for the sake of future generations. On a plain reading of Soper's theory of law (as explained on p. 55) such societies are not governed by law. They fail to qualify not because of the atrocities they perpetrate (remember that the sacrificial policies they pursue may be enthusiastically supported by the entire population), but because of the morality their rulers uphold.

As the following chapters make clear, this important disagreement between Soper and me is only apparent. Soper notes that slaves and conquered people are often oppressed by regimes that believe in the justification of slavery and other forms of exploitation and oppression.

Officials who accept the beliefs that underlie such moral judgments are acting in the interests of justice and fairness as they see it, and in that sense in the interests of all (including the disadvantaged group . . . ) Thus, tempting though it may be to derive a substantive constraint from a theory that requires acting in the interests of all, the constraint is empty, as formal equality always is. [P. 121.]

The temptation here mentioned is indeed to be resisted. But not for the reason stated. Soper seems to misunderstand his own theory. His theory of law does not establish a right that governments should act in the interest of the governed, nor does it establish a duty on them to do so. It merely claims that if they do not, then they are coercive orders rather than legal ones. He gives no reason to think that coercive orders cannot do a lot of good, nor does he attempt to show that they are not, in some circumstances, preferable to legal orders. The fact that we all take for granted that normally the reverse is the case is neither here nor there.

The temptation Soper mentions should indeed be resisted. But the interest of the passage I quoted lies elsewhere, for it withdraws the only aspect of his definition of law which separates his view from mine. Soper, it seems, has an idiosyncratic view of people's interests. It is a commonplace that morality sometimes calls on people to sacrifice their own interests for the sake of others. Soper disagrees. On the evidence of the passage quoted above, it appears that he thinks that a soldier who volunteers, out of moral conviction, to go to a certain death in order to save his friends is really pursuing his own interest, which happens to be to sacrifice himself.<sup>14</sup> Given that understanding of people's interests, Soper's theory of law amounts to saying that

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14. Soper's argument at pp. 149-50 suggests that if my volunteer acts for other reasons he may not actually be pursuing his own self interest. Soper says there that a tyrant who puts his own interest above morality (which in the circumstances imagined requires him to rule in the interest of his subjects) is not acting in their interest even though he believes himself to be acting

"legal systems are essentially characterized by . . . the claim in good faith by those who rule that they do so" (p. 55) in pursuit of valid moral principles (whether or not these serve the interest of the governed in the ordinary understanding of such interests).

Am I saying that Soper's theory is really a familiar variant of legal positivist themes? Not quite. My claim is that the distinctive part of his theory of law is not in the doctrine he calls his theory of law but in his theory of natural rights. The latter theory is explained in chapter five, which is misleadingly entitled "Applications." In fact, this chapter introduces for the first time a doctrine which, while being presupposed by the political principle explained in chapter three, is not supported by it. This doctrine lies at the heart of Soper's philosophy and is one of his two major novel theses in the book.<sup>15</sup>

Natural rights "are rights against the state which can be invaded or ignored only at the cost of losing the title of law" (p. 132). Note the accuracy of this explanation. Natural rights are moral rights, and to establish their validity as rights one resorts to moral argument; one consults, as it were, one's moral theory. Moral rights are natural ones because they coincide with the necessary conditions without which a social order is not a legal but a coercive one.<sup>16</sup> Hence, the doctrine of natural rights reveals Soper's view of the necessary features of law. It, more than his theory of law, illuminates the difference, according to him, between a legal and a coercive order.

Soper claims to discern two such rights: a right to "that minimum of security that underlies the judgment that any legal system is better than none" (p. 130), and a right to discourse (pp. 134-43). Soper says little about the content of his alleged natural rights. My main difficulty is not, however, with their content but with the reasons for thinking that they are natural rights in the sense explained.

So far as I can see Soper has one argument for the naturalness of the right to security and two in support of the naturalness of the right to discourse. I emphasise that naturalness is the only issue Soper discusses because his way of writing may mislead many readers into taking him to claim that he has established the existence of rights to

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correctly and justifiably. The difference is, presumably, that he does not think that it is morality which calls on him to prefer his interests to those of his subjects.

15. I assume that his statement that the court is "an institution the primary function of which is to assume this responsibility of justifying the manner in which sanctions are imposed and disputes resolved" (p. 113) only sounds novel because of its rhetorical exaggeration. Presumably Soper would admit that the difference between a department of information and propaganda and a court is that while both explain the way sanctions are applied and disputes resolved, only the second applies sanctions and resolves disputes.

Another controversial thesis he endorses is that "the essential difference between court and legislature consists in the constraint placed on the former, but not on the latter, to reach decisions in accordance with preexisting (presumably legal) standards. Judges find the law; legislatures make it" (p. 110). Unfortunately Soper does not explain or defend this claim.

16. See pp. 130, 132.

security and discourse against all governments, rights which are legally binding independently of any legislation or judicial recognition. Nothing could be further from the truth. Soper assumes without argument that people have rights to minimum security and to discourse against their government. He argues that these are natural rights, that is, that a government which violates them would be administering a system of coercion rather than law. But nowhere does he argue that natural rights are legal rights. All his argument purports to show is that the rights are not violated in law. But rights can remain inviolate without being recognised as rights. A country which does not have conscription, to give but one example, does not violate anyone's right of conscientious objection, assuming people have such a moral right. It does not follow that it recognises a legal right of conscientious objection. For all that Soper tells us neither of his natural rights need be legal rights.

Let us turn to Soper's arguments for the naturalness of his two natural rights. The reason to regard the right to minimum security as a natural one is that without such security, having a system of law is no better than having no such system. Therefore, as we shall see below, if there could be such a law undermining minimum security, there would be no obligation to obey it. This contradicts the basic maxim (*i.e.*, that law is such that it is obligatory to obey it). Therefore there can be no such law. The startling aspect of this argument is that it flatly contradicts Soper's methodological principle. It now turns out that organised force and the rulers' belief in the moral rightness of their actions is not enough to assure a social order of legal status. It may still be nothing but a gunman situation writ large unless it also assures one of minimum security.

Soper gives us no reason to believe that a social order meeting the only two conditions stipulated by his theory of law cannot infringe people's right to minimum security. On the contrary, he seems to recognize that it can do so.<sup>17</sup> He needs not a contingent argument, like Hart's, to the effect that law which systematically violates minimum security is unlikely to survive. He needs a conceptual argument establishing the conceptual impossibility of there being law which infringes the right to security. The only argument Soper makes is that one would not be obligated to obey it were it to exist. Thus, Soper is impaled on the horns of a dilemma. Either he gives up his methodological principle and admits that his conception of natural law is definitional — he identifies the essential features of the law because of their moral significance, and their moral significance is his only reason for regarding them as essential to law. Or he has to abandon his basic maxim and concede that it is not necessarily the case that there is an

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17. See p. 183 n. 15 & 17 (The case of slaves whose interests are sacrificed: for them no personal security is assured.).

obligation to obey the law. The question "what is law that I should obey it?" has no answer, for it rests on a false premise.

Soper's arguments for the naturalness of the right to discourse fare no better. One relies on an empirical generalisation: rulers who deny the right to discourse are unlikely to be sincere believers in the moral rightness of their own actions (p. 135). Whatever one may think of this as an empirical generalisation is immaterial. The naturalness of the right can be established only by an exceptionless conceptual necessity. The second argument is to the effect that denial of a right to discourse shows that the rulers do not respect their subjects (pp. 136-40). This lack of respect absolves the subjects of the obligation to obey the law, according to the political theory to be discussed below. From here the argument is identical to that for the right to security. If there could be such a law it would be a law one is not obligated to obey. Therefore, it would contradict the basic maxim. Therefore it cannot exist. Violation of the right to discourse can be purchased, then, only at the price of losing the right to the title of law. Therefore, the right to discourse is a natural right.

Given these premises, so it is. Unfortunately the premises land Soper again in the same dilemma. He must either drop his methodological principle and allow that he holds certain features to be essential for law for no other reason than that they endow it with moral value, or he must discard his basic maxim and allow for the existence of non-obligating law.

It may be worth noting that Soper holds that respect for their subjects is a conceptual condition of the sincerity of the rulers' belief in the moral justification of their actions. His notion of sincerity is such that it is impossible for rulers both sincerely to believe in the moral justification of their actions and to lack respect (that is, lack the respect which expresses itself in the right of discourse) for their subjects. So whether a person is sincere or not turns out not to be a matter of fact, but of morality. Something like the following may be a generalised statement of the principle Soper seems to presuppose: Only those who respect others are capable of having sincere beliefs on the morality of action affecting those others. Given this interpretation of sincerity (though I am unclear as to why Soper adopts it), the first apparently innocuous difference between his theory of law and my view of the matter turns out to be of major significance.

#### IV. THE OBLIGATION TO OBEY THE LAW

It is plain, on the other hand, why Soper thinks that respect for the subjects is a condition of legality. His argument for an obligation to obey the law, the second major innovation of the book, depends on it. Three premises entail a *prima facie* obligation to obey the law (pp. 78, 80):

- (1) "[T]he enterprise of law in general — including the particular system, defective though it may be, that confronts an individual — is better than no law at all."
- (2) There is "a good faith effort by those in charge to govern" in the light of valid moral principles. [This second premise understood in Soper's special way includes, as we saw above, a further premise:]
- (3) The rulers respect the ruled.

The advantage of law over no law at all is, according to Soper, that law secures minimum safety. He consciously endorses a Hobbesian position on this issue in order to make sure that he does not pitch his claim for the law too high. Much needs be said about Soper's premises. Having discussed them briefly in the previous section we should, however, press on. Do the premises support his conclusion? His conclusion is very far-reaching. It will establish not merely an obligation to obey the law in an essentially decent society; it reaches further and asserts an obligation to obey any legal system which observes his two natural rights. At times Soper makes it appear as if these conditions establish quite a lot, as if they establish mutuality of respect between rulers and their subjects and the genuine attempt by the rulers to further the interests of all their subjects in a rational, reasoned and open-minded way. Most of the time, however, Soper is cautious enough to warn against such a reading of his theory. Though law necessarily observes the two natural rights, they are very minimal. It appears, for example, that even Nazi Germany conformed to the conditions of legality sufficiently to impose on most of its subjects an obligation to obey (p. 92). Can his meagre premises support so strong a conclusion? Can the obligation to obey depend to such an extent on the convictions of the rulers, regardless of the morality of their actions?

Soper's basic idea is simple. There is a job that needs to be done, the job of government. Someone is faithfully trying to do it. Other things being equal, such a person deserves one's respect. So far so good. The problem starts when we try to understand why that respect involves an obligation to obey the law. I believe that Soper is trading on two recognised sources of respect and obligation. First there is respect for an enterprise which is not merely a valuable enterprise, but also *my* enterprise. Every individual's attitude toward his own government should be not merely that they have a job which they are doing their best to carry out. There is a common enterprise in which both rulers and subjects should engage, the enterprise of promoting the good of the community. The rulers are trying to do their share. They may be failing, but at least they are trying in good faith. Their failure does not violate one's natural rights, and therefore has not deprived the common enterprise of all its point. It is in this spirit that Soper refers to respect for law based on "equal commitment to the search for truth and humility about the correctness of one's conclu-

sions" (p. 82).<sup>18</sup>

The second recognised source of obligation Soper is invoking is the duty not to frustrate and upset people who are doing their best. They deserve that one should spare their feelings. The rulers would be hurt and offended if their best efforts on our behalf were to be met with rebuff in the form of disobedience. Therefore one is (*prima facie*) obligated to obey in order to spare their feelings. In this vein, which dominates in the book, Soper observes that while "disobedience cannot easily be linked to societal disintegration; . . . it can be linked in an ascending scale of sadness, disappointment, concern, anxiety, and fear on the part of those who think the laws are important and my obedience desirable" (p. 86). Therefore, the more they care about my compliance the stronger my duty is to comply (pp. 87, 153).

I can see no way of merging these two underlying strands, if indeed I am right to find them in Soper's argument. Moreover, neither of them can support Soper's conclusion. Respect for law out of a sense of participation in a joint enterprise is, in its proper place, a real moral concern. It should indeed lead one to uphold laws which one finds to be less than ideal. One reason is the humility and the sense of one's own fallibility that Soper mentions. Another is the fact that, in many cases in which one's action makes a difference to a joint enterprise, one does more to promote the good and prevent evil by supporting the partners to that enterprise than by opposing them. Soper is aware that this last consideration cannot be the foundation of an obligation to obey the law, however weak.

First, it is simply not the case that one's actions in breaking the law always make a difference to the enterprise. Quite often they do not. Furthermore, it is not necessarily the case that citizens and governments are engaged in a joint enterprise. The divergence of opinion about morality between me and a Nazi government or between me and a fundamentalist Muslim government is so great that I would deny that just because they believe in the rightness of their action there is some joint pursuit in which we are partners (assuming that I am their subject).

Nor is Soper's argument from humility and fallibility any help. While aware of one's own fallibility one is also aware of the fallibility of the government. One should be cautious in believing oneself right and the rest of the world wrong, especially in matters in which others have greater expertise or experience or judgment. We discount our own opinions for such reasons many times every day. But we judge the action of others and their credentials before we trust them. Do the

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18. At times Soper sounds as if he sees the situation as one in which respect for law is merely the pursuit of long-term self-interest, *see* p. 84, but such passages are really concerned with the truth of the premises of his argument enumerated above. They are liable to mislead if read as explanations of why those premises support the conclusion.

considerations of humility show that one should support racist policies, even if only *prima facie*? Would not such support make one participant to a racist enterprise? I confess that neither these nor any other examples can really carry the day against a claim that there is a *prima facie* obligation. All objections seem easy to deflect on the ground that they merely show that the obligation is overridden, not that it does not exist. But certain forms of racism and other iniquities perpetrated by legal systems all over the world, even those which meet Soper's conditions of legality, are such that the very belief that one has a *prima facie* obligation to go along with them makes one guilty by association.

Ultimately the first source of obligation, participation in a joint enterprise, fails to establish an obligation to obey, for such participation merely requires doing that which contributes to the success of the enterprise. But Soper argues for an obligation to obey those whose actions lead to the failure of the enterprise. Respect for them as joint entrepreneurs requires frustrating them rather than obeying them. A sense of a shared enterprise gives one license to act against one's partner's wishes where but for the partnership one would not be allowed to interfere. If we go on an expedition together, I may be entitled to use force to restrain you from some very damaging action which will lead to the expedition's failure even though I may not use the same means to save a stranger from failure in an enterprise of which I am not a part. This explains why citizens care more than foreigners about evils perpetrated by their own government even when they do not suffer from them. It explains why citizens feel free to engage in civil disobedience whereas visiting foreigners do not. Respect arising out of the existence of a joint enterprise may actually undermine any obligation to obey an unjust government rather than support it.

Soper's second source of obligation, the need to spare the feelings of the rulers,<sup>19</sup> is both too strong and too weak to serve as a foundation of an obligation to obey the law. It is too weak because it applies

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19. In a footnote Soper explains: "I have cast the theory in terms of respect for 'those in charge' only because that is the limiting case of law; in most cases, those who accept the system and thus deserve respect will include citizens as well as officials." P. 179 n.36. Naturally the argument has to hold in the limiting case if it is to be valid at all. That is why Soper concentrates on the limiting case, and why I commented on it in those terms. Paradoxically Soper fails to notice that the conditions which he rightly regards as normal, *i.e.*, in which sections of the population share the attitude of those in charge, do not strengthen his argument at all. The respect for the rulers, he claims, is based on the fact that they are the rulers, that they do their best to carry out a necessary job. By-standers may share the values and attitude of the rulers. But being by-standers they do not deserve that respect. (It is arguable that voters, or at least those who actually vote, are themselves among the rulers. J. Austin, for example, held that the British sovereign is not Parliament but those who have a right to elect it. I am not arguing who should count as a ruler. My only concern is with the claim that similar respect is owed to members of the public who share the attitude of the rulers toward the law.) They do, of course, deserve the respect that is due to all humanity. But then it does not matter that they are citizens of one's own country. On that argument the population of Poland ought to obey the laws of Poland in order not to hurt the feelings of Chernenko, or those of the commander-in-chief of the Soviet army. Most of the



only to law-breaking acts the commission of which will be or is likely to become known to the officials. Right now, sitting by myself in the study late at night, I can think of some dozen offences I can commit within the next half hour of which no one will know if I choose not to let my secret out. Besides, the vast majority of violations of law are infringements of private rights. The overwhelming majority of these will never reach official notice, and were always known to be most unlikely to do so.

In any event, Soper's argument applies only if the rulers mind if their laws are not obeyed. I do indeed hope that they do mind. I myself, and almost everyone I know, mind if valuable laws are recklessly disregarded or deliberately flouted. If Soper does not count the need to spare my feelings as a ground for an obligation to obey the law this is presumably because I am not involved in the legal system in the way which will make my feelings count. But if so it is reasonable to assume that one should give special consideration only to those feelings of the rulers which result from the fact that they make and enforce the law, the feelings which are not shared by ordinary citizens. (One would not feel obliged, for example, to spare the rulers' feelings in private matters entirely unconnected with their official functions just because their official functions obligate us to spare their feelings.) One should, in other words, avoid engendering feelings of unappreciated or frustrated authorship (which distinguishes the rulers from the rest of us). One may well doubt, however, whether such feelings are widespread among the rulers. Many of them are just doing a job. They care about success or failure. But one would have to be very presumptuous to assume that one's petty violations would make a difference to their feelings, or that they are likely to make such a difference.

Another thought is relevant here. Do we really want to encourage the sort of feelings that Soper's argument presupposes? It is true that we do not like "the unthinking invocation of ritual and rote" (p. 153). But for myself I would replace it with a dedication to the task coupled with a sense of moral responsibility, and would shy away from the personal involvement which leads to continuous frustrations when others fail to do as one wishes. This last attitude on which Soper models his political theory is both undesirable and, luckily, rarer than he thinks.

Soper's argument is too strong because it does not apply to the law alone. Much governmental business nowadays is carried out not by the use of public law powers but through the conduct of economic policies. Those have little to do with the achievement of minimum security for people. Nor do most laws have much to do with that task.

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points I make in the text against the argument from respect to the rulers apply to any arguments based on respect to those who share their views as well.

If it is better to have law, however imperfect, than to have no law at all, then it is also better to have government, even with imperfect policies, than to have no government at all. So if there is *prima facie* obligation to obey the law, there is also a *prima facie* obligation to follow government policy recommendations. If the President advises all employees to forgo any wage demands in the coming year, then there is a *prima facie* obligation to do so. There can be little doubt that in a case like this he will be frustrated and upset if people do not take his advice. I venture to regard this as a *reductio ad absurdum* of Soper's argument.

#### CONCLUSION

There is much in the book that I did not mention. In particular I did not comment on the excellence of many of Soper's critical discussions. His discussion of the frequent abuse of considerations of certainty (pp. 102-07), for example, should be taken to heart by all the positivists and realists who all too often rely on the need for certainty in a most unthinking manner. While focusing on the book's novel ideas I could not do full justice to its value in stimulating discussion and re-examination of old ideas. I failed to discuss Soper's use of paradigms and his revival of the provocative paradigm of parental relations as a model of political authority. There is much in the book to delight as well as to infuriate. This reader's ultimate conclusion is, however, that Soper has failed to make good his aspiration to provide us with a cogent new theory of law and political obligation.<sup>20</sup>

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20. I am grateful to Kent Greenawalt for letting me see his comments on chapter three, to be published in the proceedings of the March 1984 Hart conference in Jerusalem.

SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY. By *Alan Watson*. Philadelphia: University of Pennsylvania Press. 1984. Pp. xviii, 164. \$22.50.

*Sources of Law, Legal Change, and Ambiguity*, by Alan Watson,<sup>1</sup> is a valuable and ambitious discussion of the "sources of law" — how law is developed and what authority gives it legitimacy. The first half of the book discusses methods of lawmaking at various points in European history, while the second concerns problems of lawmaking in modern England and makes proposals for radical reform. Both halves share a single thesis: that inadequate and uncertain sources of law in Western society have often caused confusion as to what the law is.

Unfortunately, Professor Watson's treatment, spanning twenty-two centuries in 131 pages of text, is too brief and too cursory to do justice either to the subject or to the author's own provocative ideas. The result is two incongruous halves uneasily pasted together rather than a seamless whole. Furthermore, the second half — especially the author's proposal for a new system of law — is especially vulnerable to criticism.

The "sources of law" of which Watson writes include custom, legislation, scholarly writing, and judicial precedent.<sup>2</sup> The general line of his argument is clear: these sources of law are often inadequate and unclear, and lawyers and others have paid insufficient attention to improving them. One of his examples of this inadequacy is the legislative system of England (and, by analogy, that of the United States), in which old, outmoded laws are retained because the legislature does not have the will to agree on new laws (p. 83). A related example is the legislative habit of passing statutes with broad, often ambiguous language (because it is easier to secure a majority this way), and leaving it to the courts to divine the legislative "intent" behind the language — even though there really was no such "intent," and many of the legislators voting for a bill may not even have read it (pp. 78, 80). Consequently, there is much confusion as to what the law is and from whom it comes.

In arguing that this problem is by no means new, Watson draws on examples from ancient Rome, from Germany and northern France in the thirteenth through fifteenth centuries, and from Italy, France, and

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1. Professor of Law and Classical Studies, University of Pennsylvania, and editor of a forthcoming English edition of Justinian's *Digest*.

2. Unfortunately, the author is not always entirely clear what he means by such terms. For example, "custom" as he uses the phrase is extremely difficult to define. It is something other than merely prevailing moral values (p. xii), but it does appear to have something to do with popular feelings and usages, pp. 22, 37 — which need not, however, be *current* usages but may be relics of past beliefs. P. 27.

Scotland in the seventeenth century. In all of these examples, problems resulted when a jurisdiction sought to formulate its laws, especially when the jurisdiction sought to use custom (whether its own or another's) or the laws of another jurisdiction.

In imperial Rome, Watson notes, confusion about the sources of law was partly caused by the fact that works which had the force of law were rarely collected and difficult to find, so that even lawyers did not have access to them (pp. 16-17). In medieval Germany and northern France, law was almost wholly customary and local. Custom, however, is often hard to discern and leaves many gaps, creating a legal vacuum, which in Germany was filled in part by *Spiegels* (books discussing the legal customs of a specific place). These books were privately produced, yet often considered authoritative even outside of the place covered — oddly, since the laws treated by the books were based solely on the custom of the jurisdiction covered (pp. 26, 28). The failure of custom to provide sufficient legal guidance in a jurisdiction thus led it to adopt the customs of other jurisdictions. Furthermore, in time the *Spiegels* came to be treated as a kind of code, which would override custom itself (p. 38) — thus making one jurisdiction's custom subservient to that of another area.

Another way in which the legal vacuum was filled was the practice of some towns of carrying over intact the body of law of another town (even when that other town was not politically dominant). The body of law adopted would itself be essentially the custom of the "mother" town; the "daughter" town would not only adopt this custom but rely on interpretations of the law by experts in the "mother" town. Adding to the confusion was the fact that the mother town's law was often unwritten — indeed, such law was in many cases written down for the first time by the experts, or *Schöffen*, only in response to questions from the "daughter" town as to what the *latter's* own law was (pp. 35, 39). The value of custom as a source of law is that it reflects and is adaptable to local usage and belief, yet in the case of both the *Spiegels* and the "mother-daughter" arrangements, jurisdictions adopted the custom of other areas, partly because their own customs were inadequate in that they were not known or written down.

In medieval France, there were frequent attempts to remedy the inadequacies of custom by writing them down. Once these customs were written out, however, they tended to become established as if they were statutes, thereby lessening the values of adaptability and compatibility with local usage (pp. 44, 48, 101). Even though the customs were written down, there remained a need for other sources of law, yet these alternative sources were sometimes ludicrously disguised. One French legal compiler, in clarifying the French law, simply carried over the old Roman law but, to give it authority, attributed it to French sources (p. 47).

In seventeenth-century Italy, lack of sufficient local law contributed to the use of Roman law and of the "law of neighboring places," a group often broadly defined to include France and Spain. Use of Roman law, however, led to confusion because the Latin of the Roman legal authorities was neither that of the classical authors nor that of educated seventeenth-century Italians.<sup>3</sup> The "law of neighboring places," meanwhile, was extremely difficult to find and raised further language problems. Moreover, since there was no systematic ranking of other legal systems, its use gave great discretion to the judge to use whatever law he favored.

Watson perceives a common problem in these examples: the inadequacies of existing law create a vacuum which leads to the often unthinking adoption of other inadequate law in an attempt to fill the gaps. Examples include the ready adoption of the *Spiegels* and of "mother" towns' laws in medieval Germany, the significance accorded Lord Stair's *Institutions* in eighteenth-century Scotland (p. 74), and a frequent demand for codification as a way to clarify and simplify the law. The replacements, however, were themselves rarely satisfactory: Watson notes, for example, that "codification once complete, law begins to sink back into complexity and ambiguity" (p. 97).

Watson's overview of the problem of legal sources in European history is an impressive performance, but a flawed one. For some periods, notably seventeenth-century Italy, he relies too heavily on the work of a few authors, and sometimes strains to make rather bland quotations carry a greater freight of significance than they can easily bear.<sup>4</sup> For some areas, such as ancient Rome, it may be that there are just not enough sources extant for an exhaustive study; the author's twenty-four pages on the subject span eight centuries. If this is the case, however, it would be better to face up to it rather than to pretend that one can accurately discern, from a handful of texts, a society's attitudes toward many issues over a long period. Finally, Watson does not always translate his quotations into graceful (or even grammatical) English. One quotation is rendered as: "we relied upon God who in the magnitude of his goodness can gift and bring to fulfillment achievements deeply desperate" (p. 94).

It is, however, the second half of the book — dealing with modern England and with Watson's scheme for a new system of law — that is most vulnerable to attack. First, while a paucity of materials may justify briefer treatment of ancient Rome than is desirable, the same cannot be said of nineteenth-century England. Yet the author, having an

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3. Indeed, one polemicist argued for the use of Italian in the law on the ground that, being clearer and better understood than Latin, its use would give rise to less litigation. P. 57.

4. See, e.g., pp. 4 (in which a two-sentence joke by Cicero becomes a major source on Romans' attitude toward legal authority), 60 (in which a single contemporary treatise becomes virtually the sole important authority Watson uses in discussing seventeenth-century Italy).

opportunity to delve into the riches of English legal history, and expressly disclaiming a desire to deal with the present (p. 77), prefers to write, in pamphlet-like tones, about Harold Wilson's Minister of Housing and Local Government, and how impossible it is to get anything through parliament nowadays.

Watson's scheme for a new system of law is still less satisfactory. He proposes a system of "two-tier law" which he believes would enhance the law's comprehensibility, comprehensiveness, and responsiveness to community values and social change (p. 112). Under this system, the focus would be on the legislature rather than on the judiciary. An interpretive committee, mainly of legal experts, would draft, and the legislature ratify, two types of law: a code of "first-tier law," which would be accessible to the layman and would seek to make the law clear to nonlawyers; and a "second-tier law," which would be a thorough, comprehensive commentary on the first-tier law, and which itself would have the force of statute but, unlike modern statutes, would deal in much greater depth with the reasoning behind the law and with possible applications to hypothetical situations. In Watson's system, the courts would be limited to applying the very detailed codification and would have no judicial precedent and no direct citation of scholarship (p. 113).

Professor Watson somewhat uncharitably observes that his proposal has no chance of being enacted because of the selfishness and self-interest of the legal profession (p. 131). Another possible reason is that it is an inherently unworkable scheme. It may seem quaint to hand over the writing of laws to a group of legal scholars who would sit down and write up works with the force of law. This, however, is in itself not a very difficult notion to accept, since it is essentially how the Uniform Commercial Code, for example, originated. The problem, rather, lies in Watson's belief that such law could be drafted so as to be considerably more comprehensible than it is now, and so that it could significantly reduce the role of judges in producing the law.

The first-tier law, for example, would be aimed specifically at non-lawyers (p. 126), but it would be supplemented by the second-tier law and overridden by it when the second-tier law is directly on point.<sup>5</sup> Therefore, even if the first-tier law is extremely clear, it could mislead the citizen who does not know the second-tier law. Indeed, the clearer, simpler, and shorter the first-tier law is, the greater its likely divergence from the more complex and specific second-tier law. Conversely, the more accurate the first-tier law is, the less likely it is that it could be communicated effectively to the nonlawyer. It may be that in a complex society, law is necessarily complex, and it is an unhappy thing to imagine trying to explain amorphous standards such as "rea-

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5. Presumably the extremely difficult issue (not dealt with by Watson) of whether the second-tier law is "on point" would be decided by the judges.

sonableness" to the layperson in such a way that it will both be understood by the nonlawyer and be accurate enough to be codified law.

But there are still graver practical obstacles to the plan. Watson himself acknowledges that it is extremely difficult to pass any law in a legislature, and still more difficult to get legislators to agree on a common reason for passing it. Legislators, therefore, are often intentionally obscure in their drafting, so as to attract the largest number of other legislators to support the bill for often contradictory reasons, and, by eliminating unneeded specificity, to avoid antagonizing voters. Difficult as it is to pass laws under that system, it would be far more difficult to persuade a majority of legislators to agree on a thorough treatise having the force of law, discussing in detail how the law will apply to specific situations, and describing the reasons why the law should be so.

This problem is compounded by the fact that the Interpretive Committee itself would probably have enormous trouble agreeing, and a treatise approved by the committee on a three-to-two vote would be unlikely to find much deference in the legislature. The Committee might be able to agree (or to win legislative ratification) only by obscuring the language and blurring differences; the temptation to leave the real problems to the judges would remain.<sup>6</sup>

Thus, even if the author's proposal were put into effect, it would be likely to lead naturally to a system with many of the defects of our own: broad, general statutory language, promulgated because more specific proposals were too controversial, and supplemented by a plethora of exceptions. Therefore, while Professor Watson may be correct in arguing that the currently existing sources of law are unsatisfactory, he has failed to show that his own preferred alternative would be an improvement.

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6. Any expectation that the statutes passed would be free of inconsistencies should be tempered by knowledge of the American Law Institute's experiences in drafting restatements. Faced with a dispute between Williston and Corbin on whether consideration should be required for an enforceable contract, the Restaters of Contracts chose simply to include both views, in sections 75 and 90. *See* G. GILMORE, *THE DEATH OF CONTRACT* 60-65 (1974).

LAW, MORALITY, AND THE RELATIONS OF STATES. By *Terry Nardin*. Princeton, N.J.: Princeton University Press. 1983. Pp. xii, 350. Cloth, \$35; paper \$14.50.

This unusual book is at once an attempt to revise and refine the nineteenth-century conception of international relations and an argument for its moral superiority to some prominent recent theories of the international system. Professor Nardin, an associate professor of political science at the State University of New York in Buffalo, claims that the statements of shared purposes in the United Nations Charter and in the programs of movements like the New International Economic Order misstate the basis for international association and misapprehend the nature of moral conduct in international affairs. Professor Nardin's argument falls short in several respects and his tone is occasionally a bit strident, but this spirited defense of a controversial position should stimulate discussion among theorists of international law and jurisprudence.

Nardin begins by positing a distinction between "purposive" and "practical" associations of states. Purposive associations exist to further shared goals or ends: the abolitionist movement in America was an example of a purposive association of individuals dedicated to ending slavery. Practical associations, on the other hand, are based on rules or practices that are "proper to be observed in acting, regardless of one's end" (p. 8). One example of a practical association might be a debating society, in which the members may not share any political goals but are willing to follow common rules of debate.

Nardin argues that international society is emphatically the latter kind of association, a practical association of states based on a few shared rules and practices. It is "an association of independent and diverse political communities, each devoted to its own ends and its own conception of the good, often related to one another by nothing more than the fragile ties of a common tradition of diplomacy" (p. 19). He rejects the idea that states associate with other states in order to further goals of world peace or economic justice, arguing that such a notion is logically incomplete, historically inaccurate, and morally questionable.

Nardin's argument from logic is not very satisfying. For Nardin, the purposive conception of international society is logically incomplete because its proponents "forget that any international agreement presupposes commonly acknowledged rules and procedures according to which agreements can be made" (p. 24).<sup>1</sup> The idea here is that no

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1. This classic formalist argument appears in different guises again and again in the book. See, e.g., p. 172 ("*Pacta sunt servanda* is a rule of customary international law and not itself the product of explicit agreement, for if it were one would have to ask why the agreement to respect agreements should itself be respected."); p. 194 ("The view that there is no law apart from what officials decide is indeed self-contradictory, for the very idea of an official presupposes rules ac-



association can be purely purposive: some kind of practical association, some set of rules independent of the common goals and accepted by all, must lie behind a purposive association if it is to act at all. Even an anarchists' convention needs procedural laws, or else no one can say when the group has agreed. Yet this does not prove that international society is not purposive — just that it must be practical as well. Nardin's developed theory of the practical association of states must go beyond this weak formalism.

Professor Nardin's historical and political argument is stronger: the "practical" conception of international society can better account for the actual diversity of ends in the world and can generally provide a more satisfactory explanation of international law. His analysis of the history of international relations is perhaps the most interesting and valuable section in the book. Nardin combines intellectual and social history by exploring the tension between practical and purposive conceptions of international law both in the theories of Kant and Bentham and in the actual workings of nineteenth-century and twentieth-century international organizations. His treatment of the Concert of Europe (pp. 86-97) is particularly good. Historians have viewed the Concert as both an instrument of collective interests and as a set of practices designed to achieve security and stability among nineteenth-century European states regardless of their individual goals. The early congresses of the Concert can be seen as purposive efforts to advance the shared goal of monarchical rule, but they were also practical efforts to preserve the European states system by promoting legitimate monarchy in most — but not all<sup>2</sup> — countries. Nardin suggests that the Concert maintained an essentially practical character even late in its history, when theories of world community and shared goals were on the rise. He states that, "although it was colored by successive versions of the view that it existed to promote the shared purposes of its members, it never entirely shed its character as a forum for setting limits to the conduct of sovereign powers whose national pride, preoccupation with security, and competitive rivalry stood as evidence of their divergent purposes" (p. 96). This descriptive passage seems close to Nardin's idea of what an important international organization should be.

Nardin's treatment of the League of Nations and the United Nations is more problematic, and his rather surprising conclusion that the United Nations represents a more radical departure from traditional forms of international relations than does the League relies too much on a very formal reading of the United Nations Charter.

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cording to which public offices are created, their lawful incumbents identified, and the scope of their jurisdiction delimited.").

2. Nardin notes that the rights of nonmonarchical states like the Swiss Republic were protected as well. *See* p. 89.

Nardin writes that the United Nations "is really an attempt to establish a new regime in which states, associated on the basis of an agreement to pursue together certain specified substantive ends, will follow the directives of the body that is set up to organize the pursuit of these ends" (p. 107). Nardin may be right that such an attempt was made; five Secretaries-General would agree that it did not succeed.

The heart of Nardin's book is his attempt to show that the practical conception of international society is compatible with traditional theories of international law. First, Nardin seeks to establish that international law is law, arguing that legislation, enforcement, and a common judge are only contingent features of law and that their apparent absence in the international system does not negate the existence or obligatory nature of international law. Yet Nardin's treatment of the problem of enforcement is disturbingly casual:

First, we must dispose of what is now generally agreed to be the most egregious error made by Austin concerning the relation between enforcement and law. . . . That one agent is able by force to compel another to act in a certain manner can hardly mean the first has right to demand such conduct, nor can it mean that the second has a duty or obligation to comply. . . . Coercion alone cannot create rights or obligations of any sort, legal or nonlegal. On the contrary, enforcement *presupposes* the validity of the law that is enforced.<sup>3</sup>

This is unpersuasive. It is not quite so clear that Austin was wrong that law must carry sanctions to be law, and Nardin's argument does not inspire confidence. Austin could reply that any sense of obligation to obey the law other than fear of sanction is a contingent feature of law, and that coercion does oblige a person to obey if she wishes to avoid the sanction. That is, law need not be morally binding to be considered "law." In any case, Nardin's argument that enforcement is not a sufficient condition for law — "Coercion alone cannot create rights" (p. 126) — does not prove that enforcement is not a necessary component.

Nardin next attempts to delimit the specific character of the international legal system. He argues that international law is largely customary law, created not intentionally but rather as "the indirect consequence of innumerable and substantively motivated acts, decisions, and policies" (pp. 166-67). Empirical investigation and inductive reasoning are needed to determine whether a particular norm is a valid international law: there is no "rule of recognition," in H.L.A. Hart's terms. According to Nardin, "Customary international law arises wherever there exists a general or uniform practice together with the general acceptance of this practice as law" (p. 167).

There are two related problems with this conception of international law. First, Nardin does not explain how international legal

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3. Pp. 125-26 (emphasis in original).

rules change.<sup>4</sup> Second, Nardin's model will not be very helpful to someone who wants to predict whether particular acts of one country are likely to be accompanied by strong sanctions, weak sanctions, or no sanctions at all from the international community. The Soviet invasion of Czechoslovakia was followed not by superpower confrontation, but by the first stirrings of detente. The Soviet invasion of Afghanistan had very different consequences, and Nardin's model cannot explain why.<sup>5</sup>

Nardin ends his book with an argument for the moral superiority of the practical conception of international society. The fact that the rules and practices of international law are limited in number and scope allows the world's societies to remain diverse and encourages self-determination. Yet surely other values are lost. A system of international law premised on the formal equality of states that aims only to place a few restrictions on international conduct will do little to overcome the dire poverty of the developing countries and little to equalize the real power of nations. Perhaps it is unrealistic to suggest that the countries of the world can engage in a purposive association to bring about these changes, but Nardin comes uncomfortably close to justifying the status quo.

AMERICA'S UNWRITTEN CONSTITUTION: SCIENCE, RELIGION, AND POLITICAL RESPONSIBILITY. By *Don K. Price*. Baton Rouge: Louisiana State University Press. 1983. Pp. xvi, 202. \$19.95.

Don K. Price<sup>1</sup> has arrived at a time of life when he could be forgiven for indulging an impulse to recapitulate or even simply to reprint previously published views, perhaps prefacing such a work with a brief essay highlighting the continuing relevance of any relatively dated theories and placing the various pieces in proper historical context. In

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4. Nardin writes:

The rules of customary international law are a distillation of the constantly changing practices of states, and they reflect the collective will of the international community only in the sense that certain patterns of conduct from time to time attain a degree of acceptance sufficient for them to be acknowledged as a distinct practice entitled to govern future conduct.

P. 167. Nardin completely fails to explain how the changing practices of states attain this degree of acceptance or why accepted practices fall into disrepute.

5. Both the problem of change and the likelihood of sanctions in the area of international relations are treated with sophistication by Professor Myres S. McDougal and his colleagues at the Yale Law School. See generally M. McDOUGAL, *STUDIES IN WORLD PUBLIC ORDER* (1960); Reisman, *International Lawmaking: A Process of Communication* (1981) (April 24, 1981) (unpublished Harold D. Lasswell Memorial Lecture).

1. Emeritus professor of government and of public management, Kennedy School of Government, Harvard University.

this volume,<sup>2</sup> Price has done both more and less than this. On the one hand, he has reappraised virtually all of the major issues encountered in a long career of service to government, private foundations, and universities, and has forged them into a thoughtful analysis of American political policymaking. On the other hand, he has done all this in a single concise and readable volume that bespeaks a greater concern with reaching and influencing a contemporary audience than with preserving the form of past publications.

The conciseness of his work is suitable in that Price's main concern is the "roots of the incoherence of policy which lead[s] many critics to wish to amend the U.S. Constitution" (p. 9).<sup>3</sup> The "incoherence of policy" itself Price generally takes to be self-evident; the nature of the perceived problem must be inferred from the proposed solutions.<sup>4</sup> The focus of the book is rather the underlying intellectual and social structures which determine whether our governmental institutions are capable of formulating coherent, unified policies. Price asks: "[H]ow can we know what we should do and how we should do it and how we may hold government responsible? That is to say, what is the authoritative source of truth on which we should rely" (p. 4)? These questions raise broad and inherently amorphous issues, which it would be only too easy to talk around at great length without achieving useful insight or reform. Accordingly, Price dispenses with an extensive analytic and bibliographic apparatus, saying, "The issues here are too broad to be dealt with by the precise methods of the scientific study of politics and society, but the stakes are high enough to discourage professional timidity" (p. 14). To strike at the roots of incoherence, in other words, one must at times run the risk of appearing opinionated and conclusory.

In Price's case, any such appearance would be somewhat deceptive, for the groundwork for these opinions and conclusions has in fact been laid by his previously published works, spanning more than four decades. The thesis, for example, that America's "unwritten constitution" — "the fixed political customs that have developed without formal Constitutional amendment, but that have been authorized by statute or frozen, at least temporarily, in tradition" (p. 9) — ought to be the focus of reform, derives significant support from Price's early work. In the late 1930's, Price coauthored a series of studies on the efficacy of the "city manager" form of government in selected cities.

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2. This book has also been reviewed by Genuth, Book Review, *BULLETIN OF THE ATOMIC SCIENTISTS*, Mar. 1984, at 43.

3. An extreme manifestation of this tendency is the ongoing effort to call a constitutional convention in order to pass a balanced budget amendment. See *The Constitution as Cudgel*, N.Y. Times, Feb. 6, 1982, at 22, col. 1.

4. Price's proposals presume that a coherent policy is not simply one that leads to cost-effective or nonduplicative programs. It also sets forth clear and specific goals with which voters can agree or disagree so that the act of voting is as meaningful as possible.

The city manager was seen at the time "as America's most promising illustration of the need to separate management cleanly from policy interests in the interest of economy and efficiency" (p. 172). Yet, detailed empirical study at times turned up cases such as that of Jackson, Michigan: "The theory of the city manager plan has never been generally understood in Jackson. . . . Old political habits continued unchanged from one form of government to the other, making it impossible under either for the electorate to exercise much control over the policies of the administration."<sup>5</sup>

Price was already well-educated to perceive the importance of "old political habits" by study (begun as a Rhodes Scholar in the early 1930's) of the United Kingdom's unwritten parliamentary constitution.<sup>6</sup> The central lesson derived from these early studies is that new written rules alone will never change "old political habits," and that the key to political reform is "to command a consensus between the major political parties . . . [that] would amount to an agreement on how the unwritten constitution of the United States should operate" (p. 128).

These and other earlier studies are incorporated by reference in the instant work, primarily by the device of prefacing each chapter's footnotes with "reminiscences of the personal experiences which were responsible . . . for the opinions and prejudices that show through any scholarly work" (p. 153). The result is two books bound in one cover — the first a scholarly discourse, the second, in essence, Price's (abbreviated) memoirs. The use of this device reveals not only the sort of authority ultimately relied upon in this book, but, in a sense, the sort of authority Price suggests ought ultimately to be relied upon by government itself. Thus, a central conclusion of the book is that decisions on "[t]he more important issues that arise at the higher levels of the governmental hierarchy . . . ought to be controlled in the end not by scientific data or predetermined rules but by moral and political judgment, guided in turn by a concern for the general welfare" (p. 143).

Readers may perhaps be satisfied by less rigorous documentation when their author's "moral and political judgment" seems sound. It is less clear that citizens in a democracy should be encouraged to defer in a comparable way to government officials by entrusting a select cadre of them with the "substance of policy" (p. 80). By analogy to the British civil service, however, Price proposes just such an institution:<sup>7</sup> "a career service heading the major departments of a government, with lifetime commitments and a common outlook or education and at

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5. H. STONE, D. PRICE & K. STONE, *CITY MANAGER GOVERNMENT IN JACKSON (MICHIGAN)* 48 (Pub. Admin. Serv. No. SP.13, 1939).

6. See Price, *The Parliamentary System*, 3 PUB. AD. REV. 317 (1943).

7. An especially formative experience with regard to this proposal was Price's service on former President Hoover's Commission on the Organization of the Executive Branch.

least partly beyond political control" (p. 76). By "common education," he means that these civil servants would be "generalists" as opposed to legal and scientific experts.<sup>8</sup> Price's suggestions for creating this establishment within government include decreasing the number and type of congressional checks on agencies and programs, creating cabinet committees with genuine authority to formulate policy away from the media spotlight, decreasing the numbers of political appointees, and reducing staff size in Congress and the Executive Office of the President.

In Price's view, giving the executive more freedom to act is the best way to make government more accountable to the people. His new version of the unwritten constitution would call for a disciplined Congress, in which party leaders are able to deliver or withhold support and maintain a firm party line, to delegate to the president enough authority to carry out and coordinate the laws. A streamlined executive office, in turn, sets the overall goals of policy and delegates authority, through the cabinet, to a cadre of depoliticized professionals who independently work out and execute the government's programs. Accountability is assured both by the more direct causal link between voters and government action and by the more coherent manner in which the business of government is carried out: "In ideal terms, this is the more democratic and responsible arrangement since it focuses the attention of the electorate and Congress as a whole on the main general issues, which they are interested in and competent to decide, rather than on technical or procedural details, which they are not" (p. 141).

Thus, Price's direct answers to the difficult question he poses are quite striking. The "authoritative source of truth on which we should rely" in setting national policy is not religion (the *written* Constitution prevents this), not science (which the unwritten constitution has relegated to a role similar to that of religion), and not law (which is not a *source* of truth at all, but at best a codification of truths arrived at by other means). It may be objected that the "moral and political judgment" Price posits instead as the ultimate policymaking guide is not an "authoritative source of truth" either, but rather a name for the kind of comprehensive and disinterested review of goals and anticipated effects that ideally takes place before any government program is implemented. Nonetheless, Price argues that it is a failure to defer to expertise in this mode of analysis which has fostered, in recent years, a "partly scientific and partly legalistic" (p. 93) approach to lawmaking that precludes coherent and responsible government.

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8. Nonetheless, it would probably not be unreasonable to envision this elite corps as people very much like Price's students at the Kennedy School of Government. In terms of existing governmental structures, the recently instituted Senior Executive Service is positioned to become such a corps, but would have to be expanded and modified significantly to meet Price's criteria.

Attempts to legislate scientific goals directly, without tempering the scientists' "abstract and specialized view of the truth" (p. 58) with a measured sense of priorities, results in programs that are liable to be partially or wholly counterproductive.<sup>9</sup> At the same time, the legalistic tendency to curb abuse of power through extensive congressional oversight of agencies and programs splinters democratic responsibility in the legislature and removes accountability from the president and the departments.

The American voters' manifest preference for the genial generalist Ronald Reagan over both the scrupulous scientist Jimmy Carter and Washington lawyer Walter Mondale illustrates the timeliness, if not necessarily the accuracy, of Price's critique. The voters' acceptance of a president who seems to rely upon his own moral and political judgment in preference to detailed technical knowledge in his decisionmaking does not, however, indicate a willingness to permit an unelected bureaucracy similarly to set its own policy. On the contrary, at present there appears to be a durable consensus *against* the creation of a new and powerful entrenched establishment within the federal government. Price confronts this objection directly, acknowledging the existence of a deep-seated American "prejudice against establishments" and loathing for bureaucracy (p. 77). He goes even further, and sets up an analogy between our theological past, with its antiestablishment bias, and our scientific present, typified by a deep attachment to academic freedom. In this scheme, absolute, unyielding truths may motivate political action so long as religious and scientific institutions are not part of the government, nor so closely allied with government as to dictate results inconsistent with democracy and justice. Having ratified this American prejudice insofar as it extends to established religion and science,<sup>10</sup> Price maintains that we should not carry our prejudice against establishments to the extreme of banishing policy-making expertise from government. Rather, we should see to it that there is an institution firmly implanted in the government which can preserve coherence, fairness, and continuity in the execution of the laws.

Once a viable solution is paired in the public's mind with a pressing need, a consensus that changes the unwritten constitution may well arise with surprising speed. While it may be easier to command a consensus upon some of Price's proposals than others, they are all worthy of consideration, and their presentation serves to make them appear neither more nor less significant than they actually are.

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9. The original and detailed form of this argument may be found in D. PRICE, *GOVERNMENT AND SCIENCE: THEIR DYNAMIC RELATION IN AMERICAN DEMOCRACY* (1954); D. PRICE, *THE SCIENTIFIC ESTATE* (1965).

10. An example of established science is the Soviet Academy of Sciences, which, Price observes, "in its complete dependence on government authority and support and its dedication to a quasi-scientific ideology that justifies absolute authority, is rather like the old Russian Orthodox church in its relation to the czars." Pp. 11-12.

As a final point, it is perhaps also significant that Price's thought is characterized by a pervasive, unpolarized dualism: Though fond of thinking in two's, Price never thinks in opposites. As a youth, he was driven to inquire into the necessity of having two Methodist Episcopal churches in one small Virginia town, and was gratified to be told, "Why, of course, we have to have one church for the Republican Methodists and one for the Democrat Methodists" (p. 154). In a field whose broadest conceivable distinction seems to be that often elusive contrast between Republican and Democrat, this fascination with contemplating the profound differences between two things that are very much alike — mayors and city managers, British and American government, personal prejudice and scholarly predilection — is surely a valuable trait. Imagine his intellectual thrill when his Oxford tutor told him: "You American students never seem to understand. . . . Merton College has no rule against climbing into the college after midnight. It has a very strict rule against getting caught climbing into the college after midnight" (p. 159).

THE DILEMMAS OF INDIVIDUALISM: STATUS, LIBERTY, AND AMERICAN CONSTITUTIONAL LAW. By *Michael J. Phillips*. Westport, Conn.: Greenwood Press. 1983. Pp. x, 226. \$29.95.

Sometime in the near future, the individual in the United States will become subject to increasingly harsh and repressive denials of freedom — or so says Michael J. Phillips<sup>1</sup> in *The Dilemmas of Individualism: Status, Liberty, and American Constitutional Law* (p. 200). Ironically, the principal reason for the transformation of America into an authoritarian regime will be liberalism, through its emphasis on individual freedom (pp. 165-66).

It would be inaccurate to identify the "liberalism" to which Phillips refers with any particular political group. Instead, Phillips' liberalism "is a body of ideas dominating the entire American political spectrum" (p. vii). The central goal of liberalism as Phillips describes it is the emancipation of individuals from all restraints on their ability to act (pp. 153-56). To achieve this end, liberal freedom must accomplish two things. First, it must remove physical and cultural obstacles to individual freedom of choice. Second, it must confer upon individuals the capacity to exercise the options available to them. According to Phillips, the logical conclusion of this sort of liberty is either random or suicidal behavior (pp. 156-58).

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1. Michael J. Phillips is an Associate Professor of Business Law at Indiana University's School of Business. He holds a J.D. degree from Columbia University, and LL.M. and S.J.D. degrees from the National Law Center at George Washington University.



Thus, liberal freedom must always be tempered with restraining influences (p. 161). Phillips contends that the communitarian influences of family, region, religion, morality, and the like no longer provide any meaningful limitation on the self-destructive aspects of liberalism, because their continued vitality depends upon prejudicial treatment of certain groups. For example, Phillips asserts that discrimination against women and children "[i]s vital to, if not constitutive of, the family and the stabilizing and socializing functions it fulfill[s]," with "the opprobrium visitd [sic] upon homosexuals and illegitimates" also contributing (p. 164). Similarly, he states that black slavery and the banishment of American Indians to reservations were elements "of a social hierarchy that, if nothing else, was ordered" (p. 164). Finally, the disabilities imposed upon all of these groups "also tended to reinforce the values of localism and community by putting some restraints on social and geographical mobility" (p. 164). In sum, Phillips sees prejudice as "reflecting and to some degree forming, a variegated pattern of social ordering" (p. 163). Since liberalism, through the equal protection clause of the Constitution, prohibits discrimination, it has destroyed the ability of communitarianism to guide society.<sup>2</sup>

In the absence of communitarian values liberalism must seek restraints elsewhere. Phillips interprets the growth of government, corporations, labor unions, and other large organizations as the response to that need (pp. 167-72).<sup>3</sup> These institutions fail to provide a viable substitute for the lost community (pp. 164-74), so American society will instead avoid the self-destructive tendencies of liberalism through increasing institutional oppression of individuals (pp. 94-96), which will ultimately take the form of direct control of thought by use of drugs, behavior modification, and "electrical and chemical stimulation of the brain" (pp. 200-07).

Confronted with a vision as radical and apocalyptic as this, the reader expects Phillips to propose a "coherent system of alternative moral possibilities," but Phillips disappoints this expectation "because [he has] no such scheme to offer." Instead, he explicitly adopts a "descriptive posture" (p. ix), asserting that there is no escape from the script he has recited (pp. 199-200). Phillips palliates his projection by claiming that "it is fairly optimistic" because the alternatives, nuclear war, economic ruin, or environmental disintegration, are even worse (p. 207).<sup>4</sup>

Although some of Phillips' reasoning invites dispute — for exam-

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2. Note that Phillips neither acknowledges that the equal protection clause bars only arbitrary and irrational discrimination, *see, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 681 (1966) (Harlan, J., dissenting), nor considers the possibility that this limitation on the reach of equal protection doctrine might provide the necessary restraint.

3. Phillips contends that individuals have essentially identical relationships with all large institutions, and that it is therefore unnecessary to distinguish among them. *See* pp. 69-120.

4. *See also* p. 196 ("subordination to Russian designs").

ple, he ignores alternative explanations for the phenomena he observes, such as the impact of technology on the growth of modern institutions<sup>5</sup> — his rhetorical method forces the reader to question his motives. Throughout his book, Phillips relentlessly distances himself from the text, using at least four tricks. First, he couches his argument in opaque, confusing jargon.<sup>6</sup> Second, he continually uses weak phrasing in order to express his positions in an equivocal manner.<sup>7</sup> Third, he attributes many of his statements to unspecified third parties.<sup>8</sup> Finally, he argues via proxy, presenting the writings of great philosophers (most frequently Hegel,<sup>9</sup> Hobbes,<sup>10</sup> and Plato<sup>11</sup>) in lieu of his own. By riding on the coattails of these formidable thinkers, Phillips lends his writing a false aura of legitimacy<sup>12</sup> and avoids responsibility for his arguments.

5. P. 167 (institutions have grown in order to provide their members with "competitive advantages and increased power," to facilitate the "urge toward the domination and exploitation of nature," and to fulfill "the need for some alternative form of community"). Phillips' argument is fundamentally incomplete, see notes 20-22 *infra* and accompanying text, so there is little to be gained by responding to its substantive shortcomings.

6. The most important examples are provided by his use of the terms "freedom" and "status." According to Phillips, there are three varieties of freedom: "negative freedom," pp. 3-4; "authoritarian positive freedom," pp. 9-12; and "liberal positive freedom," p. 13; and two types of status, "ascribed" and "achieved." P. 8. His work largely depends on the manipulation of these five terms. One example of Phillips' use of jargon is as follows: "In one version of this status-positive freedom fusion, ascribed statuses are very significant." P. 10 (footnote omitted).

Phillips burdens other concepts with unnecessarily weighty labels, see, e.g., p. 202 ("corporate state paradigm"), and forces his reader to digest complex terminology even where a more common word would be unambiguous. See, e.g., p. 206 ("ESB and neuropsychopharmacology" instead of "drugs").

7. See, e.g., p. 6 (supporting a point by claiming that it "is not self-evidently false"); p. 30 ("[t]oo often, it appears"); p. 72 ("tend to support"); p. 98 ("may come to involve").

8. See, e.g., p. 89 ("some contend"); p. 96 ("often said").

9. See, e.g., pp. 168-69.

10. See, e.g., pp. 184-85.

11. See, e.g., pp. 189-93. These three are the only writers Phillips discusses at any length, but he lists other prominent figures when it serves his purpose. See, e.g., p. 5 ("Saint Paul, the Stoics, Kant").

12. Phillips' disregard of philosophical writings contrary to his position undermines the ability of his citations to legitimate his work. For example, Phillips uses the theories of Thomas Hobbes to justify his assertion that liberalism leads to totalitarian government. After certifying Hobbes' liberal credentials (and Hobbes, along with John Locke, is acknowledged as one of the two originators of the liberal tradition), Phillips paraphrases Hobbes' conclusion that "[t]he absolute power of the sovereign . . . was really the necessary complement to . . . individualism." P. 184 (quoting G. SABINE, *A HISTORY OF POLITICAL THEORY* 475 (1961)).

Phillips neglects, however, to respond to the works of Locke. Like Hobbes, Locke presumes that humanity consists of free individuals. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 309 (1960). The individualism of Locke, contrary to that of Hobbes and Phillips, does not require state repression. In fact, Locke explicitly denounces authoritarian forms of government: "Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together." J. LOCKE, *supra*, at 325 (emphasis in original). American political theory draws largely on the philosophy of Locke, not Hobbes. Since one of Locke's primary purposes was to debunk Hobbes' authoritarian theory, A. GUTMANN, *LIBERAL EQUALITY* 19-20, 27-32 (1980), Phillips cannot make effective use of Hobbes without also responding to Locke.

Phillips bases much of his book on the ground broken by the Conference on Critical Legal Studies, but perverts its teachings in the process. Like Phillips, the Critical Legal scholars point out the bankruptcy of unqualified liberalism as a means of social organization and the fundamental contradiction between liberal individualism and communitarian values.<sup>13</sup> Phillips parts with them, however, when he asserts that a society must choose either freedom or community (pp. 198-99) and attacks reduced discrimination brought about by enforcement of the equal protection clause.<sup>14</sup>

To this end, Phillips allots much of his work to describing and denouncing the law of equal protection (pp. 19-67, 151-64). For example, he opposes due process in juvenile criminal proceedings, student rights, and equal access to contraception and abortion for minors (p. 27). He believes that government should control the development of children (p. 30), and that discriminatory treatment is necessary to ensure that children mature in the manner prescribed by the state (p. 25). He makes similar arguments as to women (pp. 20-24) and blacks.<sup>15</sup>

Phillips devotes substantial effort to deprecating affirmative action (pp. 121-52, 174-78), even though he acknowledges that this criticism provides little support for his thesis (p. 175). He never mentions the term "affirmative action," but uses the pejorative expression "reverse discrimination" instead.<sup>16</sup> He bases his blanket condemnation<sup>17</sup> on

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13. Compare, e.g., p. 175 (liberal individualism is self-contradictory), with Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 211 (1979) ("Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it.").

14. In contrast, members of Critical Legal Studies emphatically believe that society can incorporate a commitment to both individual freedom and communitarian values. See, e.g., Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1427-28 (1982) (law must incorporate both individualism and communitarianism); Kennedy, *supra* note 13, at 217 (individual liberty and state coercion can be fused in civil society); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 785-86 (1983) (liberalism is an incomplete social theory, but "just as conservatism correctly emphasizes our mutual dependence, liberalism correctly emphasizes our individuality and the threats we pose to each other. It may be that we live in a world of tension, in which no unified social theory but only a dialogue between liberalism and conservatism is possible."). In fact, one purpose of their criticism is to engineer a better synthesis of these ideals. See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710 (1976) ("What we need is a way to relate the values intrinsic to form to the values we try to achieve through form.") (emphasis in original); Kennedy, *supra* note 13, at 221. But see Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15 (1984).

Professor Alan David Freeman addresses the points Phillips raises more specifically. He insists that the law can integrate equality and justice and criticizes the law for its failure to do so. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1103, 1119 (1978).

15. See text following note 16 *infra*.

16. See, e.g., p. 174.

17. Phillips criticizes every area of affirmative action law: education, pp. 134-35, 138-41; employment, pp. 135-38; and voting, pp. 142-45.

the belief that, occasionally laudable purposes<sup>18</sup> notwithstanding, affirmative action constitutes "odious" discrimination (p. 176) and is merely a "concession to minority political power" created in response to a "thoroughly egoistic group struggle" (p. 178).<sup>19</sup> Phillips also contends that commitment to affirmative action will cause the government to take increasingly severe measures to ensure equality, culminating in "genetic engineering" (p. 177). Ultimately, Phillips hopes for a catastrophe engendering an "authoritarian" backlash that abolishes affirmative action (p. 177).

In essence, Phillips argues that liberalism run amok will compel American society to choose among a few intolerable alternatives: suicide, incoherence, or tyranny involving government-sponsored drug addiction and eugenics. Moreover, he claims that the triumph of liberalism depends upon rejection of communitarian values, which is in turn caused by enforcement of the equal protection clause. A reader accepting this reasoning is likely to decide that rejecting equal protection might restore communitarianism and avert the occurrence of Phillips' frightening predictions. Phillips supports this conclusion by advocating that contemporary society should impose sacrifices on minorities and stating his regret that America's representative democracy presents obstacles to such a program (p. 197). In this light Phillips' actual purpose, which is quite different from his stated descriptive intent, becomes clear: *The Dilemmas of Individualism* is a manifesto for the repudiation of the equal protection clause that goes beyond rejecting affirmative action, and actually advocates restoring the most reprehensible varieties of public and private discrimination. Phillips does not even renounce the view that slavery is the social condition for which blacks are most suited, condemning that institution only for its excesses (p. 31).

Unfortunately, Phillips lacks the audacity to state his thesis boldly and defend it forthrightly.<sup>20</sup> In adopting his indirect argumentative style, Phillips avoids the most important questions. First, he never considers the possibility that liberty and community might be harmonized.<sup>21</sup> Second, even if the two cannot coexist, Phillips does not at-

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18. Phillips concedes that preferential treatment may sometimes be justifiable to remedy past injustice and to develop true equality of opportunity. Pp. 132-34.

19. Even if affirmative action is necessary to implement the desired enhancement of the productive capabilities of minority group members, Phillips argues, liberalism will probably destroy the "nurturing" and "constructive" aspects of the doctrine. P. 178.

20. Phillips' caution in this respect also explains his efforts to dissociate himself from his writing. See text at notes 6-12 *supra*.

21. If the law can resolve the conflict between individual and community and avoid the disastrous consequences of that conflict, as Critical Legal Studies teaches, then there is no need to eviscerate the equal protection clause. The Critical Legal scholars predicate their argument on the discord between individualistic and communitarian goals, but, directly contrary to Phillips, argue for legal militancy on behalf of distributive justice. See, e.g., Freeman, *supra* note 13; Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 849-57 (1983) (critical theory seeks to expose, destroy, and replace contract law because it encourages wealthy parties to

tempt to prove that constitutionally mandated equality is the root of the conflict.<sup>22</sup> Phillips does himself and his reader a disservice by his failure to address these pivotal issues, for this shortcoming makes his startling views neither convincing nor credible, and relegates his book to the status of an extremist novelty.

PASSION: AN ESSAY ON PERSONALITY. By *Roberto Mangabeira Unger*. New York: The Free Press. 1984. Pp. ix, 300. \$14.95.

Western philosophical thought has moved from the metaphysical to the nihilistic, and in *Passion* Roberto Unger wants to reconcile the two. Unger notes that "[t]wo great themes" comprise the focus of metaphysical "thought about personality": the central value of interpersonal relationships, especially love, and the continuous assault on particular societies, to express the belief that human beings are inherently unable to find perfect satisfaction on earth (p. 24). The first theme has not disappeared from human experience, claims Unger, for it is only through relationships with other free and "insatiable beings like ourselves" that we are able to find fulfillment (p. 25). But the second theme eliminates the possibility of discovering meaning in the real world, by positing instead an extra-human, ideal realm. Radical modernism, embracing the nihilistic, rescues the metaphysical tradition from viewing human existence as merely an earthly metaphor of an absent ideal, but just as it recognizes that we are what we make ourselves to be, radical modernism concludes wearily that "the individual can expect no real progress" (p. 36) from such a continuous reshaping of the self. The possibility of discovering meaning on earth disappears altogether in this extreme skepticism.

Roberto Unger, who teaches law and social theory at Harvard University, believes that a form of social life can be developed which will better enable us to become fully human, which to him means a society where institutions are structured primarily to promote personal freedom and change, and in *Passion* he points toward this goal in the realm of interpersonal relations. In an earlier article, *The Critical*

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exert power over poorer parties); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1295-96 (1984) ("Bureaucracy is . . . a primary target for those who seek liberation from modern forms of human domination. . . . Critical theory seeks to undermine" its existing legal basis and foster individual liberty.); Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876, 896-98 (1979) (law cannot succeed unless it takes steps to reduce the influence of advantaged parties in "our highly stratified, class-dominated society"); Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 771-72 (1981) (contract law cannot accommodate true freedom without rejecting the premises of present law).

22. Phillips' approach logically requires this result, but he does not explicitly propose rejecting the ideal of equality.

*Legal Studies Movement*,<sup>1</sup> Unger described this goal in the field of legal systems; in a reported forthcoming work, he will do so in social theory. Unger recognizes that the "systematic shift in the character of direct personal relations"<sup>2</sup> which he discusses in *Passion* "need[s] to be thought out in legal categories and protected by legal rights,"<sup>3</sup> a task he began undertaking in *The Critical Legal Studies Movement*. "[N]ot to give these reconstructed forms of solidarity and subjectivity institutional support would be . . . merely to abandon them to entrenched forms of human connection at war with our ideals."<sup>4</sup> Likewise, an "indispensable counterpart to a psychology of empowerment" (p. 75), which Unger describes as enabling people to discover novel ways of relating with others (p. 73), "is a social theory capable of describing the forms of social life that advance the practical, passionate, and cognitive forms of empowerment" (p. 75), which Unger undoubtedly will elaborate in his forthcoming social theory. But the discussions of legal systems and social theory are in a sense secondary, for they depend upon a notion of what it means to be a human being, a notion which is expounded in *Passion*.

Although he accepts the modernist conception that people are defined by their social and historical contexts, Unger's view of what it means to be a human being cuts across specific social and historical barriers and consists of a universal claim: *all* human beings — no matter when or where they live — must cope with the tension between our need for and our fear of one another, which Unger calls "the problem of solidarity" (p. 4). "Passion" is "the living out" of this tension (p. 115), which, though unresolvable, is eased to varying degrees by the many different passions (p. 125). Much of the book involves descriptions of these passions, detailing their relative successes and failures in alleviating the conflict between our need for and fear of each other.

In Unger's hierarchy of passions, it is love which best allows us to embrace others without apprehension:

Love is an impulse toward acceptance of the other person, less in his distinctive physical and moral traits (which the lover may criticize and devalue) than in his whole individuality. The specific features of the person are never irrelevant — how else could you know him? — but they are taken as incarnations of a self that both speaks through them and transcends them. This acceptance, made in the face of the inexorably hidden and threatening being of another person, always has something of the miraculous. It is an act of grace devoid of condescension or resentment. [P. 221.]<sup>5</sup>

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1. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

2. *Id.* at 598.

3. *Id.*

4. *Id.*

5. Both Freud and Hegel appear to have influenced Unger's discussion of love:

For Unger, when we love, we break down defenses, vulnerabilities, socially circumscribed barriers to appreciating other people. As we ourselves learn to play with the possibilities of being human, as we discover a multiplicity of ways of reinventing and recombining the elements that make up our otherwise unchanging character, we begin to see that other people are like us because they can do the same. Although we cannot reach an extra-human Utopia, we can find images of that ideal realm in our own lives by recognizing and uncovering the infinite possibilities that human freedom can provide. Thus, in Unger's view, the form of social life which would best enable us to become fully human is that form which is most malleable, which we see as itself contingent. This form leaves us the greatest room for play:

An order must be invented that, considered from one standpoint, minimizes the obstacles to our experiments in problem-solving and in accepted vulnerability and, viewed from another perspective, multiplies the instruments and opportunities for its own revision. Such an order represents the next best thing to the unconditional context whose unavailability helps make us what we are. Its characterological form is a central concern of this inquiry . . . . [P. 193.]<sup>6</sup>

A crude but helpful description of Unger's best society would understand it as procedural rather than substantive. That is, the best society is one in which we can most easily open ourselves to others with the least amount of fear — this society is best because of *how* it enables us to act, not *what* it enables us to be.<sup>7</sup> Unger is careful, though, in both *Passion* and *The Critical Legal Studies Movement*, to disassociate his theory from theories of abrupt and violent revolution, which are only necessary to shatter the harsh intransigence of a society which fails to allow for change. Unger's best society would contain

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Normally, there is nothing of which we are more certain than the feeling of our self, of our own ego. This ego appears to us as something autonomous and unitary, marked off distinctly from everything else. . . . [T]owards the outside . . . the ego seems to maintain clear and sharp lines of demarcation. There is only one state . . . in which it does not do this. At the height of being in love the boundary between ego and object threatens to melt away. Against all the evidence of his senses, a man who is in love declares that 'I' and 'you' are one, and is prepared to behave as if it were a fact.

S. FREUD, CIVILIZATION AND ITS DISCONTENTS 12-13 (J. Strachey ed. 1961) (footnotes omitted). See also G. HEGEL, PHENOMENOLOGY OF SPIRIT ¶ 184, at 112 (A. Miller trans. 1977) (emphasis in original):

[Self-consciousness] is aware that it at once is, and is not, another consciousness, and equally that this other is *for itself* only when it supersedes itself as being for itself, and is for itself only in the being-for-self of the other. . . . They recognize themselves as *mutually recognizing* one another.

6. The legal aspect of this possible order is described in *The Critical Legal Studies Movement* as "deviationist doctrine." Unger, *supra* note 2, at 576-83. This "enlarged doctrine"

is the legal-theoretical concomitant to a social theory [and a theory of interpersonal relations] that sees transformative possibilities built into the very mechanisms of social stabilization and that refuses to explain the established forms of society, or the sequence of these forms in history, as primarily reflecting practical or psychological imperatives.

*Id.* at 583.

7. Cf. J. CONRAD, LORD JIM 212-15 (Stein discussing "how to be").

self-corrective mechanisms because its inhabitants would see it as a laboratory for possibilities of human interaction, and be ready to laugh at rather than defend a failed program.

That Unger's best society would be a place of playfulness and laughter is, however, only implicit in *Passion*, and Unger's failure to describe the mirthfulness of the world of love exemplifies the speculative tone that marks the central failure of the work as a whole. For although Unger claims that his mode of discourse will be that of the storyteller (p. 84), his stories are more generic than specific. He discusses, abstractly, lust, despair, hatred, vanity, jealousy, envy, faith, hope, and love, without once posing a hypothetical tale to situate the discussion in the lives of real or imagined people.<sup>8</sup> Only once, when he embarks upon a "biographical genealogy of the passions" (p. 147), does Unger move toward a specific example. His lovely discussion of the development of the passionate self<sup>9</sup> reminds one substantively of Piaget's description of the development of the child,<sup>10</sup> but even here Unger is rarely able to tell real tales.<sup>11</sup>

Unger also tends to think dualistically; the cornerstone of *Passion* is itself a dichotomy, that of our mutual longing for and fear of each other. But Unger would probably acknowledge that his method of thought is not meant to imply an ontological assertion. Unger recognizes that although we often discuss our relations by reducing them to easily graspable conceptual categories, our relations themselves are complex and not dualistic.

The publication of *Passion* seems to mark an important moment in post-modernist thought. Although human is all we can be, we nonetheless yearn for more, and the post-modernist task is to find representations of the infinite in the real. The most fertile ground for such representations is humanity itself. We cannot reach godliness, but as Roberto Unger's *Passion* so trenchantly demonstrates, we can reach each other, if only we can learn to overcome who we are and envision the possibilities of who we might become.

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8. For examples of helpful story-telling in philosophical discourse, see J. SARTRE, *BEING AND NOTHINGNESS* 40-42, 96-98, 101-03 (H. Barnes trans. 1956). For further elaboration of this feature of Unger's work, see Teachout, Book Review, 83 MICH. L. REV. 849, 883-90 (1985) (in this issue).

9. For example, when Unger describes a child's "beginning of reflection upon contingency — the discovery that things might be otherwise," p. 154, he first writes of a child's crying for his parents. Then Unger widens his interpretive focus to incorporate in the crying the child's developing though still unconscious sense of his mortality: "If only he could think more clearly, he would not stop crying when father comes home." P. 154.

10. See generally *THE ESSENTIAL PIAGET* (H. Gruber & J. Vonèche eds. 1977).

11. Unger's description of the turning points in the development of the passionate self is general rather than specific. That is, Unger rarely sets forth a hypothetical situation to represent a larger idea.