Prescriptive Formality and Normative Rationality in Modern Legal Systems

Festschrift for Robert S. Summers

Edited by

Werner Krawietz
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Duncker & Humblot · Berlin

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Foreword

My Friend from Halfway, Oregon – A Most Unusual American Academic Career

I.

On September 19, 1933, Robert S. Summers was born in a farmhouse about five and a half miles from Halfway, Oregon, a remote village in a small valley called "Pine Valley" on the south side of the Wallowa mountain region in Eastern Oregon, a dozen miles from the Snake River which marks the border between Oregon and Idaho. His father, Orson W. Summers, now deceased, was born in the same general area (and was a distant relative of Abraham Lincoln). His mother, Estella Robertson Summers, of Scottish descent, still lives on the family farm.

1. As Robert Summers has elsewhere recorded, in the schools of Pine Valley Union High School he was recognized as one who should "go away to a university", and his parents and teachers saw that he went to the University of Oregon, in Eugene, where he enrolled in September of 1951, and from which he graduated with high honors in 1955. (There, too, he met his wife, Dorothy M. Kopp, mother of their five children.)* According to an article in the *Cornell Law Forum* for November, 1990, two of his teachers at the University of Oregon, Professors Egbert S. Wengert and H. Thomas Koplin, encouraged him to apply for what was then called a "junior" Fulbright Scholarship to study in England for a year after graduating from the University. He applied, and in the annual statewide competition received one of the two Fulbright awards allocated to seniors graduating from Oregon universities and colleges that year. Receipt of this award was an absolutely pivotal event in his life.

a) During the year 1955-56, Summers studied for one year as a Fulbright Scholar at the then new University of Southampton in England. While there, he formed what was to become a life-long attachment to England (and to Scotland, which he also visited then and from whence ancestors of his mother had emigrated in the nineteenth century). In that year he also met and became acquainted with the distinguished Oxford jurist, Professor H. L. A. Hart, who visited Southampton to give a guest lecture in April of 1956. This was the

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* Brent Gordon, b. 1956; William Charles, b. 1959; Thomas Kopp, b. 1962; Elizabeth Anne, b. 1964; and Robert Orson, b. 1969.

beginning of a relationship that Summers had with Hart which lasted until Hart's death, on December 19, 1992.

b) Summers entered Harvard Law School in 1956, and received the LL.B degree in 1959. While there, he studied jurisprudence under Professor Lon L. Fuller, and the criminal law, and much else about law in general, under Professor Henry M. Hart. Roscoe Pound, though long since retired from the active faculty, was still a frequent presence at the Harvard Law School. Summers has recorded that he also became acquainted with Pound (in the fashion of a student), and read many of his writings. Most important, H. L. A. Hart was a visiting professor at Harvard during Summers' first year there. Summers saw him frequently, and Hart encouraged Summers' growing interest in legal theory.

c) In his second year at Harvard, Summers found Fuller's course in jurisprudence to be extraordinarily stimulating, especially since Fuller and Hart were then locked in their famous debate over the subject of Hart's Holmes Lecture, delivered at Harvard in April 1957, and called "Positivism and the Separation of Law and Morals". Summers, of course, heard this lecture, and discussed it at length with Hart after it was delivered. The written version of the debate between Hart and Fuller appeared in the pages of volume 71 of the *Harvard Law Review,* in February of 1958. With two teachers as stimulating and powerful as Hart and Fuller, it comes as no surprise that Summers ultimately chose to pursue an academic life in law, with legal theory a major interest.

2. Upon graduation from Harvard Law School in 1959, Robert Summers returned to his home state of Oregon where he practiced law in the Portland, Oregon law firm of King, Miller, Anderson, Nash and Yerke. After a little more than a year, he received an offer from Dean Orlando J. Hollis to become a member of the University of Oregon Law School faculty in Eugene, Oregon. In the fall of 1960, he started teaching contracts and commercial law, as these were the subjects then open. He soon introduced a course in legal theory.

a) At this time, Summers developed a strong interest in offering a broadly based and liberally oriented course about law not to professional law students but to university undergraduates as part of their general education. In 1961, he began teaching such a course, and prepared materials for use as a text in the course. The materials were eventually published in 1965 as his first book, with Charles G. Howard as a co-author. The title was *Law, Its Nature, Functions, and Limits.* The book is now in its third edition, and has been widely used in American universities as a text for general education courses on law.

b) As later recorded in the *Cornell Law Forum,* H. L. A. Hart, who was in the Fall of 1962 a visiting professor at the University of California at Los Angeles, traveled to the University of Oregon where he presented two lec-

tures. At this time, Hart invited Summers to spend a year on research in residence in Oxford. Hart also discussed with Summers an early draft of Summers' first substantial essay in legal theory, a review article on Hart's then recently published book, *The Concept of Law* (1961). The essay was later published in the *Duke Law Journal* as "H. L. A. Hart's Concept of Law" (1964). The essay considers the central theses of this justly celebrated book, and develops a critique of it as somewhat reductionist in its analysis of legal phenomena, especially legal precepts and legal institutions, both of which Hart analyzed almost exclusively in terms of rules.

3. In 1963, the Uniform Commercial Code became law in many American states, including the State of Oregon. This Code had been drafted chiefly by the well-known American legal theorist and commercial law specialist, Karl N. Llewellyn. Since Robert Summers had been teaching in this field, he had had occasion, during the preceding year and a half, to compare the Code with the Oregon statute and case law which the Code was to supersede. These efforts marked the beginning of his life-long study of the Uniform Commercial Code and the case law growing out of it. In 1962, he published his first substantial article on a branch of this subject ("Secured Transactions Under the Uniform Commercial Code"). At that time, he also responded to many requests of the Oregon State Bar Association and of local county bar associations to lecture to practicing lawyers on the Code and on developments thereunder. His records of public lectures that he has given reveal that over the next thirty years, he would deliver more than a hundred such lectures to practicing lawyers and judges not only in Oregon but also in New York, California, Michigan, Tennessee, Ohio, Virginia, Washington, Florida and Minnesota. For such efforts, Summers has received various citations. For example, on June 19, 1987, the Minnesota Bar Association, by Special Resolution, awarded a Certificate of Merit to Summers (and one to his co-author, James J. White): "In recognition of, and in appreciation for, his high achievements in Legal Scholarship and Education, which constitute invaluable contributions to the Administration of Justice, the Facilitation of Commerce, and the Orderly Maintenance of Our Society."

4. During the academic year 1963-64, Robert Summers was a Visiting Associate Professor at Stanford Law School. Also visiting at Stanford that year were the British jurist, Graham Hughes, and the Australian jurist, Julius Stone. These other, more senior, personages offered the basic courses in legal theory while Summers taught contracts and commercial law. But in addition to many fruitful discussions, there were other notable events during the year. Thus, Summers has recorded that he and Professor Hughes went to Berkeley in March of 1964 where they spent an afternoon as guests of Professor Hans Kelsen. Kelsen at this time was probably the most influential living jurist in the world. He was then 83 years old, and Summers recalls that he was still most lively in discussion.

5. In the course of the year at Stanford, Summers applied, with the support of H. L. A. Hart, for a grant – a special fellowship in legal philosophy funded by the Rockefeller Foundation and administered by the Social Science Research Council. The grant was sufficient to enable him and his family to spend the year 1964-65 in Oxford, where he studied legal theory under Hart.

a) During the fall and winter terms at Oxford, Hart arranged for weekly discussions in his rooms in Kybald House, at University College. Summers' personal diary indicates that the procedure was usually for Summers to deliver a paper to Hart on Thursdays, which Hart would review in advance of their Saturday morning sessions. The topics varied greatly, ranging from differing models of justification in appellate judicial decision-making (e.g., for overruling a precedent, for creating an exception to a doctrine, for resolving a case of first impression, for upholding a finding of fact), to central issues in the Hart-Fuller debate (still going on at that time), and to general standards of criticism in legal philosophy. Summers has recorded that in discussion Hart had only one "speed", namely "high", and that he had a remarkable capacity for combining strong criticism with strong encouragement. Summers says that he often left these discussions feeling both "down" and "up" at the same time. The focus was on working out solutions to specific problems, and on method, technique, and approach. In two essays, Summers has summarized various aspects of the methodology current in Oxford legal theory at that time: "The New Analytical Jurists" in the *New York University Law Review* (1966), and "Notes on Criticism in Legal Philosophy" in *More Essays in Legal Philosophy* (1971).

b) The year 1964-65 was uniquely important for Summers in still another way. Largely self taught as a philosopher, it afforded him an opportunity to attend classes, lectures, and seminars offered by Oxford philosophers. In particular, he attended lectures or seminars by Peter Strawson, Gilbert Ryle, J. O. Urmson, Richard Hare, Isaiah Berlin, John Lucas, A. J. P. Kenny, and Phillipa Foot. This was in addition to lectures by Hart on Kelsen, and on rights and duties in the utilitarian tradition. During the year, Summers began what was to become his most important article in private law, an analysis of good faith in contract and commercial law. Summers has recounted many features of the Oxford scene during 1964-65 in a short essay: "Legal Philosophy at Oxford" (1966).

c) Summers' diary during this year in Oxford reveals that he became acquainted with, among others, Patrick Atiyah, Peter Carter, John Finnis, Peter Hacker, A. M. Honoré, A. J. P. Kenny, John Lucas, Geoffrey Marshall, Joseph Raz and Francis Reynolds, all Fellows of Oxford colleges and pursuing research in philosophy, law, or related subjects. Summers also became acquainted in this year with A. H. Campbell, a Fellow of All Souls College, and then Professor of Jurisprudence at the University of Edinburgh, who was later to introduce him to another theorist who would become his co-

author, Neil MacCormick. Summers has maintained nearly all of these and still other relationships, intellectual and personal, in Britain, and he has renewed them more intensively at periodic intervals when spending sabbatical years in Oxford in 1974-75, 1981-82, and 1988-89. Indeed, Oxford has been, for him, a kind of second intellectual habitat, and he now resides there for three or four months each year.

6. Upon his return to the University of Oregon in 1965, Summers concerned himself with the research in legal theory and law he had begun in Oxford, with extensive lecturing to Oregon State Bar groups on the Uniform Commercial Code, with organizing and co-chairing a conference at the University of Colorado sponsored by the Association of American Law Schools for teachers of general education courses about law for undergraduates, and with editing the first of two collections of essays in legal philosophy published by Blackwells in England and the University of California Press in the U. S.

a) At this time, he also concentrated on finishing his article, "Good Faith in General Contract Law and the Sales Provision of the Uniform Commercial Code" which he completed in the summer of 1967, when he was thirty-three years old. The article, which he had begun in Oxford while working at what had been the desk of J. L. Austin, drew on Austin's "excluder" analysis of the meaning of certain types of words, and defended the thesis that good faith is not used in contract and commercial law as the name for a formally definable set of necessary and sufficient conditions for use of the words "good faith", but rather is generally used to "exclude" or proscribe on particular occasions a heterogeneous variety of forms of bad faith.

b) Once so conceptualized, American scholars could see clearly for the first time that the United States already had many judicial precedents on good faith extending far beyond the acknowledged doctrine of "good faith purchase". Indeed, Summers identified many such precedents in his article. This proved to be a significant revelation, given the wide-ranging potential of a general legal obligation of good faith. Summers' personal records include a letter about the article that he received from Professor Friedrich Kessler of Yale Law School in which Kessler concluded: "I think all of us working in the field of contracts owe you a real debt of gratitude for having written it." The seventy-two page article has been the most widely cited essay in the American legal literature on the subject of good faith in general contract law and the Uniform Commercial Code. Scholars and judges have referred to the essay as a "classic" and as "seminal". In 1970, when Section 205 on good faith in the proposed second Restatement of Contracts was before the American Law Institute for consideration, the director of the project, Professor Robert Braucher of Harvard, stated in the Institute's official proceedings that he was "indebted for its formulation to Professor Summers". Section 205 represented one of the three most important developments in the whole of American con-

tract law between 1929, when the first Restatement of Contracts appeared, and 1979, when the second Restatement was completed.

c) Summers later published another article of similarly wide ranging applicability: "General Equitable Principles Under Section 1 - 103 of the Uniform Commercial Code" (1978). From the evidence of footnotes, it is apparent that scholars, judges, and practitioners have frequently relied upon this article as well. The good faith article and the article on general equitable principles deal with what might be called the morality of contract and commercial law.

7. For the fall semester of the 1968-69 academic year, Summers accepted an invitation to be a visiting professor at Cornell Law School and moved to Ithaca, New York. While there, he taught basic commercial law and the required first-year course in civil procedure. From the experience of teaching civil procedure, he developed a deep interest in what he came to call "process values", later the subject of another extended article. Also at this time, he entered into a contract with West Publishing Company to publish a casebook for commercial law courses with co-authors Richard E. Speidel and James J. White. Much of the visiting semester was spent on this project, and the first edition of this book was published in 1969. In 1993, it appeared in its 5th edition, and it has been widely used in American law schools for over twenty years. Before Summers returned to the University of Oregon in January of 1969, the Cornell Law School Faculty voted him a permanent offer of appointment, which he ultimately accepted. Summers' private papers include letters indicating that the Cornell offer was made largely on the basis of his writings on commercial law, including the subject of good faith (which had caught the eye of the distinguished Cornell comparativist, Rudolf Schlesinger), and on the basis of the quality of Summers' classroom teaching.

a) In subsequent years, Summers has often returned to the University of Oregon, and he taught the law school summer session there in 1980. In three short essays he has paid tribute to three former University of Oregon law faculty colleagues: Chapin Clark, Frank R. Lacy, and Hans A. Linde.

b) The Cornell appointment, which Summers took up in August of 1969, also marked the beginning of three years of extensive public service by Professor Summers as a consultant and co-founder of the "CLEO" Program co-sponsored by the Association of American Law Schools and the national bar associations. "CLEO" was the name for the Council on Legal Education Opportunity, founded to provide special opportunities for minority students to attend law school. CLEO contributed to a major increase in minority enrollments in law schools across the United States.

8. In the period 1969 to 1974, before his first sabbatical leave from Cornell, Summers published a number of articles and books. One of the articles, "The Technique Element in Law" appeared in 1971 in a *Festschrift* for Hans Kelsen.

It differentiated five basic ways in which law discharges its social functions: (1) the grievance-remedial technique, (2) the penal technique, (3) the administrative-regulatory technique, (4) the public-benefit conferral technique, and (5) the private-arranging technique. This framework also provided the structure for the second and third editions of his book: *Law, Its Nature, Functions, and Limits,* published in 1972, and again in 1986 respectively (with Cornell colleagues as co-authors). The framework has also figured as the conceptual foundation for books and articles by several other scholars.

a) Pursuant to a deep interest in providing liberal education about law for the lay citizen, Summers in 1973 also co-authored two books on law for grade school and high school students published by Ginn and Company of Boston. These books were used in American public schools for many years.

b) It was also in this period that Summers published his lengthy article on process values ("Evaluating and Improving Legal Processes – A Plea for Process Values", 1974.) This article defined "process values" as values realizable in the course of the workings of legal processes, values that are prizeable whether or not their implementation affects the quality of outcomes. In the article, various process values such as procedural fairness, orderly deliberation, institutional legitimacy, and appropriate impartiality are identified and subjected to analysis and evaluation. This article contributes to the analysis and improvement of procedural systems, and also criticizes utilitarian moral theory for its overemphasis on outcome values to the neglect of process values.

c) But perhaps Summers' most substantial contribution in this period was the appearance of the first edition of J. White and R. Summers, *The Uniform Commercial Code* (West Pub. Co. 1972), a book now about to go into its fourth edition and which today takes two forms, a single volume for students and a three volume treatise for practitioners, judges, and scholars. Today this is the most influential scholarly work in what is the largest field of private statutory law in the United States. The work has been cited in court opinions over 3000 times. As the *Cornell Law Forum* records, numerous judicial opinions in federal and state courts refer to "White and Summers" as the Code's "foremost" or "leading" commentators, and cite the book as the leading authority on commercial law. Chief Justice Ellen Peters of the Connecticut Supreme Court and former professor at Yale Law School once wrote of the book that it has been "enormously and deservedly influential".

9. In September of 1974, Summers returned to Great Britain for another sabbatical year in Oxford. In that year, he was affiliated with Balliol College (where Dr. A. J. P. Kenny, Dr. Joseph Raz, Donald Harris, and Paul Davies were Fellows). Summers' diary and the *Cornell Law Forum* reveal that in the course of that year, he delivered twenty-four guest lectures or seminars at universities in Britain, in Scandinavia, where his hosts were Professors Torstein Eckhoff, Folke Schmidt, Aleksander Peczenik and Stig Jørgensen, and in

Vienna and Salzburg, where his hosts were Herbert Hausmaninger, Theodor Tomandl, Günter Winkler and Ilmar Tammelo. His lecture and seminar topics included "process" values, the limited efficacy of law, and the technique element in law. While in Denmark, he had the privilege of spending an afternoon and evening with Professor Alf Ross, who reflected at length on developments in twentieth-century legal theory.

a) It was during this year that Professor Summers began a preliminary study of the elements of general theories of law that are essentially instrumentalist in nature. He did not confine himself to American theorists, but also studied the writings of Jeremy Bentham and Rudolf von Jhering. The first published essay to issue from this work was called "Naive Instrumentalism and the Law", a contribution to a *Festschrift* in honor of H. L. A. Hart on his seventieth birthday.

b) On returning to Cornell in the Fall of 1975, Summers continued his work on instrumentalist legal theory, concentrating on American thinkers such as Roscoe Pound and Karl Llewellyn. In the summer of 1976, he also prepared a first draft of a lengthy article on "goal" reasons and "rightness" reasons in judicial decision-making. In that same summer, with his colleague Roger Cramton, Summers also taught a basic course on "elements of law and legal process" to a group of 25 professors of economics for one week under the auspices of the Institute for Law and Economics, then at the University of Miami and directed by Henry Manne. Summers continued teaching such groups of university economists annually for twelve years. This assignment ultimately inspired a 42-page article in the *Oxford Journal of Legal Studies* on the nature of economic reasoning as applied to law, which Summers co-authored with his former student Leigh B. Kelly. The essay includes the first relatively comprehensive account in the legal literature of the basic criteria for judging the utility of substantive reasons of any type in making and justifying judicial decisions ("Economist's Reasons for Common Law Decisions", 1981).

c) It was also in this period that Summers had his second experience with field research, the first having been in 1967 as an interviewer of judges, lawyers, and others for the Brookings Institution study of the administration of the bankruptcy laws. (*Bankruptcy – Problem, Process, Reform* (1971)). His second experience at field research was as a participant-observer of the administration of New York State's "Taylor Act", a body of law designed to regulate the negotiation and implementation of collective bargaining contracts between state governmental employees and their employers. The Taylor Act was a model statute widely copied in other states. Professor Summers served as principal negotiator for several school districts and municipalities, and then prepared and published a monograph under the auspices of Cornell University's School of Industrial and Labor Relations: *Collective Bargaining and Public Benefit Conferral – A Jurisprudential Critique* (1976). The monograph is criti-

cal of the way in which the Taylor Act impinges upon representative democracy, especially at the local level. The monograph was discussed in academic journals, and in the New York Times and other newspapers.

d) In the Spring of 1976, Summers was invited to conduct seminars on topics in judicial decision-making for judges of the Washington State appellate courts. According to his records, this was the first of a dozen such seminars he presented over several years as part of continuing education programs for the judiciary in Oregon, Washington, Tennessee, New Hampshire, Massachusetts, Arizona, Wisconsin, Virginia, and Florida.

e) Effective July 1, 1976, Summers was appointed by the Board of Trustees of Cornell University the "William G. McRoberts Professor of Research in the Administration of the Law". This endowed chair provided him with special research support and teaching flexibility.

10. The summer of 1977 took Professor Summers to Australia where he was a visiting professor at the Australian National University in Canberra and at the University of Sydney. He also gave lectures at a number of other universities in Australia and New Zealand and attended the World Congress of the International Association of Social and Legal Philosophy, which was held at Sydney. In subsequent years, he attended such "IVR" congresses in Basel in 1979 (where he met Aulis Aarnio, Werner Krawietz, and Robert Alexy), at Helsinki in 1983, at Athens in 1985, at Edinburgh in 1989 and at Göttingen in 1991.

a) In 1978, Summers published in the *Cornell Law Review* one of his principal articles in legal theory, 82 pages in length: "Two Types of Substantive Reasons – The Core of a Theory of Common Law Justification." In this article he differentiated "goal" reasons from "rightness" reasons, and argued that rightness reasons, contrary to much modern moral and economic analysis, have justificatory force, too. They derive this force not from goal-serving effects but from the way in which rightness norms apply to past interactions of the parties involved. The article analyzed the structure and force of rightness reasons in judicial decision-making more systematically than had been done earlier, and sought to refute the utilitarian thesis that rightness reasons, because they are past-regarding, cannot have, as such, any force at all. "Thank you" does not really mean "more please"; it has force of its own.

b) Also in 1978, Summers published in the *Harvard Law Review* the first fruits of his intermittent studies of the legal theory of his former Harvard teacher, Lon L. Fuller: "Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law."

c) In January of 1978, Summers gave a lecture at the University of Hamburg: "Current Trends in American Legal Theory." This was the first of more than fifteen lectures and seminars that he presented between 1978 and 1993 at

various German universities, including, in addition to Hamburg, the Free University of Berlin, the University of Munich, the University of Göttingen, the University of the Saarland, the University of Münster, the University of Hannover, the University of Tübingen, the University of Heidelberg, and the University of Trier. Just as Summers' entry upon the English and Scottish legal world two decades earlier had proved to be a special source of growth for him, his introduction to the German legal world and the German tradition in legal theory was to prove, as he has put it elsewhere, "distinctively enriching". From the late 1970's, Summers took an increasing interest in German legal theory, including especially the writings of Jhering, Heck, Radbruch, and Weber. From the 1980's on, Summers was regularly a guest for brief periods at German universities, and in 1985 he was a visiting professor for an entire semester at the University of Vienna.

11. In the fall of 1981, Summers presented the first of about a dozen special lectureships he was invited to deliver at various universities between 1981 and 1993, mostly in the United States. These included the Sherman Lecture at Boston University Law School in 1981, the Harris Lecture at Indiana University Law School in 1983, the Patterson Lecture at Duke University Law School in 1984, the Halle Lecture at Case Western Law School in 1987, the Higgins Lecture at Lewis and Clark College of Law in 1988, the Seegers Lecture at Valparaiso University School of Law in 1989, the Hamlyn Lecture at the University of Edinburgh in 1989, the Altheimer Lecture at the University of Arkansas in 1991, the Goodhart Lecture at the University of Cambridge in 1991, and the MacDermott Lecture at the University of Belfast in 1992.

a) During 1981-82, Robert Summers was again in Oxford on sabbatical leave, having been elected a Visiting Research Fellow at Merton College. At this time, he was completing final work on two books, one to be published by Cornell University Press on American pragmatic instrumentalist legal theory, and one on Lon L. Fuller for the "Jurists – Profiles in Legal Theory" series edited by Professor William Twining and to be published by Stanford University Press. Summers' diary records that during this sabbatical year, he also presented twenty-three lectures and seminars at various universities in England, Scotland, Scandinavia, Germany and elsewhere in Europe. In the winter term of that year, he also hosted a small informal conference in Oxford attended by Professors Aulis Aarnio, Aleksander Peczenik, Robert Alexy, Neil MacCormick, Geoffrey Marshall, and John Lucas. Most participants read short papers, and this was followed by discussion.

b) Professor Summers and Professor Patrick S. Atiyah, University of Oxford, agreed in the summer of 1982 to enter upon a long-term project to write a book comparing levels of formality in the English and American legal systems. In that year, Summers had already published an article that was one of the fore-runners of this book: "Working Conceptions of the Law".

c) Also in the summer of 1982, and as the preface to *Interpreting Statutes – A Comparative Study* (1991) records, the idea of forming a group of legal theorists to do a comparative study of interpretive practices in nine Western countries was conceived by Professors Peczenik, Pattaro and Summers in the Italian Alps during a joint holiday. The agreed aim was to identify significant similarities and differences in such practices, and consider whether any similarities exist at the level of deep structure. The research group was actually formed in Helsinki during the IVR Congress in 1983, with Professor Aulis Aarnio as host. The group completed its work on interpretation through several workshops held at the Center for Interdisciplinary Studies at the University of Bielefeld. After publishing the book referred to above, the group has been at work comparing the role of legal precedent in the same nine countries. After a meeting on this topic at Cornell Law School in 1993, the group will finish its work during two further sessions in Italy and Finland. Summers has served as chair of the group since its founding, with Neil MacCormick as co-chair.

12. Summers' book, *Instrumentalism in American Legal Theory,* was largely completed in Oxford in 1981, and was published by Cornell University Press in 1982. This book provided an account and critique of the rise and reception of legal theory in the United States from the end of the nineteenth century up to the middle decades of the twentieth century, and was the first book to conceptualize and systematically draw together various tenets of American instrumentalist legal theory. An earlier version of the book had already been published in Dutch. An abridged German translation appeared in 1983: *Pragmatischer Instrumentalismus und amerikanische Rechtstheorie,* translated in final form by Dr. Thomas Laker of Göttingen and Professor Herbert Hausmaninger of the University of Vienna, and published by the Karl Alber Verlag of Freiburg. The English-language version of the book was reviewed in a dozen periodicals. One European reviewer remarked that it "includes profound insights about the nature of law and legal method, mostly indicated in the particular context of pragmatic instrumentalism and yet possessing universal importance".

a) This book, appearing in English, and in German and Dutch translations, and appearing in summary form in articles published in English, Italian, Japanese and Russian, demonstrated the coalescence of American philosophical pragmatism, sociological jurisprudence, and legal realism, and reconstructed the resulting general theory in terms of a set of basic pragmatic instrumentalist tenets. Among the leading tenets, stated in very general terms, were these: (1) the purpose of legal theorizing is to make law more useful for "social engineering", (2) the main purpose of law itself is the more or less utilitarian one of serving the "wants" or "interests" of the citizenry, (3) law is essentially a set of tools – instruments – to be deployed as a kind of technology in accord with the findings of social science, (4) the judges in the legal system

are to play major roles in making and implementing policy through law, (5) the essential criterion for identifying valid law is predictive – that is, valid law consists of whatever officials in power, especially judges, may be predicted to do, and (6) the efficacy of law ultimately derives from the monopoly that officials of the system have over the use of state coercion, force and direct action. Summers subjected these and other tenets both to positive analysis and evaluative critique.

b) His reconstruction of main currents in early to mid-century American legal theory yielded novel results. His reconstruction exposed similarities of view that justified grouping together such otherwise disparate thinkers as Dewey and Gray, and Pound and Frank. At the same time, his reconstruction revealed that the American instrumentalist movement could be illuminatingly bifurcated into a "mainstream" in which certain views of Holmes, Pound, Gray, and Dewey were widely influential, and an "extremist wing" characterized by certain realist views most stridently expressed in the 1930's but which never became widely or continuously influential. At the same time, Summers argued that his work identified constructive general directions of thought in instrumentalist theorizing which provide an important corrective to the common view that many "realist" theorists were merely destructive trashers. In a debate with Professor Michael Moore, published in volume 69 of the *Cornell Law Review,* Summers defended the methodological principles that guided his reconstruction of twentieth-century American legal theory. The most concise account of Summers' views of the leading tenets and strengths and weaknesses of American pragmatic instrumentalism, "Pragmatic Instrumentalism and American Legal Theory", appeared in 1982 in *Rechtstheorie.*

13. In 1984, Robert Summers' book on the life and work of Lon L. Fuller was published by the Stanford University Press in the Great Jurists series edited by Professor William Twining. The book was entitled, simply, *Lon L. Fuller.* Summers dedicated it as follows: "For Lon L. Fuller of Harvard and H. L. A. Hart of Oxford, who jointly and severally rejuvenated the subject of legal theory in our time." Between 1926 and 1939, Fuller was successively a professor of law at the University of Oregon, the University of Illinois, and at Duke University. From 1939 until 1972, when he retired, he was a professor at Harvard Law School, having succeeded to Roscoe Pound's chair in 1948. Fuller, with Holmes, Pound, and Llewellyn, was one of the leading American legal theorists of the last 100 years. Fuller was also a major critic of American pragmatic instrumentalist legal theory. Himself an original thinker, he was highly conversant with European legal thought, and especially admired the writings of the great German jurist, Rudolf von Jhering.

a) As Summers demonstrated in his book, Fuller was a leading proponent of what might be called secular natural law theory. Fuller showed that notions of value – of what "ought to be" – figure in the very existence of rules and that

law is inherently value laden. He argued that it is impossible to draw sharp lines between law and morals. More than any thinker before him, except perhaps for Rudolf von Jhering, Fuller stressed law's essential purposiveness and the necessary "direction-giving quality" of the purposes of law. Fuller had demonstrated at length in his *The Law in Quest of Itself* (1940) that there can be no universally applicable "master" criterion by which judges can determine whether any given rule is a valid law of the system. Fuller also wrote more illuminatingly than anyone before him on the complexities of law's means and ends and on the interactions between means and ends in legal ordering. In Summers' view, Fuller's sophisticated analyses of law's means and ends provided a major corrective to crude instrumentalist theories of law. In his book on Fuller, Summers also offered some critical commentary. The book was widely reviewed and well received.

b) Summers spent most of June and July of 1984 in Göttingen at a Goethe Institute studying German. He was already acquainted with some members of the Göttingen law faculty, and he found the intellectual atmosphere there most congenial. He had numerous professional discussions with Professors Ralf Dreier, Okko Behrends, Franz Wieacker, and Robert Alexy, all then at the University. That summer, he completed an influential article, "Toward a Better Theory of Legal Validity". After presenting the article in the form of a lecture to the Göttingen law faculty and as a seminar topic at Professor Arthur Kaufmann's Institute at the University of Munich, he published it in *Rechtstheorie.*

c) In the fall of 1984, Summers attended a conference on Reason and Law organized by Professor Enrico Pattaro at the University of Bologna. There he presented a paper on "Why Common Law Courts Seldom Need to Assess Closely the Comparative Force of Conflicting Substantive Reasons" (1987). This essay was a development of his work on the nature and role of substantive reasoning in judicial decision-making. In the article, Summers sought to show that when two substantive reasons conflict in a case, it is often not necessary to choose between them on the basis of their comparative weight. Rather, there will often be a preferable basis for choice *on other grounds,* e.g., the suitability of the reason for encapsulation in a well-defined rule.

14. Robert Summers was a Visiting Fulbright Professor at the University of Vienna Faculty of Law in the spring of 1985. During this period, he gave a course of lectures comparing developments in English and American legal theory from 1776 to 1976. The lectures later served as part of the basis for two chapters on legal theory in his book with Professor Atiyah. At this time, Summers also gave guest lectures at universities in Graz, Budapest, Tübingen, and Jerusalem.

a) On returning to the United States, Summers resumed work on the book he was writing with Professor Atiyah, and devoted much of the next two years

to that project. In 1986, he was appointed by the President of the Association of American Law Schools (A. A. L. S.) to chair and organize a Conference for Teachers of Jurisprudence which was held in March of 1986. He devoted much time to this conference, which attracted many teachers of legal theory and also many teachers of first-year law subjects interested in incorporating more legal theory into their courses.

b) Summers was invited to the Soviet Union in December of 1986 under the auspices of the International Exchange of Scholars (IREX) program and the U. S. State Department. He presented one lecture at the Institute of State and Law in Moscow on "America's Dominant Legal Theory in the Twentieth Century", which was later translated into Russian, and one lecture on good faith in contract law at the University of Tashkent in Uzbeckistan.

c) In 1987, after more than twenty years of teaching in the field of contracts, Summers, with his Cornell colleague, Professor Robert Hillman, published a casebook for first-year law school courses in that subject: *Contract & Related Obligation: Theory, Doctrine, and Practice* (West Publishing Company). This is a somewhat distinctive teaching tool in its emphasis on the variety of lawyer roles in contractual matters, its focus on the special problems of law created by private parties, its stress on substantive as well as formal reasoning in judicial decisions, and its presentation of materials on contract theory.

15. At the end of 1987, Robert Summers and Patrick Atiyah of Oxford published their book *Form and Substance in Anglo-American Law*. This was the product of a five-year collaborative effort in which the book went through four complete drafts. In their preface the co-authors wrote: "This book has throughout been written jointly. Each of us has had a hand in writing and rewriting (often several times) every chapter." The book was published by Oxford University Press, and was immediately acclaimed in the United States, in Scandinavia, in Europe and in Britain. Professor John Fleming of the University of California, wrote in the *International and Comparative Law Quarterly* that the book is a "profound" work with an "original methodology". Professor Jerzy Wróblewski of Poland in his review in *Archiv für Rechts- und Sozialphilosophie* characterized the book as an "extremely rich and interesting comparative analysis". Professor Xavier Blanc-Jouvain of Paris, in the *Revue International de Droit Comparé*, commented that the book is "a brilliant treatment of fundamental questions about law". Dr. N. A. Andrews, in the *Cambridge Law Journal,* wrote: "Not since Holmes and Pollock exchanged their letters has there been such a sustained and absorbing communion of American and English legal minds."

a) This complex book cannot be briefly summarized, but a few remarks are in order. It offers, first, a new way of analyzing legal reasoning in terms of more "formal" or more "substantive" styles. This analysis, which is worked out in some detail, is offered as a contribution to legal theory in its own right.

Second, the book then develops the differences in legal reasoning and in legal systems in England and America, arguing that the English is a rather "formal" system and the American, more "substantive". Thirdly, the book explores a wide range of cultural, institutional, and historical factors influencing the formal style of the English system, and influencing the substantive style of the American. This exploration is of relevance not only for comparative studies, but also confirms the argument in the first part of the book that the English system is relatively more formal.

b) As he has indicated subsequently, Professor Summers' work on this book altered his perspective on general theories of law. He has come to believe that it is unlikely that there can be a single, general correct legal theory even for all western systems. Hart's general legal theory, for example, fits the more formal English system, whereas Fuller's theory fits the more substantive American system. Truth in legal theory is, to an extent, relative to the legal system in question.

16. In 1988-89, Professor Summers returned to the University of Oxford for a further sabbatical leave, and resumed his relationships there with colleagues working in philosophy, politics and law. This year marked the beginning of intensive work on what Summers now calls "the formal character of law", or "a general theory of formality in law". At the end of the sabbatical year, he presented the special Hamlyn lecture to close the Fourteenth IVR World Congress held at the University of Edinburgh. The lecture was entitled "Theory, Formality and Practical Legal Criticism", and was later published in the *Law Quarterly Review*. In the course of the sabbatical year, Summers also gave fourteen lectures at various universities, including presentations at a symposium on the Legitimacy of Law in Tampere, Finland, a *Festschrift* symposium at the University of Göttingen in honor of Professor Franz Wieacker, and a series of lectures while a Guest Professor at the University of Münster (to which he returned in 1993 for further lectures, hosted by Professor Werner Krawietz).

a) In 1989-90, several developments may be noted. Summers lectured on the topic "Peirce and America's Dominant Theory of Law" at the Charles Sanders Peirce Sesquicentennial held in September at Harvard University. Later that fall, he lectured at the Max Planck Institute on Comparative Law in Hamburg on "Form and Substance in Anglo-American Law", and on the "Comparative Statutory Interpretation Project". During 1989 and 1990, he served as President of the American Section of the International Association of Social and Legal Philosophy ("IVR").

b) On May 24, 1990, he was awarded the degree of Doctor of Laws, *honoris causa,* by the University of Helsinki, during the 350th anniversary celebration of the founding of that University. At the award ceremony, he was cited for his work in private law and in legal theory, and for the way he had attempted to bridge American and European legal thought.

c) Later that summer, he served as a member of the law faculty of the Salzburg Seminar in American Studies, where he lectured on form and substance in Anglo-American law, and on contract law in a market economy.

d) In the summer of 1991, the first fruit of the Comparative Statutory Interpretation Project, which had been formed in 1983 with members from nine countries, was published under the title *Interpreting Statutes – A Comparative Study,* co-edited by D. Neil MacCormick and Robert Summers. It included nine chapters reporting on basic issues of interpretive practice in each of the countries in the project. In addition, there is an introductory chapter, a chapter on methodology, a comparative chapter, and a chapter on "interpretation and justification". Professor Summers co-authored these four chapters, and contributed a chapter on statutory interpretation in the U.S. Supreme Court. Some of the more significant features of the book are these: a novel general framework for the systematic analysis of a wide range of types of interpretive argument; extensive analysis of particular types of argument; a finding that all nine countries in the project share a common core of eleven types of arguments; a discovery that conflicts between argument are resolved not only by weighing and balancing but also by resorting to other important techniques, including processes of cancellation; the identification of differences in interpretive practices and justificatory styles of opinion writing, and treatment of possible explanations for these (especially of an institutional kind). Among the early reviews of the book is one by Professor John Bell, who wrote in the *Oxford Journal of Legal Studies* that the book "will long be an essential and valuable resource for anyone seriously studying statutory interpretation". In another review Professor Theodor Tomandl of Vienna wrote that the book is a "pioneering" work that explores "major new dimensions" of the subject.

e) For the 1991-92 academic year, Summers was elected by the Cambridge Law faculty as the Arthur L. Goodhart Visiting Professor of Legal Science at Cambridge University. The Goodhart Visiting Professorship, tenable for one academic year, was founded in 1971 in honor of Arthur L. Goodhart who had been an academic lawyer in Cambridge and in Oxford, founder of the *Cambridge Law Journal,* Professor of Jurisprudence in Oxford prior to Hart, and Master of University College, Oxford. Visiting scholars appointed to the chair from Europe who preceded Summers include professors Andre Tunc of Paris, Folke Schmidt of Stockholm, Xavier Blanc-Jouvain of Paris and R. C. Van Caenegem of Ghent. From the United States, prior holders of the chair include professors John Fleming of Berkeley, Guido Calebresi of Yale, John Hazard of Columbia, Arthur von Mehren of Harvard, and Charles Alan Wright of Texas.

f) Summers has summarized the 1991-92 year in "An Academic Year in Cambridge" published in the *Cornell Law Forum* (1993). Much of his research that year was devoted to development of his theory that law is formal in char-

acter, and he presented the Goodhart Lecture before the Cambridge law faculty on this subject on December 4, 1992. This lecture was later published under that title in the *Cambridge Law Journal.* In the course of the academic year, Summers conducted a weekly seminar at Cambridge for graduate students on legal formality. The *Cornell Law Forum* indicates that he gave fourteen lectures and seminars elsewhere in Britain and on the Continent in that year, many on the subject of formality. In May 1992, Duncker & Humblot published his book entitled *Essays on the Nature of Law and Legal Reasoning,* a collection (as revised) of previously published articles, including several on formality in law.

17. In 1992-94, Summers completed, with his co-author, James J. White, two new volumes of the practitioner's edition of their treatise on the Uniform Commercial Code: a volume on Article 2A on leases, and a volume on Articles 3 and 4 and 4A on negotiable instruments and wire transfers. In May of 1993, Summers lectured at the celebration marking the 100th anniversary of Professor Karl N. Llewellyn's birth, held at the University of Chicago. In the fall of 1993, Summers and White began the process of assisting the Institute of Private Law in Moscow with the drafting of a new code of commercial law modeled in part on the Uniform Commercial Code. This project is also cosponsored by American Aid for International Development (AID), an organization of the United States government.

a) At present, Professor Summers is working mainly on three long-term book projects: the fourth edition of J. White and R. Summers, *The Uniform Commercial Code,* a book on statutory interpretation, and a book on what he calls the formal character of law. As he conceives the law, all basic types of legal phenomena are formal. Thus, for example, source-oriented criteria of legal validity (e.g., due enactment by a legislature), statutory and common law rules, accepted methods of interpretation, the principle of *stare decisis,* and adjudicative processes, are all essentially formal, though in differing ways.

b) So, too, are features of the legal system viewed as a whole. It is formal in its structure, formal in the coherence of its norms, and formal in its basic modus operandi, for example. Moreover, the appropriate formality of law, of basic legal phenomena, and of legal systems is justified by various general rationales for formality such as predictability, citizen autonomy and self-direction, avoidance of disputes, and equality before the law. Appropriate formality itself also tends to beget law good in content, and inappropriate formality or lack of due formality tends to beget law bad in content. These and related themes are neglected in modern legal theory, especially in the United States, and to an extent in Britain and Europe as well. According to Professor Summers, a book of the right kind here would not only contribute to the rehabilitation of formality in those systems where it has been neglected, but would correct a major deficiency in traditional legal theory. In the course of his work on

this book, Summers is drawing to some extent on ideas of formality articulated by the nineteenth-century German jurist Rudolf von Jhering.

c) In recognition of his work in contract law, commercial law, and legal theory, the University of Göttingen, on February 2, 1994, voted to award Robert Summers an honorary doctorate in law.

II.

Robert S. Summers is best known among his European colleagues as a legal theorist. He entered upon the post-war legal theory scene in the early 1960s. As he himself has written, at this time in the United States, tenets of philosophical pragmatism in the writings of John Dewey and William James, the sociological jurisprudence of Roscoe Pound, and the legal realism of Karl Llewellyn and others, had coalesced to form a relatively distinctive and dominant general theory of law which Professor Summers has called "pragmatic instrumentalism". Other major American developments in the general theory of law during the second half of this century have included what might be called the "legal process school" founded by the late Professors Henry Hart and Albert Sacks, the "rights thesis" of Ronald Dworkin and others, the "law and economics" movement associated with Richard Posner and Guido Calebresi, and, somewhat later, the "Critical Legal Studies" school, and its offshoots known as "feminist jurisprudence", and "critical race theory". Lon L. Fuller stood apart from such developments, practicing his own distinctive brand of secular natural law theory, including a reinterpretation of the ideal of the rule of law.

Elsewhere in the post-war Western legal world, legal theory evolved very differently. In Britain, Oxford analytic philosophy provided the leading models in legal theory, with Professor H. L. A. Hart the premier exemplar. On the Continent, Kelsenian positivism continued to be influential. There was a special revival of natural law theory led by, among others, Gustav Radbruch of Heidelberg. There were also developments in sociological jurisprudence in Germany and developments in realist jurisprudence, especially in Scandinavia. More recently, various theorists have refined legal thinking in terms of concepts of practical reason.

When Robert Summers became an Assistant Professor of Law at the University of Oregon in the early 1960's, he did not, either immediately or thereafter, subscribe to any of the various American movements in legal theory. He was specially influenced by Oxford analytic philosophy and by H. L. A. Hart in particular. At the same time, however, he was influenced by an adversary of Hart's, Lon L. Fuller, on whose life and work Summers has written extensively.

Although Professor Summers has done as much as any of his contemporaries to acquaint British, German, Scandinavian, Italian and other European thinkers with the distinctive American version of instrumentalist legal theory that he calls "pragmatic instrumentalism", he should not himself be classified as a subscriber to that type of theory. He has not even worked out very many of his own ideas and positions from the viewpoint of that type of theory. His writings on American instrumentalist theory have consisted largely of a scholarly effort to reconstruct, analyze and evaluate its leading tenets, and, where the theory was sketchy and incomplete, to suggest lines of further development. It may be that Professor Summers is best known in Europe for this work, which includes books in English, German and Dutch.

Rather than develop and refine an existing general theory of law, or attempt to work out a general theory of law of his own, Professor Summers has concentrated most of his creative theoretical efforts on more discrete problems of legal theory. His contributions here include a systematic account of the five basic techniques of legal implementation in any legal system (especially "The Technique Element in Law"); extended work on the nature of substantive reasons in law, itself a major branch of practical reasoning (especially "Two Types of Substantive Reasons"); elaborate treatment of what might be called the "morality" of commercial law ("Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code", "General Equitable Principles Under the Uniform Commercial Code"), a lengthy article on "process values", that is, values that may be realized in the course of the workings of a legal process but not necessarily also in its outcomes ("Evaluating and Improving Legal Processes"); a substantial treatment of the nature and limits of economic reasoning in judicial decision ("Economist's Reasons for Common Law Decisions"); and the systematic differentiation and analysis of basic modes of argumentation in the interpretation of statutes ("The Argument from Ordinary Meaning" with G. Marshall).

There is, however, one major exception to the generalization that Professor Summers has tended to concentrate his creative efforts on relatively discrete problems of legal theory. Over the last few years, he has been working out a more wide-ranging general theory of the nature, varieties, and importance of form and formality in modern legal systems. His interest in this fundamental topic did not originate in, but was certainly stimulated by, his collaboration with Professor Patrick S. Atiyah of Oxford on their well known book: *Form and Substance in Anglo-American Law* (1987). The current state of Professor Summers' work on legal formality is best seen in three articles: "The Formal Character of Law" (1992), "Der formale Charakter des Rechts II" in *Archiv für Rechts- und Sozialphilosophie* (1994), and "The Formal Character of Law III" forthcoming in *Rechtstheorie* (1994).

III.

Taking one's cues from the European practice, it is most unusual that a legal scholar would be honored with a *Festschrift* as early as his sixtieth birthday. It is still more unusual that the circle of friends and colleagues contributing to the *Festschrift* would stem from a dozen different countries, a truly international group. Legal scholars rarely enjoy much attention outside their own legal circles at home, and Robert Summers is the exception that establishes the rule. He is well known abroad, and his reputation there reflects a judgment on the part of the greater international scientific community about the high quality of his work.

The sketch of Robert Summers, whom we are celebrating with this *Festschrift,* would, however, be incomplete if one sought only to characterize the researcher and his work. All who know Robert Summers personally – and a good number of those who have contributed to this volume are close to him – value and appreciate his openness and enthusiasm, his boundless energy and vigor, indeed, his lust for life. His great warmth, his fairness in the give-and-take with those who challenge his views, and his ability to engage in self-criticism have won him many friends and admirers over the years. And last but by no means least: What would my friend Robert from Halfway, Oregon, be without Dorothy, their five children, and a growing brood of grandchildren?

IV.

I should like to add heartfelt thanks – in the name of the other editors, too – to all of those who have contributed to the *Festschrift.* Their collegiality and support have helped to minimize the burdens of the editorial work. Special thanks are due to Dean Russell K. Osgood, Cornell Law School, for support on a number of fronts. Special thanks, too, to Professor Herbert Hausmaninger, Vienna, and to Professor Stanley L. Paulson, presently in residence in Göttingen, for translating a number of papers into English and for refining the English of other papers.

What with fairly severe constraints on time, not everyone who was invited to contribute to the *Festschrift* was able to do so. Still more painful for the editors – not least of all with an eye to the range of themes and problems examined here – is the fact that they were by no means in a position to invite contributions from all of those with whom Robert Summers has worked and exchanged ideas over the years. This note of regret has particular application to Robert Summers' European colleagues, who are, I am afraid, not as well represented here as they ought to be.

I should like to thank the publisher Duncker & Humblot GmbH, in Berlin, above all, its director Professor Norbert Simon, who generously support this

volume from its inception. The publisher, too, takes special pleasure in celebrating Robert Summers!

I thank, too, my assistants in Münster for their valuable help in the work on the *Festschrift,* especially Dr. Petra Werner and Andreas Schemann. My secretary, Andrea Freund, deserves warm thanks for her tireless efforts in seeing the manuscripts to the press. The painstaking work of reading the proofs was undertaken by Markus Ausetz and Matthias Neeb; they, too, have my special thanks.

Münster, March 1994

Werner Krawietz

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I. Definition and Theory in Jurisprudence Reconsidered

Is Legal Science a Social Science?

By Aulis Aarnio, Tampere

I. Background

1. Sometimes one sees definitions according to which everything that studies *society* is a social science. This kind of definition rings hollow when the social scientific nature of legal science is considered. The definition says nothing about research or society. Nor does a standard definition which is based on the *research object* (the social, economic or political sphere) solve the question set in the title. According to this kind of definition, law is a field of "its own nature" which is not covered by social science.

Traditional characterizations of legal science do not make the issue less problematic. In particular, certain trends of legal positivism have wanted to "abolish" such elements in law which are of interest in the social sciences. This abolition has included morals as well, and thus the philosophy of values has been excluded from legal science. *Hans Kelsen,* among others, represented such a "pure" legal science. At the other extreme, there are theories which hold that legal science should be *restored* specifically to the empirical social sciences. Representatives of German "sociological" trends were among the many who followed this line of thought at the beginning of 1900s. In Finland, similar kinds of notions arose as late as the 1970s.

2. My strategy is not to *define* (stipulatively) either social or legal science so that the dilemma could be solved per definitionem. Reality does not follow a theorist's definitions. Thus, I neither accept the traditional definition of the object field of the social sciences nor commit myself to any specific endeavor to restore legal science to the social sciences. Although it may be paradoxical, my conception of the issue rather closely resembles Kelsen's way of thinking but on a different basis. Though my conclusions are somewhat similar to Kelsen's interpretations, one should not, however, generalize this to concern anything other than the relation of my theoretical approach to the "pure legal science".

Instead of rendering precise definitions, the aim here is to delineate the *rational reconstruction* of social science, on the one hand, and of legal science, on the other, in order to obtain that mutual "core" which the social sciences as social sciences and legal science as a social science share. In other words, to

discover the linkage which combines research on different sectors and problems.

As mentioned above, a broad definition of the social sciences (that is, the notion that everything which studies society is a social science) is useless if nothing is said concerning the *concept of society* under consideration. When we try to specify this concept we will immediately be confronted by the statement: society *as such* does not exist. Society is a combination of various kinds of individuals, interest groups, etc., all of which have their own expectations, roles and function models. Society is nothing but interaction between people and society and – as *Kauko Pietilä* has expressed it – society is always "present" when there is interaction between people. This is also why the genuine research object for social science is interaction, it lies within those processes which create *consistency* in the eternally changing relations between people.

Thus, society *as such* is not an *ontologically* empirical object to which the propositions refer. One cannot observe society itself (an sich), only phenomena in which society is "present" can be objects of our observation. This is why, in the ontology represented by *Karl Popper,* society is a concept of a higher order than the world 1 consisting, for example, of physical objects and human beings. Society is a *theoretical object* manifested in the phenomena observed by empirical research.

If this is accepted as a point of departure, the following argument by Kauko Pietilä can be taken as a vantage point in further elaboration. He says that the research object of social science is, in the true sense of the word, the kind of sociation (Vergesellschaftung) that is present in certain behavior (interactional phenomena) of people. Thus, social science is studying people's activity as a specifically *sociating* activity, not as separate phenomena such as leisure behavior, health care, education, etc. Social science asks: what kind of society is born in this behavior, in the interaction between people?

People interact with each other as individuals, groups, institutions, etc., and it is essential to study those linkages and mediating mechanisms which make interaction social. In a way, society *exists* in those interaction relationships.

This is what Kauko Pietilä implies when he says that social science should not study phenomena as embedded in a society, but society as existing in the phenomena. The field of the social sciences (for example, sociology) should not be fragmented into the sociology of sports, health care, education, etc., but one should try to find the very element which unifies the fragmented object field of the social sciences. Hence, criminology is not a social science only because it studies a phenomenon thought to be social-scientific, namely crime. It is social science if and only if it analyzes – if ever – *society* which exists in this phenomenon. In this case, the social facts are studied as *social interactions which generate society.*

In the following the problem will be outlined against this conceptual-theoretical background. Let us ask: in what specific sense legal science is or can be social science if social science is reconstructed to be research on social interactions which generate society? In answering this, a short introduction to the reconstruction of legal science is necessary.

II. On Legal Science

1. For hundreds of years, the task of legal science in the *social division of labor* has been connected to (legal) *norms.* In a certain specific sense, legal science studies the valid system of legal norms in society.

From this point of view, it would be justified to discuss legal science in its plural form. The legal sciences include *legal dogmatics* (in German: Rechtsdogmatik), abbreviated here as *LD;* legal history, the sociology of law and comparative legal science. The oldest and most overwhelmingly essential of these is LD. It is based on Roman Law but its origin in the present sense can be rather reliably dated back to 1099. At that time, the first faculty of legal science was established in Bologna under guidance of *Irnerius.*

In the following, the analysis is condensed solely to the "social character" of LD. Thus, the question in the title can be defined more precisely as follows: is LD a social science? This dilemma is especially relevant because the main part of the research conducted in the world under the name of legal science is specifically LD. There is also an obvious reason for this.

The tasks of LD have been and still seem to be determined by society because LD obviously satisfies a constant social interest of knowledge, in other words, the need to know something about the *substance of the valid legal order.* This answers the question: what are the binding legal norms in society?

2. Thus, the social role of LD was already established at an early stage, and until today, this role has determined not only the social but also the *scientific function* of LD. To understand its scientific function one has to outline, on the one hand, its *task* and, on the other, its *object.* The tasks of LD are:

(i) to clarify the contents of the valid legal norms, i.e. the *interpretations* of statutes etc., and

(ii) the systematic (re)organization of legal norms, i.e. the *systematization.*

3. Through the tasks characteristic of LD, its object is determined, and additionally, the way in which it deviates from the other branches of the legal sciences. Although both LD and the comparative study of law analyze norms, the distinction is clear. The comparative study of law is interested in the substance of *foreign* norms and LD in valid law. Legal history focuses its studies on the norms (or institutions) which *have been valid* in the past.