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ON IDENTIFYING AND RECONSTRUCTING A GENERAL LEGAL THEORY—SOME THOUGHTS PROMPTED BY PROFESSOR MOORE'S CRITIQUE

Robert S. Summers†

INTRODUCTION

My purposes in this article are dual: to discuss some relatively neglected issues about the scope, aims, and methods of legal theory that arise out of, yet transcend, the differences between Professor Moore and myself, and to comment on some of Professor Moore's criticisms of my book, *Instrumentalism and American Legal Theory*.[1]

What counts as a general legal theory? How does the subject of legal theory differ from legal sociology? What role should rational reconstruction play when interpreting the writings of a group of theorists? These important issues have been relatively neglected in the history of legal thought. Though they may not be susceptible of definitive resolution in general terms, they certainly merit more discussion than they have received.

Professor Moore's criticisms of my book are comprehensive. He even doubts that there is much of value for legal theory in the entire tradition I have chosen to call "pragmatic intrumentalism"—a tradition that includes certain works of Holmes, Pound, Dewey, Gray, Llewellyn, and Felix Cohen. In the course of discussing the above general issues about the scope, aims, and methods of legal theory, I will comment on some of Professor Moore's criticisms. We do agree on several points. He finds my description of the views of particular theorists to be accurate.[2] He concludes that my reconstruction of their views is legitimate and

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† McRoberts Research Professor, Cornell Law School. The author wishes to record his gratitude to several persons who read part or all of this article in draft and offered thoughtful comments: Professors Alan Gunn, Leigh B. Kelley, Roderick MacDonald, and Dale A. Oesterle. Sterling Harwood, Cornell Law School Class of 1983 read two drafts and contributed several useful thoughts. Mr. Geoffrey Marshall of the Queens College, Oxford, provided helpful advice. I am, as usual, much indebted to my research assistants and I wish to record my thanks to them: Ms. Patty Ceruzzi and Mr. Michael Hingerty, Cornell Law School Class of 1984. None of the foregoing should be held responsible for any errors or misjudgments that may remain. I also wish to thank my secretary, Anna L. Tileston, for valuable assistance in preparing the manuscript.

1 R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982).

2 Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism. A Review Essay of* Instrumentalism and American Legal Theory *by Robert S. Summers,* 69 CORNELL L. REV. 988, 999, 1011 (1984).

informative.[3] He concedes that this body of thought has "heavily influenced our contemporary legal theory."[4] But on certain points Professor Moore has not fully understood what I was trying to say. I will single out three of the most important. First, on the opening page of his critique he inaccurately formulates my central thesis. My central thesis is not that pragmatic instrumentalism forms America's only indigenous legal theory, but the nonhistorical thesis that the pragmatic and instrumentalist facets of law are a fertile subject matter for a distinctive type of legal theory on which American and other theorists did some important work, with much still remaining to be done. Second, Professor Moore mischaracterizes my overall assessment of the American contribution to this type of theory. I did not claim that American pragmatic instrumentalism was unqualifiedly a good legal theory, or the "right" legal theory.[5] Nor did I even claim that it was as good as each of the other major legal theories, present as well as past.[6] I did dwell on what I took to be its virtues,[7] but I stressed its deficiencies as well, and it can

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3 *Id.* at 1000, 1011.

4 *Id.* at 1011.

5 *Id.* at 1000. Among the other significant misunderstandings are these: (1) Professor Moore says I merely organized my book around themes that interested the American pragmatic instrumentalists. I organized the book around themes *of legal theoretic interest* that concerned these thinkers. (2) Professor Moore calls my reconstructed version of instrumentalist theory a *Weltanschauung*—a "world view." But the tenets of instrumentalist theory are not, in the usual sense of the word a *Weltanschauung.* (3) Professor Moore suggests that extreme rule-skepticism was widespread among the instrumentalists. It was not widespread among those theorists I selected for study in my book. *See generally* R. SUMMERS, *supra* note 1, at ch. 6, 161-62. (4) Professor Moore says that a theory of change in the law is the nominal topic of my chapter 3. This is not so. The nominal as well as the substantial topic of that chapter is the general theory of law making. (5) Professor Moore remarks that in my book I do not reecognize the weaknesses of the "what was done" theory of precedent. This is untrue. The reader should see my chapters 4, 5, and 6, especially pages 102-05, 112-15. (6) Professor Moore says that I omit entirely any treatment of instrumentalist writings on facts and factual analysis in the law. Parts of chapters 1, 3, and 6 are devoted to this, and I remark at pages 279-80 of my book that this is an important area of further inquiry that these thinkers opened up. (7) Professor Moore complains that I did not give enough emphasis to instrumentalist theories of interpretation. He adds, however, that these thinkers largely failed to articulate a theory of interpretation, a point I also make in my book at pages 153-54. (8) Professor Moore says I am unable to state "precisely" how values enter a theory of adjudication. On page 173, I do treat an important aspect of this, and I go into it more fully in an earlier article. *See* Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justifications,* 63 CORNELL L. REV. 707 (1978).

6 Moore, *supra* note 2, at 1011.

7 In the book I stated that:

> The virtues are impressive. Many of these theorists saw the importance of formulating a general theory of value. As instrumentalists they naturally saw how law is itself an expression of value. It might even be said that they reconceptualized law's nature. They saw it as a set of practical social tools with specific uses and identifiable effects, rather than as an authoritative and formal body of preexisting precepts. Surely these alone were gigantic steps.
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> Those who had gone before had drastically overstated the necessary limits of law's efficacy. The instrumentalists corrected this, and at the same time introduced technological rationalism and an empiricist mentality into legal

hardly be said that I accorded it an "exalted position," overall.[8] (Also, when I did compare it with other theories, I compared it mainly with theoretical work already done in other traditions before the instrumentalists came on the scene, not with the most recent work of today, as Professor Moore would have me do.) Third, and contrary to what Professor Moore says, I did set forth in my book several criteria for identifying a body of thought as a general legal theory, and I did defend my judgment that in light of these criteria, American pragmatic instrumentalism qualifies. In so doing, I did not take the position that ordinary empirical sociology of law is, as such, a branch of legal theory.

I

AMERICAN PRAGMATIC INSTRUMENTALISM

I will first summarize briefly the central tenets of American pragmatic instrumentalism as I reconstructed them in my book. This summary will not only provide important background for my own arguments in subsequent sections of this article, but should also help readers understand more fully the methodological and other issues Professor Moore raises.[9]

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thought. They brought to the fore the element of personnel in the law and provided a devastating critique of formalism, especially as it afflicted judges.

It is appropriate to say that the instrumentalists *opened up* several relatively new branches of legal theory (including some that even the percipient Bentham had missed). Among these were the nature and variety of the means at law's disposal, the law's varied and complex goals and goal structures, the element of personnel in law, and the limits of law's efficacy.

R. SUMMERS, *supra* note 1, at 279 (emphasis in original).

8 In the book I stated that:

Beginning with the vices, we can conclude that these theorists dwelled far too much, in their theorizing about values, on the merely quantitative maximizing of wants and interests (as conventionally given). They thus failed to give qualitative notions of the just, the right, and the good their due. In stressing the practical and "technological" aspects of law, they neglected its normative character. It is true that they unmasked judicial lawmaking, but they devoted too little attention to the norms that should govern it. They were also unduly change-minded and experimentalist. They did not work out a general theory of justification for common law cases or for cases involving written law. They were excessively means-minded, and failed to grasp fully how law can be understood in terms of a continuum of means and goals. They adopted restrictive models of law's goals and means—models essentially behavioral in nature. They generally misdescribed the nature of the criteria of validity at work in our system, and insisted on a misleading and, in my view, unhealthy version of the doctrine that law and morals are separate. They espoused an untenable predictivism. They failed to see major differences between legal and machine technologies. They overstated the roles of coercion and force. And they were naive about the complexities and difficulties of determining law's effects and social facts generally. These are not small failures. Yet many are failures of overemphasis or of neglect and can thus be remedied.

Id. at 278-79.

9 It is a defect of my book that it does not include a summary of the leading tenets. For a more extended summary than the one I now offer, see Summers, *Pragmatic Instrumentalism and American Legal Theory,* 13 RECHTSTHEORIE 257 (1982).

First, in this body of thought, one encounters a broadly utilitarian theory of value.[10] The law exists to serve "wants" or "interests" external to law. ("Interest" is defined as the object of any desire.) As Holmes said, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[11] Wants or interests may conflict, and the law should resolve these conflicts so as to maximize the realization of all the wants or interests involved. This overall approach to value may be characterized as pragmatic, rather than ideological.

The second fundamental element is an instrumental conception of legal rules and other forms of law.[12] The law is essentially a body of social means—instruments to serve goals derived from underlying wants and interests. The law is thus a kind of elaborate technology. This technology, in Llewellyn's words, is a "heterogeneous multitude of engines": It is vast and sophisticated and may be broken down into a variety of component parts.[13] Law's technology is a man-made set of tools that may be deployed to serve goals as needed. The officials who make and apply law are viewed as "social engineers," in whose hands the instrumentalities of the law have great potential for social improvement through "social engineering." Officials thus play a large role in instrumentalist theory and generally exercise vastly more discretion than the formalist doctrines of Langdell, Beale, and others allowed.

Third, the instrumentalists espoused a prescriptive theory of lawmaking in which judges as well as legislators participate fully. Lawmakers are to draw on social scientific knowledge extensively and to take full account of substantive, future-regarding considerations.[14] Formalistic notions, including ideas about the separation of powers, had obscured the true and proper role of judges. Judges can and should join with legislators in making the law. All lawmakers should draw heavily on the findings of the social sciences because the issues in lawmaking can ultimately be reduced to questions of fact. Lawmakers must also draw on democratic processes and on rough and ready judicial judgment, in determining actual wants and interests, and in formulating means-goal hypotheses to maximize them. Social phenomena, including legal precepts, processes, and structures are relatively plastic or malleable and can thus be readily adapted as legal means. The key ends of legal formalism—harmony, coherence and consistency with the rest of the system are relatively unimportant when making new law. In lawmaking, choices should be made in light of the probable substantive effects of

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10 R. SUMMERS, *supra* note 1, ch. 1.

11 O.W. HOLMES, THE COMMON LAW 41 (1881).

12 R. SUMMERS, *supra* note 1, ch. 2.

13 Llewellyn, *A Realistic Jurisprudence—The Next Step,* 30 COLUM. L. REV. 431, 464 (1930).

14 R. SUMMERS, *supra* note 1, ch. 3.

alternative means and the extent to which these effects fulfill wants and interests. The entire lawmaking process must be essentially scientific and, of course, consistent with the instrumentalist theory of value. Forms of law are experiments which require constant monitoring and evaluation. The general theory of lawmaking requires an empirical science of law.

The influence of legal positivism is evident in the instrumentalists' official-oriented and source-based theory of legal validity.[15] According to this fourth tenet, a putative rule qualifies as valid law only if an appropriate court or other body has acted upon it or laid it down as law. The content of a putative precept (including its reasonableness and its moral quality) is largely irrelevant to whether the precept is valid. Moreover, the "law in action" prevails over the "law in books."[16] Therefore the behavioral regularities of officials must be scientifically catalogued and described, for law is far more than mere words on paper. Lawyers, when identifying valid law, must *predict* the behavioral regularities of officials, particularly judges. Some instrumentalists also held that legal rules and other forms of law are essentially indeterminate, at least when compared to true rules.

Fifth, judges and other administrators are to follow goal-oriented methods when interpreting and applying valid law.[17] Judges should not follow literalistic "plain meaning" methods, nor should they resort to conceptualist "logic" or other essentially formalistic methods. Forms of law are to be interpreted in light of authoritative goals and other purposes attributable to the law in question. Policy considerations should inform interpretation and application. In deciding on the meaning of judicial precedents, lawyers should consider not only what judges say they are doing, but also what the judges are actually doing. Lawyers should categorize holdings narrowly in terms of patterns of fact. Otherwise, they will overgeneralize and misapply the law. Judges and other officials should not pretend that the law is always determinate. Instead, they should frankly confront the necessity of choice and come to grips with extralegal considerations in the decisional process.

A sixth tenet, also positivistic, is that law and nonlaw (particularly morals) are to be sharply separated.[18] In particular, law and morals must be sharply distinguished. Otherwise, there will be confusion and uncertainty about what the law is. Thus the validity of putative law should be determined solely by whether it was authoritatively laid down or acted upon, and not by reference to its content. If the content of law is made relevant to its validity, this would invite confusion between law

15 *Id.* ch. 4.
16 *Id.* at 112-15.
17 *Id.* ch. 6.
18 *Id.* ch. 7.

and morals and thus undermine predictability. A sharp separation of law and morals also facilitates the pointed criticism of law.

That coercion, force and direct official action are characteristic of law is another leading tenet.[19] The daily effectiveness of law ultimately derives largely from the state's monopoly on coercion, force, and direct action. As Felix Cohen said, "Whatever cannot be . . . translated [into acts of state force] is functionally meaningless."[20]

Finally, the success of uses of law is to be judged by the effects of those uses.[21] Put roughly, if the desired effects have occurred, then a use of law has been successful. Determinations of the effectiveness of uses of law are factual rather than evaluative, and thus relatively straightforward. In the face of social change, the uses of law must be constantly monitored so that appropriate reforms and adjustments can be made.

The central tenets and corollaries of American pragmatic instrumentalism call for further elaboration, and much of my book is devoted to this.[22] The foregoing is only the barest summary. The tenets are hardly above criticism, and much of my book is devoted to critical evaluation.[23]

I have chosen the name "pragmatic instrumentalism" mainly because of its descriptive accuracy—various elements of this type of theory are instrumentalist and pragmatic. The main task of legal theory is conceived to be that of providing an understanding of law that will make it more valuable as a practical tool in the hands of legal personnel. The varied instrumental facets of legal phenomena including law's goals, law's means, and their interactions are the primary focus of study. Rules of law are viewed essentially as social instruments rather than as mere authoritative norms, expressions of reason, historical data or the like.

This type of theory is also pragmatic in ways not necessarily implied in the term "instrumentalist." For example, these thinkers concentrate on the law *in use*—the "law in action" as well as the "law in books." This focus extends beyond law's external effects and includes the internal workings of its processes. Such theories are also pragmatic in their conception of the relative malleability, for human use, of social and legal phenomena, including legal processes and institutional structures. Further, the law's means and goals are held to derive significantly from functional interrelations emergent in discrete social contexts, also a pragmatic notion.

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19 *Id.* ch. 10.

20 F. Cohen, *The Problems of a Functional Jurisprudence,* 1 MOD. L. REV. 5, 8 (1937) (footnote omitted).

21 R. SUMMERS, *supra* note 1, ch. 11.

22 *Id.* at 62-66, 69-70, 74-78, 105-12, 161-74, 182-89, 193-201, 212-22, 227-35, 258-67.

23 *See, e.g., id.* at 49-59, 66-69, 70-74, 78-79, 92-99, 105-15, 121-33, 161-75, 179-89, 201-08, 215-22, 225-30, 250-52.

I concede that the name, "legal realism," is already *sometimes* used to refer to the American version of the type of theory under study. In my judgment, there are many good reasons to cease the use of "legal realism" and to adopt "pragmatic instrumentalism." The expression "legal realism," as often used, is both underinclusive and overinclusive. On the one hand, as often used, it does not include Holmes, Pound, Dewey, and Gray, but refers rather, to a group of younger thinkers writing mainly in the 1920s and 1930s such as Llewellyn, Frank, and Cook. So used, the term is underinclusive. If I am right, it is justified to group Holmes, Pound, Dewey, and Gray together with Llewellyn, Frank, Cook et al., for these thinkers were all participants in the same general directions of thought I have called pragmatic instrumentalism. Indeed, Holmes, Pound, Dewey, and Gray were not mere precursors. Their work was seminal, and highly influential on the younger thinkers who followed. (Nothing is proved by the fact that Llewellyn, Frank, and Cook seem closest to us in time. The past is not a mere backward extension of the present.[24])

On the other hand, the expression "legal realism," as often used, is overinclusive in an important way. Insofar as it is taken to refer to certain views of leading realists of the 1930s (Llewellyn, Frank, Cook, and a number of others), the expression may encompass several extreme tenets that did not, in my view, become part of our dominant instrumentalist philosophy of law, e.g., a cynical conception of the factors that influence judicial decisions (gastronomic jurisprudence), a radical moral skepticism, a notion that the reality of law resides in the behavior patterns of judges, and a view of legal theory as essentially an empirical science. Despite the stridency with which such views were expressed in the 1930s, as I read the historical record they did not become widely influential in the world of law. Yet the expression "legal realism" is frequently taken today to encompass some or all of these views, whereas "pragmatic instrumentalism" does not. Of course, one might legitimately refer to an "extreme realist wing" of pragmatic instrumentalism. But even this formulation is misleading insofar as it signifies that this wing was as influential as instrumentalist theory generally.

In addition, to some thinkers, the term "legal realism" has misleading philosophical connotations. Most instrumentalists were not realists in traditional philosophical usage. They did not share the realist doctrine that abstract words name entities that "exist" outside the mind.[25] Nor did they generally subscribe to a version of scientific realism (in which, roughly speaking, all objects of knowledge are taken to exist in-

24 *Cf.* text accompanying *infra* note 159 (on "presentism").

25 *See, e.g.*, A.G.N. FLEW, A DICTIONARY OF PHILOSOPHY 228 (1979).

dependently of the knower).[26]

"Pragmatic instrumentalism" then is a descriptively accurate name for the type of legal theory involved, whereas "legal realism" is not.[27] (Nor is "sociological jurisprudence.") "Pragmatic instrumentalism" is the name I have given not only to the American version, but also to a general type of legal theory originating in the eighteenth century. Bentham led an instrumentalist revolution in legal thought in Great Britain in the late eighteenth and early nineteenth centuries.[28] Rudolf von Ihering led an instrumentalist revolution in the second half of the nineteenth and in the early twentieth century in Germany and Austria.[29] A common name for both the general type of theory and the American version is desirable. The idiosyncratic American term, legal realism, is inadequate for this purpose.[30]

Notwithstanding the growth of instrumentalism throughout the West, the American version of this general theory was the most sustained and prominent instrumentalist movement in the history of Western legal theory. In my opinion, the substance and range of instrumentalist theory qualify it as a fourth great tradition in Western legal theory, alongside analytical positivism, natural law philosophy, and historical jurisprudence.[31]

II

CRITERIA FOR IDENTIFYING A GENERAL LEGAL THEORY

In this section I will undertake three tasks. I will first set forth my own criteria for identifying a body of thought as a general legal theory and, in light of those criteria, argue that American pragmatic instrumentalist thought qualifies as general theory. Thereafter, I will summarize Professor Moore's criteria for identifying a body of thought as a general legal theory and will argue that these criteria, as he formulates them, are inappropriate. Finally, I will try to show that even if Professor Moore's criteria are appropriate, American pragmatic instrumentalism goes rather farther than he acknowledges to satisfy those criteria.

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26 *See generally* Boyd, *On the Current Status of the Issue of Scientific Realism,* 19 ERKENNTNIS 45 (1983).

27 The so-called legal realists might be called "realists" in literary parlance, for they were concerned with fidelity to real life and with the accurate representation of life.

28 *See generally* J. BENTHAM, THE WORKS OF JEREMY BENTHAM (J. Bowring ed. 1843).

29 *See generally* R. IHERING, LAW AS A MEANS TO AN END (I. Husik trans. 1913). On Bentham's possible infiuence on Ihering, see Coing, *Bentham's Bedeutung für die Entwicklung der Interessenjurisprudenz und der allgemeinen Rechtslehre,* 54 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOHIE 69 (1968).

30 There was also a rather different movement in Scandinavia called "legal realism." *See* Hart, *Scandinavian Realism,* 17 CAMBRIDGE L.J. 233 (1959).

31 Professor Moore writes as if I referred only to the American theorists when I made this claim. The European instrumentalists also qualify as part of this tradition.

A. When Evaluated by Appropriate Criteria, Instrumentalism Qualifies as a General Legal Theory

I set forth several criteria in my book for identifying a body of thought as a general legal theory. One of those is largely historical, namely: What is the traditional subject matter of legal theory?—a criterion Professor Moore himself at times accepts.[32] The family of traditional topics includes: the nature of law and legal systems, values and the law, the theory of lawmaking, criteria for determining valid law, the character of basic legal processes such as adjudication and legislation, general issues of legal method (including the theory of interpretation), and the separation of law and morals. By this historical criterion, American pragmatic instrumentalism qualifies as a general legal theory, for most of the questions that occupied these thinkers fall within, overlap substantially with, or can be readily related to these traditional topics of legal theory. Indeed, at one point Professor Moore goes rather far to concede precisely this.[33]

In my book, I also pointed out that instrumentalist theory focused on facets of law of broad theoretical interest, thus satisfying another basic criterion. I characterized these as "instrumentalist and pragmatic" facets of law, and I summarized most of the key theoretical questions addressed to these facets: To what extent, and in what ways is law instrumental to social goals? What are the varieties and complexities of the goals law may serve? What are the basic techniques and modes of operation of law? How may uses of law be justified in terms of their effects? What tasks must be performed to create law and translate it into effective use? What counts as valid law when the law that has been laid down—"the law in books," differs from the "law in action"? How should the success of uses of law be judged? What of theoretical interest can be said about the effectiveness of law in human affairs?

Another criterion I articulated in my book is that a significant proportion of the tenets of the body of thought in question must be sufficiently developed for it to qualify as a legal theory.[34] This criterion is difficult to apply. What constitutes a "significant proportion"? When is a tenet "sufficiently developed"? There can be no formulae for resolving such questions. Although I acknowledged in my book that American instrumentalist theory was seriously underdeveloped,[35] I continue to believe that it nonetheless qualifies as a general legal theory. Instrumentalist thinkers, together and in many cases individually, sufficiently

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32 Moore, *supra* note 2, at 993.

33 *Id.* at 988-89.

34 R. SUMMERS, *supra* note 1, at 273, 279-80.

35 *Id.* at 38 ("Sometimes the American theorists carried the analysis rather far. More often, they merely gestured suggestively (yet unmistakably) in certain directions."). *See id.* at 279-80.

developed a significant proportion of tenets. This position could be defended at length along the following lines. Instrumentalism was sufficiently developed to be a source of considerable influence on subsequent thought, a fact Professor Moore concedes.[36] It was sufficiently developed to be a meaningful object of extensive criticism at the hands of sophisticated critics including H.L.A. Hart, Hans Kelsen, Morris Cohen, John Dickinson, and Lon L. Fuller.[37] And if I am right, it was sufficiently developed to enable me to elaborate several of its tenets in my book in ways that can be readily seen to be consistent with their evident purport.[38]

To qualify as a legal theory, a body of thought must also be unified or integrated, or at least subject to reconstruction in ways that sufficiently display this feature.[39] I identified several general integrating ideas in instrumentalist thought, including the instrumentalist concept of law, the notion of legal tasks and personnel, and the ideas of law as something for use, and in use, in daily life.[40] I now think that the concept of law as a social instrument is a more powerful integrating conception than I had earlier assumed. This conception alone may even integrate the various aspects of instrumentalist theory more fully than any single integrating notion within any other general legal theory.[41] It immediately invites analysis of the general nature and variety of legal means, and of legal goals and goal structures. It is but a short way from these related ideas to the notion of forms of law as means-goal hypotheses that are not self-justifying but which must be justified in light of independent values, particularly values reflected in projected effects of the law involved. The relevance of and necessity for a general theory of value thus becomes immediately apparent. So, too, do general issues about how law is to be created and used, issues that call forth theories of lawmaking, of implementive legal tasks, and of legal method. The instrumentalist conception of law therefore naturally suggests a general concern with the place of official personnel, and with the general division of legal labor in the creation and use of law. Finally, methods of judging the effectiveness of law become a natural concern of a theory that conceives of law as an instrument for social improvement. In my book I devoted a chapter to each of the foregoing topics.

Another important criterion for judging whether a body of thought can qualify as a legal theory at all is whether the theory incorporates concepts and terminology adequate to the faithful representation of the

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36 Moore, *supra* note 2, at 1011.

37 *See, e.g.,* works cited in R. SUMMERS, *supra* note 1, at 288-90.

38 *See supra* note 22.

39 R. SUMMERS, *supra* note 1, at 22-26, 269-70.

40 *Id.* at 269-70.

41 In fact, I know of no single notion in any other theory with similarly wide-ranging integrating properties. Some such properties are logical, some functional, and some otherwise.

phenomena of law.[42] The instrumentalists adopted such concepts as instrument, means, goals (or purposes), wants and interests, scientific lawmaking, social engineering, judicial legislation, prediction, the law-in-action, efficacy, and scientific fact finding. This conceptual equipment, with its accompanying terminology, was not in all respects felicitous. For example, I do not believe that the concept of prediction[43] or of law-in-action[44] can be used, without distortion, in the ways most instrumentalists used them. But neither can it be said that all the concepts of Hartian or Kelsenian theory are felicitous. To disqualify American instrumentalist theory here, it would be necessary to show that an undue proportion of its key notions are conceptually inadequate. In my view, this simply cannot be done.

I do not here propose to treat all plausible criteria for characterizing a body of thought as a general legal theory. I will comment only on one further criterion: Did instrumentalist theory fulfill the kinds of functions or purposes characteristically associated with general legal theories? Two widely acknowledged general functions or purposes of legal theory are these: to contribute to the better use of law within particular societies, and to advance our general understanding of the nature of law and its use. Instrumentalist theory has contributed to the *better use of law* in the United States. Among other things, instrumentalist thinkers overthrew formalism,[45] introduced empiricism and technological rationalism into the law,[46] and focused attention on the need to justify uses of law partly in light of their effects.[47]

The instrumentalist revolution in American legal theory also advanced our *general understanding of the nature of law and its use* in a number of important ways. For example, rules and other forms of law are much more than formal, authoritative norms to be obeyed or carried out—they are also instruments which incorporate specific adjustments of means and goals.[48] And the "law-in-action" is often a distinctive admixture of official action and antecedent norms.[49] Further, most forms of law are inevitably dependent to some extent for their content and justification on social facts and values external to law.[50] Also the law must be applied to changing social circumstances and thus is constantly in need

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42 I did not discuss this criterion in my book. *See generally* Nowell-Smith, *Philosophical Theories,* 48 ARISTOT. SOC. PROC. 165 (1948); Summers, *Notes on Criticism in Legal Philosophy,* in MORE ESSAYS IN LEGAL PHILOSOPHY 9-10 (R. Summers ed. 1971).

43 R. SUMMERS, *supra* note 1, at ch. 5.

44 *Id.* at 112-15.

45 *Id.* ch. 6.

46 *Id.* chs. 3, 8, 9, 11.

47 *Id.* chs. 11, 12.

48 *Id.* chs. 1, 2.

49 *Id.* at 143-44.

50 *Id.* ch. 1.

of some modification or readjustment.[51] The legal system as a whole is a complex form of social organization with many interacting elements, elements that must themselves be studied as general social facts rather than as "timeless givens."[52] That such truths as these are now widely understood in the American system is a tribute to the instrumentalists. One can today point to whole societies in which such truths are not widely understood.

I have little to add beyond what I said in my book about whether pragmatic instrumentalism qualifies not only as a general theory, but also as a distinct *type* of general legal theory.[53] I continue to believe that its questions, its focus, its scope, and its frequent resort to general social facts do mark it off as a distinct type of legal theory.

B. The Inappropriateness of Professor Moore's Criteria

As I understand Professor Moore, a body of thought about law can qualify as a general legal theory only if addressed (at least after any necessary reconstruction) to roughly the same set of questions as other established general types of legal theory.[54] Moore seems to assume that the other established traditions in legal theory—analytical positivism, natural law thought, and historical jurisprudence—are all addressed to "the same thing,"[55] and he claims that this enables us to see these theories as "genuine competitor[s]" of each other.[56] In light of this criterion, Moore registers serious doubt that instrumentalist theory can qualify as a general legal theory, because it does not address enough questions in common with the other traditions.[57]

In my view, Professor Moore misconceives the nature of much that falls within the established traditions. The various established traditions in legal theory differ significantly from each other in orientation, method, and scope.[58] Moore's "common focus" criterion is therefore too stringent. It forces us to question whether any traditional legal theory really qualifies. In broad terms, analytical positivism addresses the nature of law, the varieties of legal norms, their status as law, their hierarchical ordering, the analytic relations within and between them and other fundamental legal notions, and certain relations between law and

51 *Id.* ch. 3.

52 *Id.* chs. 2, 3, 8, 9, 10, 11, 12.

53 *Id.* at 272.

54 The question of what properly qualifies as a general legal theory merits more extensive treatment than either Professor Moore or I have been able to give it here. The question is exceedingly complex and requires a book of its own.

55 Moore, *supra* note 2, at 1013.

56 *Id.* at 1012.

57 *Id.* at 1013.

58 I am indebted to my colleague Professor David Lyons for discussion of this point.

morals and law and coercion;[59] most traditional natural law theory focuses on the implications for legal ordering of the nature of human beings and the human condition, on the appropriate content of law and on standards for criticizing that content, on the role of reason in law, and on the limits of the duty to obey law;[60] historical jurisprudence is mainly concerned with law as a historical phenomenon, including its organic, evolutionary, and customary elements, and with the general modes, forms, and sources of legal change over time and in different places.[61]

If my characterizations are even roughly accurate, there is much less common focus in the history of legal theory than Moore's criterion can tolerate. Yet presumably he does not want to deny that the other established traditions qualify as general types of theory on the ground that they cannot be construed to compete with each other "about the same thing."[62] If so, he must then concede that commonality of focus cannot be one of the essential requirements of legal theories. It follows also that some tenets of traditional theories can be true or sound in important respects without casting the slightest doubt on certain tenets of other legal theories.

According to Professor Moore, not just any focus on *any* common set of general questions will qualify a body of thought as a legal theory. He also requires that the theory have a certain core of content:

> The core issues of legal theory concern theories of adjudication, legislation, and citizenship. These theories are both descriptive and normative, telling us how judges, legislators, and citizens do and should perform their roles. Whether describing or prescribing, such theories focus on the legitimacy of the conduct and decisions of occupants of legal roles. For example, a legal theorist focusing on the legislative role either may prescribe the correct limits to which a legislator should seek to legislate conventional morals or may describe the limits thought by legislators in certain systems to be legitimate.[63]

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59 *See, e.g.,* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); H.L.A. HART, THE CONCEPT OF LAW (1961); H. KELSEN, GENERAL THEORY OF LAW AND STATE (1945).

60 *See, e.g.,* T. AQUINAS, *Summa Theologica,* in SELECTED POLITICAL WRITINGS 52 (A.P. d'Entreves ed. 1959); 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (W.C. Jones ed. 1976); H. GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE (F. Kelsey tr. 1957); S. PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (H. Milford ed. 1934); Locke, *An Essay Concerning the True Original, Extent and End of Civil Government,* in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 403, 503 (E. Burtt ed. 1939).

61 *See, e.g.,* J.C. CARTER, LAW, ITS ORIGIN, GROWTH AND FUNCTION (1907); H. MAINE, ANCIENT LAW (F. Pollock ed. 1906); F. VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE ch. 2 (A. Hayward ed. 1975).

62 Moore, *supra* note 2, at 1011.

63 *Id.* at 993. It is not difficult to trace the origins of Moore's conception. Professor Ronald M. Dworkin has written that a general theory of law, in its normative part, "must have a theory of legislation, of adjudication, and of compliance." R. DWORKIN, TAKING

Professor Moore's "content" criterion goes far to disqualify some major traditions of legal theory he wishes to acknowledge as established. Traditional *analytical* positivism does not reveal much concern for the normative issues of legitimacy that Moore says must be the focus. Analytical positivists such as Austin[64] and Kelsen[65] rarely addressed such matters, and one finds relatively little about legitimacy in the work of H.L.A. Hart,[66] the leading contemporary analytical postivist. With respect to the historical jurists the story is much the same.[67] Yet Professor Moore says legitimacy as such must be the focus, and he seems to equate this conception of required content with what has traditionally been characterized as legal theory.

Professor Moore goes on to suggest that if a purported general legal theory incorporates an adequate theory of adjudication, then this alone goes far to qualify it as a general legal theory, even though it remains silent or says little about legislation and citizenship. In his view, "the theory of adjudication (of any type) is a large part of any general legal theory . . . ."[68] He also claims that it is a test case of a legal theory.[69] Indeed, according to Moore, the theory of adjudication just is "jurisprudence."[70] Moore's criteria lead him to conclude that both natural law theory and analytical positivism qualify as "major types of legal theory."[71] To understand Moore's conception of adjudicative theory as a kind of "test" for identifying a body of thought as a legal theory, one must explore his notion of what the right questions are in a "theory of adjudication":

> A theory of adjudication . . . should contain a number of subtheories within it: (1) a theory of law proper that tells judges what standards their office obligates them to consider when they decide cases; (2) a theory about facts and about descriptions of facts that legitimates the use of some descriptions, but not others, of "what happened" within the legal decisional process; (3) a theory of interpretation legitimating only some interpretive premises in a judge's attempt to apply the law to the facts; and (4) a theory about logic and the place of logic in legal reasoning.
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> A theory of adjudicaton should contain each of these subtheories, at a minimum, because every judicial decision necessarily requires a judge to ascertain the relevant law, to find the facts of the case, to

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RIGHTS SERIOUSLY vii (1978). Professor Dworkin goes on, however, to indicate that a general theory of law may also treat many other matters.

64 *See, e.g.*, J. AUSTIN, *supra* note 59.

65 *See, e.g.*, H. KELSEN *supra* note 59.

66 *See* H.L.A. HART, *supra* note 59.

67 See works cited *supra* note 61.

68 Moore, *supra* note 2, at 1013.

69 *Id.* at 1002-10.

70 *Id.* at 1010.

71 *Id.* at 1013.

> connect the law to the facts via the meanings of the terms employed in the law, and to use logic to justify deductively the result reached.[72]

Later, Moore adds a fifth subtheory: a "theory of value."[73] In sum, if I interpret him correctly, a body of thought goes far to qualify in his world *as a general legal theory* if it *merely* consists of no more than a theory of adjudication that is addressed to the ("right") questions, is sufficiently detailed, developed, or complete, and is philosophically sophisticated. Indeed, Moore may hold that such a theory of adjudication alone qualifies as a general legal theory.

Contrary to what Professor Moore seems to assume, the other traditions in legal theory go far here to flunk any such adjudicational test for determining whether a body of thought qualifies as a legal theory. With rare exceptions, the major analytical positivists of the past set forth no theories of value (or only highly anemic ones) and little or no theory about facts or descriptions of facts.[74] A few analytical positivists did address "the nature of logic and its place in legal reasoning,"[75] but natural law theorists rarely treated the topic. Natural law theorists addressed matters of value, but none had what Moore would call a detailed or complete theory of value.[76] Moreover, neither the major analytical positivists nor the leading natural law theorists of the past worked out a full-fledged theory of interpretation of the kind Moore requires. And the historical jurists did not set forth theories of adjudication of the kind he requires.

Professor Moore seems to hold that whatever else a general legal theory addresses, it *must* address the sorts of issues he treats in the form of a theory of adjudication.[77] This is a dubious position. If we return to the list of questions I posed earlier[78] as inquiries addressed to basic instrumental and pragmatic facets of law, we can well imagine a theory robustly treating most of those questions and at least certain aspects of others without developing *a theory of adjudication.* Yet it would not follow that the resulting body of thought would necessarily lack sufficient substance and range to qualify as a general legal theory, devoid though it be of a Moorean theory of adjudication. Natural law theory and analytical positivist theory do not address all fundamental facets of law. Historical jurisprudence neglects important issues treated by analytical

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72 *Id.* at 1003.

73 *Id.* at 1008.

74 An important exception is Jeremy Bentham. For his views on value, see J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Burns & Hart eds. 1970). For his general views on adjudication and fact finding, see Postema, *The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication,* 11 GA. L. REV. 1393 (1977).

75 Kelsen may be something of an exception. *See* R. MOORE, LEGAL NORMS AND LEGAL SCIENCE ch. 4 (1978).

76 *See generally* A.P. D'ENTREVES, NATURAL LAW (2d ed. 1979).

77 Moore, *supra* note 2, at 1010.

78 *See supra* p. 1022.

positivists and natural law theorists. By our traditional standards, a body of theory need not be comprehensive to qualify as a general legal theory.

Moore's concentration on adjudication as the core of legal theory is somewhat curious. If any single general topic has been most central in the long history of *Western* legal theory, it is not the theory of adjudication, but the general theory of the nature of law and of legal systems.[79] Indeed, this latter topic has been the dominant preoccupation of one entire tradition—analytical positivism. Leading analytical positivists such as Kelsen and Hart actually wrote relatively little about adjudication. The same is true of most continental natural law theorists. At the least, Moore should defend his assumption that adjudication should be more central than the general nature of law and legal systems.

In my view, the omission of a systematic theory of adjudication would not necessarily be fatal to a general legal theory; this kind of theory can encompass much besides a theory of adjudication. One way to see this is by noting the nonadjudicative significance of Moore's "subtheories of adjudication." A good case can be made that theories of legal validity, interpretation, and value, have most significance *outside* adjudication. Theories of value inform legislation and administrative rulemaking in our age of statutes and regulations. And theories of legal validity and interpretation are relevant far more often out of court when lay people and their lawyers identify, interpret, and apply law than in court during the workings of adjudicative processes.

C. Assuming the Appropriateness of Professor Moore's Criteria, Instrumentalism Goes Far to Satisfy Them

The instrumentalists had as much of a theory of adjudication, even in Professor Moore's terms, as did most analytical positivists or natural law theorists. Moore fails to acknowledge that the instrumentalists had more of a theory of value than many participants in other traditions.[80] The instrumentalists did not have a full-fledged theory of statutory interpretation, but what they did propound was generally purposive in orientation and at least the equivalent of that of most major figures in the other traditions.[81] They did little with the affirmative place of logic, but that too is true of other major thinkers except for a few analytical positivists.[82] The instrumentalists had a general source-based theory of legal validity that purports to tell "judges what standards their office

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79 *See, e.g.,* works cited *supra* notes 59-60.

80 R. SUMMERS, *surpa* note 1, ch. 1.

81 Compare, for example, Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383 (1908) with H. KELSEN, PURE THEORY OF LAW 348-56 (1967).

82 *See supra* note 75.

obligates them to consider when they decide cases."[83] That theory requires judges to treat as law whatever has been laid down or acted upon as law by authorized officials.[84] As I stressed in my book, the instrumentalists were ambivalent here, and they did not develop their own source-based theory as elaborately as Kelsen[85] and Hart[86] tried to do. Moore concedes that the instrumentalists "asked exactly the questions [about a theory of facts] that needed to be asked."[87]

We need not accept Professor Moore's particular adjudicative model as a test for qualifying a body of thought as a general legal theory. I know of no one else who has set forth just such a model of a genuine theory of adjudication. It is therefore not surprising that theories do not conform to it. Moreover, the model is not uncontroversial. For example, some theorists would reject the proposition that a judicial decision must be "deductively" justified.[88] Also, Moore makes no specific place in his model for the play of substantive reasons, including institutional reasons dealing with the appropriate court-legislature relationship—a facet of adjudication frontally concerned with issues of legitimacy.[89] Any minimally adequate general theory of adjudication should address these matters.

Moore says that his test case of adjudication is a fair one because:

> these issues in adjudication greatly concern both Summers and the instrumentalists; if the instrumentalists failed to propound much of a theory here, they have failed where Summers must claim they have succeeded if he is to support his thesis that pragmatic instrumentalism represents a major type of legal theory worthy of our respect.[90]

But the instrumentalists had at least as much of an affirmative theory of adjudication as the other traditions. Even if they did not, Moore neglects their most important critical contribution, which was to demolish the formalistic theory of adjudication that had been so influential in the United States.[91] A virtue of the instrumentalist contribution was that it drew so much attention to adjudication. One is prompted to wonder whether Professor Moore, and others today would accord so much significance to adjudication if there had been no instrumentalist revolution in American legal thought. The instrumentalists also made many spe-

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83 Moore, *supra* note 2, at 1003.

84 R. SUMMERS, *supra* note 1, ch. 4.

85 H. KELSEN, *supra* note 59, chs. X, XI.

86 H.L.A. HART, *supra* note 59, chs. V, VI (1961).

87 Moore, *supra* note 2, at 1005. *See also* R. SUMMERS, *supra* note 1, at 54-56, 87-89, 146-47.

88 R. SUMMERS, *supra* note 1, at 154-57; *see also* D. LYONS, ETHICS AND THE RULE OF LAW 92-95 (1984); Wilson, *The Nature of Legal Reasoning: A Commentary with Special Reference to Professor MacCormick's Theory,* 2 LEGAL STUD. 269 (1982).

89 *See* Summers, *supra* note 5.

90 Moore, *supra* note 2, at 1010.

91 R. SUMMERS, *supra* note 1, chs. 3, 6, 11.

cific contributions to legal method (including adjudicative method), which I summarized in chapter 6 of my book. Most of these have commanded widespread respect.

Professor Moore sees little of value in the legal theory of the instrumentalists mainly because of deficiencies he sees in their positive theory of adjudication.[92] He is, however, decidely ungenerous in his own reconstruction of that theory. I will cite only three examples. First, Moore says any theory of adjudication must include a theory "that tells judges what standards their office obligates them to consider when they decide cases."[93] Thus, the theory must include a subtheory about criteria of valid law which judges are to apply. Moore considers here only the instrumentalists' famous predictivist theory that valid law is whatever we may predict the courts will do. He rightly condemns this as an inadequate theory of validity (as did I) and he says instrumentalists were "wrong because they never even saw the right question to ask."[94] Moore could have more charitably attributed a different theory of validity to the instrumentalists, namely, their source-based theory which posits that valid law is whatever has been laid down or acted upon by an authorized official. In failing to do this, Moore neglects the whole fourth chapter of my book which is devoted to this instrumentalist tenet. Of course, Moore could criticize this theory too, for it is subject to certain well known objections. Still, it remains a far more respectable theory of legal validity than predictivism (which cannot, logically, serve as such a theory at all). Indeed, one of Moore's paradigm legal theorists, H.L.A. Hart, seems to have subscribed in large measure to a version of this source-based theory.[95]

Second, Moore attributes to the instrumentalists a theory of precedent that only very few held, namely that "a deciding judge should attach precedential significance to what the preceding court *did* on the facts before it, and *no* significance to what it *said*."[96] This theory *is* subject to powerful objections. But not even Oliphant, whom Moore cites, held this theory. Nor did Holmes, Pound, Dewey, Gray, Llewellyn, or Cohen, to name the leading theorists of American instrumentalism. In three different places in my book, I discuss the views they did hold.[97] Those views are more respectable than any view that ignores all of the language in a judicial opinion.

Moore also finds instrumentalist interpretational theory highly deficient. He suggests that the instrumentalists were rule-skeptics and

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92 Moore, *supra* note 2, at 1002-13.

93 *Id.* at 1003.

94 *Id.* at 1004.

95 H.L.A. HART, *supra* note 59, chs. V, VI.

96 Moore, *supra* note 2, at 1005 (footnote omitted).

97 R. SUMMERS, *supra* note 1, at 57, 112-15, 148-50.

functionalists, and thus could not devise an adequate theory for giving content to written language in which law is authoritatively expressed.[98] Most of these theorists, including such leading progenitors as Holmes, Pound, and Dewey were not rule-skeptics. Although a number of them seem to have adopted what might be called a functionalist theory of meaning, this did not, as Moore claims, translate into the idea that judges may ignore "*any* pre-existing meaning (ordinary or otherwise) of legal standards."[99] If it is wrong to attribute to instrumentalism any such view of the meaning of language in which precedents are expressed, it is bizarre to do the same with respect to statutory language.

Again, Moore neglects my claim that one of the greatest contributions of the instrumentalists was their demolition of various facets of the formalist theory of adjudication. This was a considerable achievement. The instrumentalists' antiformalist strictures are forever relevant, because the very nature of law itself, and especially the complex technical law of modern industrial societies, is inherently subject to formalistic tendencies.

III
LEGAL THEORY AND SOCIOLOGY OF LAW

One reason American pragmatic instrumentalism is sometimes not recognized as a general theory about the nature of law and its use is that people mistake it for sociology of law. Various theorists of instrumentalism have themselves been partly to blame for this confusion. Pound often used terminology suggesting that in legal theorizing he might be concerned with sociology of law as such.[100] Some of Llewellyn's early theoretical writing was similar in this respect.[101]

Professor Moore has been led to think that instrumentalist theory was to a large extent mere sociology, and he suggests that such work does not qualify as legal theory.[102] He also says that to conjoin legal theory and legal sociology in the fashion of the instrumentalists is to produce something "rather lumpy." And he complains that there is "no common question to which the legal theory and the legal sociology provide the links of a unified answer."[103] What is at stake here? Moore correctly suggests that one thing at stake is having the right people do the right jobs: legal theory is for the theorists, but sociology is for social scientists.[104] I believe, however, that truth and soundness in legal theory

98 Moore, *supra* note 2, at 1006-07.

99 *Id.* at 1007.

100 *See, e.g.,* Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1911), 25 HARV. L. REV. 489 (1912).

101 *See, e.g.,* Llewellyn, *supra* note 13, at 431.

102 Moore, *supra* note 2, at 993.

103 *Id.* at 1011.

104 *Id.* at 993-96.

are ultimately at stake. If theorists were to act on the spirit of Moore's criticism, they would impoverish legal theory.

Moore does not stop to sort out the different uses of "sociological." At least four uses must be differentiated: (1) empirical field research on particular social facts, or gathering of particular social facts from existing published sources, (2) the devising of conceptual frameworks in the preliminary stages of projects of empirical research on particular social facts, (3) the assembling of reminders of general social facts and/or the description of general social facts, based on a variety of sources, and (4) the analysis of concepts and terminology we use to represent general social facts, including concepts that figure in legal or sociological theories about the nature of general social facts or about causal and other relationships between social events and states of affairs.

A close reading of Professor Moore's critique reveals that when he uses the word "sociological" to characterize what he objects to as merely sociological in American instrumentalist legal theory, he frequently seems to intend one or both of the *first two senses* of "sociological" differentiated above. Thus he seems to claim that the instrumentalists treated empirical research on particular social facts as legal theory. Many instrumentalists did advocate more research on particular social facts, and some of these thinkers in fact did empirical research on particular social facts.[105] But very few of them seriously viewed this work as "legal theory," or "jurisprudence," or "legal philosophy," as such. Nor did I, in my book, use these words to refer to empirical research on particular social facts. Rather, insofar as they (or I) used "legal theory" (or its equivalent) to desiguate anything characterizable as sociological, they (and I) usually had in mind the third and fourth senses of "sociological," above.[106] These theorists (and I) were interested in general social facts of and about law, and in the concepts adequate to understanding and representing them. Indeed these theorists had far more interest in these matters than was usual for legal theorists, a respect in which their tradition is distinctive. In the "mix" of the conceptual and the sociological, in the third and fourth senses of sociological, that one inevitably finds in a general legal theory, the instrumentalists did stress the sociological far more than other theorists. But it is highly misleading for Professor Moore to characterize chapters 2, 8, 9, 10, 11, and 12 of my book dealing with American instrumentalist themes as if these chapters were sociological in *senses one and two.* They are not. With one exception, they are sociological in *senses three and four.*

Professor Moore apparently does not perceive the relevance of the distinction between senses one and two of "sociological" on the one

105 *See, e.g.,* Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts,* 40 YALE L.J. 381 (1931).

106 *See, e.g.,* Pound, *supra* note 100.

hand and senses three and four on the other. Yet even participants in other established traditions of legal theory have recognized the legitimacy of a "sociological" focus, in senses three and four, for *legal theory.* Professor H.L.A. Hart, whom Moore regards as a model legal theorist, considers much of his own work in legal theory to be "descriptive sociology."[107] One could demonstrate in detail that most (if not all) of Hart's descriptive sociology is "sociological" only in senses three and four above. Instrumentalist legal theory is criticizable by Moore as "merely sociological" if, but only if, Hart's work is too.

Hart,[108] Peter Hacker,[109] and other leading philosophers have suggested that legal theory necessarily includes a distinctively large sociological element in senses three and four above. After all, a legal system is a complex, multifaceted, and interrelated set of *social phenomena.* An important job for legal theorists is to develop adequate accounts of certain general social facts of and about law, not just as a preliminary to doing legal theory, but also *as* legal theory itself. Such facts must figure *directly* in descriptive accounts of various general facets of law. In addition, we could not do a lot of the normative and conceptual work in legal theory that we now do without such facts (or such facts fairly assumed). Because Professor Moore is not alone in appearing to fail to appreciate these points fully, it is especially important to cite a range of examples of legal theorizing in which the theorist appeals directly to general social facts in criticizing or constructing (or both) some element of a general theory. I will draw my examples solely from the work of a theorist whom Moore would immediately concede to be a true legal theorist, H.L.A. Hart:

> (1) In response to a criticism that citizens generally do not know enough about the workings of a legal system—a general social fact—to justify attributing to them a conscious awareness and acceptance of the various standards for the identification of valid law in their system, Hart revised his theory to require only that the *officials* of the system have this conscious awareness and acceptance, or "internal point of view."[110]
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> (2) Hart criticized Kelsen for holding that rules of law are addressed to officials in the first instance, and that these rules specify the conditions under which officials may impose sanctions. This view, according to Hart, obscures the "characteristic way law functions in the first instance," namely through private self-application—another general social fact.[111]

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107 *See* H.L.A. HART, *supra* note 59, at vii.

108 *Id.*

109 Hacker, *Hart's Philosophy of Law,* in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 1, 8 (P. Hacker & J. Raz eds. 1977).

110 H.L.A. HART, *supra* note 59, eh. IV.

111 *Id.* at 35-38.

(3) In developing a taxonomy of the important varieties of legal rules found in modern systems of law—general social facts—Hart went beyond Austin's focus on duty-imposing rules backed by sanctions. Hart identified another major category, those rules which confer power to make contracts and wills, and to exercise official jurisdiction. Noncompliance with such rules results in nullity, instead of the imposition of a sanction.[112]

(4) Contrary to much positivistic legal theory holding that the validity of putative law is to be determined by discovering whether officials in power have duly laid it down, Hart recognized that customary law arising from the interaction of private parties does not satisfy this criterion.[113] Yet many forms of customary law are widely recognized in modern systems—a general social fact.

(5) Kelsen and others had held that the law of a legal system is a formal receptical which can have any substantive content and still be a legal system. Hart constructed an elaborate opposing argument that a legal system must have a certain minimum substantive content in the form of rules against the free use of violence and simple forms of theft, given the nature of humans and the human condition—further general social facts.[114]

The foregoing are but a selection from many possible instances in which Hart appeals to general social facts in his general theory of law. It is not surprising that he characterized this work as "descriptive sociology." I do not claim, incidentally, that the facts to which Hart appeals are of one single variety. Some are intimately legal (3), some psychological (1), some biological (5), some behavioral (4), and so on. But in all instances, Hart can hardly be said to be appealing to the particular findings of empirical sociological research projects (senses one and two above). Instead his theorizing, insofar as it is sociological, involves appeals to widely recognized general social facts (senses three and four).

Modern legal theorists regularly presuppose, draw on, or address general social facts of and about the phenomena of law, in the fashion of Hart. We have had vast experience with law and thus *already* have an accumulated stock of general social facts dealing with law as we think we know it. Professor Moore takes much of this for granted, and emphasizes the conceptual and the normative at the expense of the sociological (senses three and four). Perhaps I may suggest the following scenario. Let us imagine that Ms. Theorist is assigned the task of developing a general theory about the nature and use of law in Society A, a relatively new society. She knows nothing at all about Society A, except that it is said to be very different from our own, and that it has a system of law. How would Ms. Theorist begin? Would she simply sit down

112 *Id.* at 27-33.
113 *Id.* at 43-48.
114 *Id.* at 189-95.

and start theorizing? Or would she first try to find out some general social facts about law and its use in this society? Surely the latter. Of course, I do not deny that Ms. Theorist would bring her own general working conceptions of law to bear in deciding *what* general social facts to look for. In a legal theory, such notions and the general social facts must "inform" each other in complex ways that I cannot go into here.[115] In some fields, for example set theory, the conceptual element overwhelmingly dominates any factual element. Legal theory, however, is not one of these fields. And for theorists in the instrumentalist tradition the factual element was especially large.

It is possible that the legal theorists in a given society might, *over time,* fail to take sufficient account of general social facts (senses three and four), so that such facts about the nature and use of law in that society do not appropriately inform legal theory. This was true during the formalist era at the turn of the century when the American instrumentalists came on the scene. It is, therefore, not surprising that a significant part of their contribution should take the form of calling attention to general social facts—sociological work in senses three and four. (I do not claim that they finished all that they addressed, or that they always got the general social facts right.)

There is another method by which skeptics might be brought to see these matters more clearly. Some theorists downplay sociology, in senses three and four, and tend to subscribe to what might be called the "timeless concept of law." According to these theorists, once this concept is worked out, we need no more knowledge of general social facts (if we ever did), for we have put matters straight, once and for all.[116] At one point Moore himself writes of basic ideas of and about law in the sense of "timeless propositions."[117]

One presupposition of the "timeless concept" approach is that no changes in the general social facts of law and its use in a society could possibly alter an initially correct analysis of the nature and use of law. This is an objectionable form of apriorism. Consider this example. One important facet of law is what I have called its "technique element." By what basic techniques does law operate in a society?[118] Hart,[119] Raz,[120] and other paradigm legal theorists have acknowledged this as an important problem of legal theory. If Bentham and Austin (also paradigm legal theorists) had this matter straight in 1800, would it stand up for all time at least for Great Britain? Or would changing social facts about

115 This complex cluster of problems requires a separate essay.

116 *See generally* Hexner, *The Timeless Concept of Law,* 52 J. POLITICS 48 (1943).

117 Moore, *supra* note 2, at 998.

118 *See generally* Summers, *The Technique Element in Law,* 59 CALIF. L. REV. 733 (1971).

119 Hart has stated this in conversation on several occasions.

120 Raz, *On the Functions of Law,* in OXFORD ESSAYS IN JURISPRUDENCE 278 (A. Simpson ed. 1973).

law and its use make a difference to latter theorists? I submit they could make a major difference. In 1980, a Bentham or an Austin would have to say that at least two relatively new basic techniques of law had come into use, the regulatory and the distributive, so that a prior account in 1800 of only three techniques (the penal, the grievance remedial, and the private-arranging) would have to be supplemented.[121] There is no timeless concept of law immune in all basic respects to future changes in general social facts about the nature and use of law. To be an adequate general theory about law and its use, many of the concepts in the theory must be subject to revision as needed to take account of new manifestations of the social reality of law.[122]

In this section, I have stressed the roles of general social facts (the sociological, in senses three and four) when constructing and evaluating legal theories. In so doing I have concentrated mainly on the truth that, among other things, general social facts inform the *conceptual* components of legal theories. I have neglected the ways in which general social facts also bear upon the *normative* components of legal theories. Yet such facts must inform normative legal theory too, a matter I cannot go into here.

If Hart, Hacker, and others (including myself) are correct about the large element of descriptive sociology in legal theory, then Moore and others of like mind may wish to reconsider their overall position. Moore's examples of illegitimate "sociological" elements in instrumentalist legal theory include: the instrumentalist conception of law as essentially a means to some social goals, my own effort to map some of the means-goal structures in our legal system, structural questions about the legal means available to implement goals, the nature of legal personnel involved in the implementation of goals, theories about why people obey the law when they do, and what it means to judge the efficacy of forms of law and how one goes about measuring this.[123] Yet if I am right, in all of these examples, with perhaps one exception, the theorist *must* appeal to general social facts much in the same way that Hart did in the various examples I cited earlier.[124] If Hartian theory is legal theory, then so too is this.

Professor Moore has two further general complaints. He says, in effect, that even if sociology of law is in some sense legal theory or a branch of legal theory, the way I carry on this work in my book is both relatively purposeless and excessively taxonomic. Thus he suggests that my "sociological" efforts to revise and develop instrumentalist theory

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121 *See* R. SUMMERS, *supra* note 1, at 198-200.

122 *See generally* Hall, *Conceptual Reform—One Task of Philosophy,* 61 ARISTOT. SOC. PROC. 169 (1961).

123 Moore, *supra* note 2, at 990.

124 *See supra* text accompanying notes 110-14.

often leave one "the impression of being an answer to a question that is not asked by any properly focused legal theory."[125] I will not here recite chapter and verse to the contrary from my book. Instead I will take up only the examples Moore cites. He suggests that my inventory of the main types of goals and goal structures has no clear relationship to legal theory.[126] As I point out in my book, these theorists conceived of forms of law essentially as instruments to goals. Thus goals are of *natural* instrumentalist concern. Professor Fuller (no mean legal theorist) even argued that some intelligible goal is required before law can exist at all.[127] Distinctions of diverse potential significance can be drawn between types of goals that may figure in or lie behind forms of law. Also, these goals may conflict with each other in diverse ways calling for sensitively formulated syntheses of various sorts.

More is at stake than an advance in theory that may increase general understanding of immediate interest mainly to theoreticians. As I noted in my book, the United States Supreme Court has unwisely invalidated certain state statutes under the equal protection clause because the Court failed to see how these statutes must inevitably reflect the efforts of lawmakers to reconcile complex conflicts of goals in pursuit of some optimal state of affairs.[128] Moore acknowledges this possible practical bearing of my theoretical efforts but dismisses it as superfluous: "such knowledge of values is part of our cultural heritage. Our ability to apply that cultural heritage in understanding particular laws probably exceeds our ability to develop an explicit taxonomy of all such values."[129] The issues in these cases did not deal primarily with the intelligibility of the values involved. They dealt with the typical structural interrelations between goals, interrelations the Court misunderstood. But even if intelligibility were the issue, we would not be warranted in concluding, with Moore, that relevant values are always satisfactorily intelligible for the law's purposes because they are "part of our cultural heritage." Judges and lawyers not infrequently fail to appreciate the worth of important values. Are these failures *never* because the values involved are to some extent unintelligible to them? Surely not. In order to render certain values intelligible it is essential to grasp the variety and complexity of their manifestations in concrete phenomena. Values manifest themselves in the variety and complexity of law's goals (though not exclusively there). The realization of a value usually

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125 Moore, *supra* note 2, at 994.

126 *Id.* at 997. It is interesting to contrast Moore's view with that of Arnold Brecht: "Far greater efforts . . . should be diverted to the critical examination of goals and goal-values than have been in the past several decades . . . ." Brecht, *Political Theory: Approaches,* in 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 307, 313 (1968).

127 *See* R. SUMMERS, LON L. FULLER ch. 2 (1984).

128 R. SUMMERS, *supra* note 1, at 66.

129 Moore, *supra* note 2, at 997 (footnote omitted).

will depend on how concrete means-goal hypotheses work out. One may add that a deeper understanding of the complex goal structures that figure in and lie behind forms of law may enhance our capacity to interpret statutes and other forms of written law, a matter of immense theoretical and practical import.[130]

Despite Professor Moore's allegation that "too often throughout" my book I failed to link up my sociology with legal theory, Moore cites only one further example of "sociological" work—my preliminary inventory of implementive legal tasks. He finds it *is* possible to relate this inventory to other more general concerns of theoretical interest.[131] But then, without going into any other examples, he rests with this concluding statement: "Too often throughout the book Summers presents his taxonomies in the same way as did Bentham (whom Summers greatly admires); he presents these taxonomies without indicating their intended uses."[132] This statement is false.

Moore's other general complaint is that many of my sociological efforts to revise and develop instrumentalist theory often reduce to the formulation of mere "taxonomies," and at one point he ridicules my efforts by offering a lengthy "taxonomy" of what he calls my "taxonomies."[133] He purports to gather ten such "taxonomies" in his list. On inspection, one can see that virtually any itemization or any type of scheme of distinctions or concepts qualifies as a taxonomy in Moore's world. He not only so classifies my inventory of basic types of implementive legal resources, but also my three-fold conceptual differentiation of "external," "constitutive," and "intrinsic" relations between goals and the means of their realization through law, and the various tasks in my theory of implementive legal tasks. According to Moore, almost any time one differentiates betwcen varieties that number three or more, one is creating a taxonomy. On this view, his five-fold typology of "subtheories" in the general theory of adjudication is a taxonomy, as well as his differentiation between the "philosophical," "historical," and "evaluative" theses of my book, and his differentiation between "modest," "imperial," and intermediate forms of reconstruction in the history of ideas. Presumably the standard trichotomy of descriptive, normative, and conceptual also qualifies as a taxonomy. Thus in Moore's world taxonomies proliferate. If all or nearly all forms of differentiating analysis yield taxonomies, how can it be a *criticism* that a theorist sometimes resorts to taxonomies?

The concept of taxonomy is problematic and has been the subject

130 For precisely this point, see Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 876-78 (1930).

131 Moore, *supra* note 2, at 997.

132 *Id.*

133 *Id.* at 996.

of much controversy in the social sciences. In truth, various concepts of taxonomy are recognized. One of these is concerned with the classification of phenomena to *explain* and *predict* events, processes, structures, etc.[134] This scientific concept of taxonomy is probably the most common, and Professor Moore appears to be under the influence of this concept, given his remarks about "empirical data,"[135] causal "variables,"[136] and "fruitful generalizations."[137] Yet many of the schemes of distinctions appearing in my book that he classifies as taxonomies are not taxonomies in this sense. My inventory of implementive legal tasks is not. Nor is my account of the basic relations between means and goals. Nor is my differentiation of basic legal techniques. Indeed, only *one* of the ten items Moore lists plainly fits the foregoing scientific conception of taxonomy—the one relating to factors of law's effectiveness.

I do not wish to be counted among those who deny the value of certain taxonomies of the nonscientific variety. As H.L.A. Hart has demonstrated, they can be used to display the range of legal phenomena under study, such as the variety of types of rules, "free from the prejudice that all *must* be reducible to a single simple type."[138] Taxonomies can also be used fruitfully to order and classify phenomena under study, calling attention to essential similarities and differences in ways that deepen understanding. Taxonomies can themselves be manifestations of theory. Sometimes their use indicates that the theorist is only at an early or intermediate stage in evolving his overall scheme of thought. It is not surprising that my reconstruction of instrumentalist theory includes some taxonomies, for as I have stressed in my book, this body of theory was admittedly undeveloped. In short, just as genuine zoology is far from disreputable, "legal zoology," *properly understood,* is hardly disreputable. Of course, I do not claim (contrary to Professor Moore's allegation) that "taxonomies inevitably generate worthwhile understanding."[139]

IV

THE RECONSTRUCTION OF A GENERAL LEGAL THEORY

A number of American instrumentalists did not write as if they were constructing a general legal theory. Many wrote rather unsystematically about theoretical issues. And only one of those I included in my study made much of an effort to identify and formulate the various

134 *Id.* at 996-97. For a more elaborate account of this conception of taxonomy, see Tiryakian, *Typologies,* in 16 INTERNATIONAL ENCYLOPEDIA OF THE SOCIAL SCIENCES 177, 177-80 (1968).

135 Moore, *supra* note 2, at 996.

136 *Id.*

137 *Id.* at 997.

138 H.L.A. HART, *supra* note 59, at 32 (emphasis in original).

139 Moore, *supra* note 2, at 997.

theoretical tenets that participants in their movement shared in common.[140] For these and still other reasons, I chose not to content myself with eleven *reports* on the specific views of eleven selected thinkers. Instead, I chose to perform a version of what is today frequently called a *reconstruction,* and not just of individual views, but of the whole American instrumentalist movement (as manifested in the work of these thinkers).[141]

After studying the works of individual thinkers, I sought to devise a comprehensive framework which revealed the theorizing of these thinkers as an intelligible and coherent body of thought.[142] The main feature of my framework was a set of widely shared leading tenets, some descriptively sociological, some conceptual, and some normative. In devising my framework, I certainly did some weeding out and selecting among alternatives; not all of what these thinkers wrote was theory, let alone instrumentalist theory.[143] I also had to cope with inconsistencies within a given thinker's work and between thinkers. I accepted some matters as more in keeping with instrumentalist theory and rejected others. Sometimes I was called upon to judge whether a given thinker could readily be said to subscribe to a particular tenet. I did not require that every thinker subscribe to every tenet. I concluded, however, that no tenet failed to command numerous adherents, and that each thinker adhered to a large majority of the tenets.

Although these tenets represent meaningful and suggestive general directions of thought about law, a number of them were seriously underdeveloped. Consequently, I tried to flesh out instrumentalist theory in a number of places. In some instances I merely filled obvious gaps; in others, the result was more my own making, though still instrumentalist in spirit. I selected the name "pragmatic instrumentalism" for this general legal theory, a name that has the virtue of descriptive accuracy, as general names go.[144]

My reconstruction yielded some rather radical or at least heretofore relatively unnoticed results. Some of the thinkers involved had never viewed themselves as subscribers to a general theory. Yet my reconstruction legitimated this characterization. Law professors, judges, and lawyers not uncommonly deny that they subscribe to or are influenced

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

141 There is a rapidly growing literature on the methodology and the pros and cons of reconstruction. *See, e.g.,* THE HISTORY OF IDEAS (P. King ed. 1983).

142 As I pointed out in my book, my ultimate interest was "aggregative." The book concentrated on theorists as members of a collectivity sharing certain tenets. *See* R. SUMMERS, *supra* note 1, at 13.

143 I frequently pieced together the positions of individual theorists from different sources, as many of those thinkers were not very systematic. *See* R. SUMMERS, *supra* note 1, at 25.

144 *See supra* pp. 1019-21.

by any general theory of law. The instrumentalists were no exception, and it is important to see this. If I am right, general theory profoundly influences the law, something of which those in the law should be more conscious. My reconstruction also exposed similarities of view that justify (for my purposes) grouping such otherwise different thinkers together as Dewey and Gray, and Pound and Frank. At the same time, this reconstruction exposed what I believe to be an important truth, namely, that the instrumentalist movement can (and in my view should be) bifurcated into a "mainstream" in which certain views of Holmes, Pound, Dewey, and Gray were widely influential, and an extremist wing characterized by certain realist views expressed stridently in the 1930s but which were not widely influential and therefore did not become part of our dominant general theory of law.[145] In addition, my approach revealed the *constructive* general directions of thought in instrumentalist theorizing, a corrective to the common view that most of these theorists were merely "destructive trashers." I was also able to demonstrate the considerable extent to which various tenets of instrumentalism are technological and scientific in spirit. Finally, my reconstruction brought out the distinctively progressive and optimistic tenor of this body of thought as a whole.

Professor Moore acknowledges the legitimacy of reconstructive enterprises[146] but thinks I did not go far enough. He distinguishes between "modest" reconstruction and "imperial" reconstruction.[147] He suggests that the intellectual historian doing a *modest* reconstruction would accept the questions that the earlier thinkers addressed and content himself with reordering or developing in some way the answers those thinkers gave to the questions. The historian doing an *imperial* reconstruction, however, would "reorganize" the views of the earlier thinkers involved as answers to contemporary questions in legal theory.[148]

According to Professor Moore, I should have presented pragmatic instrumentalist theory as an imperial reconstruction in order to avoid relegating these ideas to a "scrapbook of historical curiosities;"[149] to enable others to judge the correctness of my historical thesis that these thinkers actually shared a legal theory;[150] and to allow others to see how their theory competes with contemporary ideas so that we can judge whether they had a "*good* legal theory."[151]

I do not believe I needed to do much "imperial" reconstruction, even if I were so inclined. Moreover, many questions that occupied

145 For a listing of these extreme views, see *supra* p. 1020.
146 Moore, *supra* note 2, at 999-1000.
147 *Id.* at 1001.
148 *Id.*
149 *Id.*
150 *Id.* at 1001-02.
151 *Id.* at 1002.

pragmatic instrumentalists continue to be "our questions today," at least in abstract terms. Moore concedes much of this when he acknowledges that more than half of my book is addressed to "core issues in contemporary legal theory."[152] Nevertheless, he offers an elaborate demonstration designed to show that I failed to perform necessary "imperial reconstruction." He identifies five *questions* that he says figure in our contemporary theory of adjudication: What standards must judges apply to identify the law when deciding cases? What facts and descriptions of facts may legitimately figure in judicial decisions? What theories of interpretation and precedent are appropriate in applying law to facts? What is the nature and role of logic in legal reasoning? And what theory of value is appropriate for the adjudication of cases? He then concedes that the American instrumentalists addressed adjudication (in truth, they were preoccupied with it) but implies that they failed to address or did not directly address the foregoing five questions. Thus, according to Moore, I should have "imposed" his five questions from "contemporary theory" on the instrumentalists, thereby "forcing them to answer *our* questions."[153] This reconstruction, he says, would have been "preferable" to my "more modest" approach. An analysis of these questions demonstrates, however, that I had no need to "force" these thinkers to answer "our questions" via an imperial reconstruction. With one exception, "our questions" about adjudication substantially overlap their questions![154] If it had been necessary for me to force our questions on them, however, I would have declined to do so. It would be wrong to reconstruct "answers" to our present day questions out of answers to quite distinct questions.[155] (At bottom, I suspect Moore's dissatisfaction here is with the instrumentalists' answers, not their questions.)

Professor Moore believes that without imperial reconstruction of instrumentalist views, we cannot avoid relegating their ideas to a "scrapbook of historical curiosities."[156] Without relating the views of instrumentalists to any present concerns as such, we could keep them out of the scrapbook merely by noting how they improved on the formalistic views of adjudication prevalent in many quarters when they came on the scene.

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152 *Id.* at 989.

153 *Id.* at 1003.

154 The instrumentalists were interested in standards of validity, *see* R. SUMMERS, *supra* note 1, ch. 4, in facts and descriptions of facts, *see id.* ch. 6, in theories of interpretation and precedent, *see id.* ch. 6, and in the theory of value, *see id.* ch. 1. They were not much concerned with the role of formal logic in legal reasoning. It cannot be said, though, that these theorists synthesized the foregoing interests into what Moore might call a "unified" theory of adjudication.

155 Quentin Skinner has explained better than could I why it would be wrong to "reconstruct" such answers. *See* Skinner, *Meaning and Understanding in the History of Ideas,* 8 HIST. & THEORY 3 (1969).

156 Moore, *supra* note 2, at 1001.

Professor Moore states that imperial reconstruction is necessary in order to "judge the correctness of [my] historical thesis that these influential people had a legal theory."[157] Adopting Professor Moore's own premises about what can count as a legal theory, premises which accord a central place to adjudicative theory, we can see (with or without reconstruction) that the instrumentalists were vitally concerned with issues of adjudicative theory. Even if this were not so, other theorists could still bring their *own* views to bear as to what a legal theory is and judge whether these thinkers had a legal theory.

Moore asserts that without imperial reconstruction, we cannot see how instrumentalist ideas compete with contemporary ideas and thus cannot assess my alleged thesis that American pragmatic instrumentalism was a "*good* legal theory."[158] This is a nonsequitur; one need not see an idea in competition with another idea (present or past) to discern whether it is valuable.

Imperial reconstruction, if carried out consistently, might actually obscure or neglect important truths of American instrumentalist theory. For example, many contemporary legal theorists are relatively uninterested in questions of descriptive sociology that occupied many instrumentalists. If we are to take contemporary questions as our polestars, then presumably we are to ignore prior theory that cannot be channeled into those questions. Thus, we might ignore the implications of conceiving of law as a social instrument. And we would inevitably obscure the historical dialectic between instrumentalists and formalists over basic issues of legal method. Yet it was the common formalist "enemy" which brought forth many instrumentalist ideas in the first place. The instrumentalists won this battle so convincingly that it might be thought that the issues involved are no longer contemporary questions. By Professor Moore's polestar, the issues would, therefore, no longer be relevant to legal theory, a conclusion to which I could not subscribe. As I remarked earlier, the formalistic tendencies of a system of law run deep, and we must remain forever on guard against them.

I believe that a version of "presentism" may motivate some of Professor Moore's emphasis on the desirability of more "imperial reconstruction."[159] He even sometimes appears to believe that whatever is most recent is right. Of course, no such belief, in a humanistic discipline, can be at all tenable. Consider only one example from the discipline of philosophy: the epidemic of moral nihilism or radical moral skepticism which afflicted many philosophers until well into mid-cen-

157 *Id.* at 1002.

158 *Id.*

159 "Presentism" has now become something of a name for a diverse cluster of views emphasizing currency as the criterion of relevance. *See, e.g.*, Hall, *In Defense of Presentism*, 18 HIST. & THEORY 1 (1979).

tury, and from which we still suffer to some extent, both in the law and out. Moore's "presentism" is also manifest in his relative neglect of historical perspective. One cannot fully understand the meaning of certain tenets of a given legal theory, such as instrumentalism, without first grasping the historical context out of which these tenets arose. And some of these tenets can only be understood in relation to historical sequences, for they address facets of law as played out in historical sequences. What Professor Moore himself calls a theory of "change in law" is illustrative.[160] Similarly illustrative are the interactions between means and goals. Only in historical perspective can one grasp the potency of legal theories for social influence. And only in that perspective can one fully understand the distinctive elements of such theories, or see how major movements can occur in legal theory when no movements of similar magnitude are occurring at the same time in other branches of social and political thought. Only in historical perspective can one see how the general social facts of law may change in fundamental ways over time, calling for fundamental revisions in legal theory. Then, too, there is the history of legal theorizing as such. By seeing how instrumentalists went wrong and why, we better understand their theoretical enterprise, and ours.

CONCLUSION

I have taken this occasion mainly to focus on various aspects of the scope, aims, and methods of legal theory. Perhaps others better equipped than I will be led to carry these matters farther. I hope, in particular, to see more effort devoted to the complex interrelations between descriptive sociology and the conceptual element in legal theory.

Although I wish to acknowledge an indebtedness to Professor Moore for challenging me to revisit issues of scope, aims, and method in legal theory, I would be less than honest if I did not also say that I was a little surprised to find that so many features of his critique are rather uncharitable towards instrumentalist theory (and to my treatment of it). I believe there is a growing tendency for legal theorists to denigrate American instrumentalist legal theory in general, though some current fire is more narrowly aimed at the extreme "realist" wing of this tradition. Perhaps this general denigratory tendency is in part attributable to the fact that many American practitioners of instrumentalism were "philosophically unsophisticated" (an explanation that may account for Professor Moore's own skepticism).[161] Today many legal theorists do look to the philosophers as exemplars, and not merely in matters of idiom and style. Yet it is not inherent in the nature of things that instru-

160 Moore, *supra* note 2, at 989.

161 Moore, *supra* note 2, at 1010.

mentalist theorizing must be philosophically unsophisticated. Whatever the explanation for the general denigratory tendency, I believe it will be unfortunate if this tendency diminishes the number of theorists who try to build on the work of the American instrumentalists. I believe this general type of legal theory has a real future, a view I continue to find confirmed in a variety of forms, not least in some important work by American social scientists that appeared after my book.[162]

162 *See, e.g.*, S. NAGEL, PUBLIC POLICY: GOALS, MEANS, AND METHODS (1984); D. MAZMANIAN & P. SABATIER, IMPLEMENTATION AND PUBLIC POLICY (1983).