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THE UNFINISHED WORK OF THE INSTRUMENTALISTS

*Willard Hurst**

INSTRUMENTALISM AND AMERICAN LEGAL THEORY. By *Robert Samuel Summers*. Ithaca, N.Y. and London: Cornell University Press. 1982. Pp. 295. \$24.50.

In *Instrumentalism and American Legal Theory*, Professor Summers undertakes to define and criticize an influential body of thought about legal order which he terms "pragmatic instrumentalism." Though he does not confine his study to four men, he centers on the work of Oliver Wendell Holmes, Jr., Roscoe Pound, John Dewey, and Karl N. Llewellyn. None of these writers produced an integrated theory of law broad enough to fulfill the potentials of the themes they sounded. But Summers is persuasive that their work tended to form a common pattern. His book — a contribution both to jurisprudence and to the history of ideas — helps fill out the content of the pattern which these philosophers left only partly finished.

The author identifies the distinctive content of pragmatic instrumentalism in part through its contrasts with three other currents in Western legal theory — analytical positivism, natural law, and historical jurisprudence. Analytical positivism has focused on the logical implications of concepts regarded as giving authoritative form to a system of law, such as ideas of rights, duties, or sovereignty. Instrumentalism has focused more on tracing the use and efficacy of law as a means toward achieving social goals. Natural law philosophy has measured positive law by criteria of justice, rightness or goodness to be realized through legal processes. Instrumentalism has tended to measure uses of law relative to wants in fact felt or desires in fact held by popular majorities, or at least by politically effective sectors of society. Historical jurisprudence — not a prime element in this country's legal thought — has sought to identify values legitimated by usage and by the cumulative experience of a people. Instrumentalists have been more interested in employing and understanding law in the here-and-now setting of a given time and place. Summers seems right in rating instrumentalism — as marked out by its contrasts to these other currents — as a fourth major

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strand in the history of Western legal thought. The assessment will be convincing to most of those whose law studies were colored by the legal realist movement of the late 1920's and early 1930's and who have known law school curricula shaped largely by efforts to expose law's functional relations to other social institutions or processes.

The men whose work Summers surveys set in motion many fresh courses of ideas, research, and instruction, and stirred much controversy. In this light Summers' account is striking in its demonstration of how relatively sketchy and incomplete was the sum of their product; this insight is the prime contribution of this book. Anyone who has had much direct or indirect exposure to the influence of the instrumentalist approach will find that a good deal of what is set out here is familiar. However, Summers' task requires that he provide these familiar settings in order to bring into relief both the constructive and the limiting aspects of the instrumentalist tradition. I imagine that I am not alone in having found challenge in the kinds of writing Summers deals with, and at the same time having wished that they gave me more. These writers were most persuasive as critics; they were less satisfying in what they supplied to make good what they displaced. By outlining the important gaps in their theory, Summers provides suggestive indicators for work which might fill out what the instrumentalists began. In one perspective his book is a useful study in the history of twentieth century legal thought in this country; in another, it is a contribution to research design.

At the heart of instrumentalist thinking has been its future-regarding insistence that people in this society seek to use law to achieve practical social goals. This attitude has expressed itself and has found encouragement in metaphors of social engineering. But the instrumentalists did not match this ends-and-means orientation with equal enthusiasm for exploring the legitimacy as well as the sources of the social goals that lawmakers pursued. With some warrant Summers argues that instrumentalists tended to settle for goals established mainly in quantitative terms: law should serve those ends in fact desired by popular majorities, or at least by politically effective interests. This approach avoids — or evades — setting qualitative criteria for choosing goals to be served by law, and hence also tends to promote rather narrow efficiency measures for validating means adopted to pursue goals. From this perspective there has been unresolved tension between the natural law and the instrumentalist traditions. Pragmatic analysts shy off from the unacceptable vagueness or rationalizations of undisclosed premises they find in appeals to natural law. Yet a stubborn fact in this society's legal tradition has been the persistence of the idea and the ideal of constitutionalism. A constitutional legal order asserts that all uses of power in society should be subject to some effective criteria of values beyond majority vote or the will of immediate holders of power.

Summers does not choose quite these terms in observing that instrumentalist literature has scant qualitative analysis. But tension with constitutionalism fits his diagnosis, and suggests an important limitation of the instrumentalist achievement.

Summers fairly notes that instrumentalist thinking emphasized the roles of judges in making and carrying out public policy. Judge-made law bulked large in nineteenth-century development of legal doctrine. Against that background it was understandable that pragmatically-inclined philosophers centered on the work of courts — chiefly on the work of appellate courts, but to some extent also on what went on at the trial level. But to understand is not to justify the extent of their concentration on the judicial process, particularly when they wrote in the twentieth century context in which legislators and executive and administrative officers were rapidly taking the lead in lawmaking. There was passing reference to growth of statute and administrative law, but this was not the prime subject of attention. Even Summers tends to emphasize courts. However, he does a good job of outlining the range and diversity of goals which people may seek to define and legitimize through legal processes, and the material effects that choice of means may have on the content of goals. Of like breadth is his catalog of contemporary techniques which lawmakers employ to carry out their purposes — encouraging private arrangement of affairs, providing civil remedies for grievances, distributing publicly supplied goods and services, creating standards and rules to channel behavior under licenses or other regulatory devices, and prohibiting some conduct under penal sanctions. The range of his inventories explicitly and implicitly reckons with a legal order in which legislative, executive, and administrative processes loom large alongside judicial processes. The particulars of his catalogs are not new; Roscoe Pound's zeal in classification led him to elaborate analogous lists of interests fostered or protected by law.¹ But Summers' analysis serves a distinctive function, casting into sharp relief the relatively few categories upon which instrumentalist writings dwell.

Summers finds a third limitation of the instrumentalists' contribution in their naïve optimism about the capacity of scholars to find facts to measure the effects of using law. Confident that they could capture the realities of law in action, they were the more confident that lawmakers could be effective social engineers. They underestimated the difficulties of measuring achievement not only of immediate goals of policy but also of intermediate or ultimate objectives. They underestimated the difficulty of determining to what extent law was a distinctive cause in situations where factors other than law might be at play. They underestimated the difficulties of studying

1. *E.g.*, Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

the effects of using law in the face of limits set by cost, by political objections to controlled social experiments, and by lack of means to measure intangible elements often critical in social experience. Beyond such limits lay issues which bring us back to the fact that much instrumentalist literature tended to avoid dealing with qualitative judgments. To try to measure law's efficiency is worthwhile. But the fact that a use of law may efficiently produce a desired result does not establish that the result is one that a just and humane society should want. Again, Summers raises pertinent questions about the limits as well as the strengths of the instrumentalist tradition.

Over the past thirty years scholars have given increasing attention to the successes of special interests in determining uses of law at the expense of broadly shared but less effectively represented values. This emphasis probably derives from the emergence of legislation and executive and administrative rules and orders as the principal types of lawmaking. Tensions between general and special interests have figured also in the development of judge-made law, but the growth of common law has relied on the focused energies of particular litigants to provide occasions of lawmaking — a setting which tends to obscure the presence of group interests. Since instrumentalist thought concentrated on the work of courts, it is not surprising that its exponents did not press far in examining challenges which special interest pressures posed to the legitimacy of other types of law. This is a limiting aspect of instrumentalism which Summers does not explore in the degree that its importance would seem to warrant.

Fifty years ago Karl Llewellyn delivered a devastating critique of an over-generalized identification of a "school" of jurisprudential analysis where in fact existed substantial diversity and differences of views.² While reading so ambitiously broad a survey as that presented by Summers, one must be somewhat uneasily conscious of Llewellyn's warning. Specialists more qualified than I may find particular quarrels with Summers' identification of dominant trends and themes among his pragmatic instrumentalists. But he does not fall into the style of generalization for which Llewellyn criticized Pound; to a reassuring degree Summers backs his generalizations with specifications. Overall, he is helpful in the range of elements he invites us to consider in surveying this legal order. He persuasively documents the presence of some important shared themes among writers who have greatly influenced contemporary jurisprudence. It is a valuable contribution to sensitize readers to the limits as well as the accomplishments of this important group.

2. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).