BOOK REVIEWS

LON L FULLER *by Robert S Summers* (William Twining (gen ed), *Jurists : Profile in Legal Theory series,* Edward Arnold 1984) pp 174.

The earlier books published in Professor Twining's series were concerned with Herbert Hart, John Austin and Max Weber respectively. Summers' study is devoted to Lon Fuller, Carter Professor of General Jurisprudence at the Harvard Law School from 1948 to 1972, and a major 20th century legal theorist by any standard. Summers has tried to interpret Fuller's work by placing it in the context of the period in which he lived and worked and by highlighting the enduring contribution which Fuller has made to the progress of legal thought. Occasionally Summers has also attempted to carry Fuller's argument further by completing a line of reasoning which Fuller left unfinished or by adducing additional supporting arguments for a jurisprudential position adopted by Fuller. Overall this book contains a careful critical evaluation of Fuller's work, all the more welcome and important because that work is scattered in law journals and a number of short monographs. Fuller did not find the time to sum up his legal philosophy in a comprehensive and definitive treatise.

Robert Summers of the Cornell Law School is himself a noted legal theorist. He is no stranger to Australia where he worked and lectured for some months in 1977. His own jurisprudential orientation owes so much to Fuller that the writing of the book was obviously a labour of love for him.

The book opens with a brief account of Fuller's life, of the various positions he held and of his continuing influence in the United States and beyond.

Chapters 2-5 explain Fuller's contributions to many of the great issues of legal philosophy. Fuller read Jhering's writings early in his career and thoroughly endorsed and developed further Jhering's view that purpose plays a major role in the law. Fuller saw the whole of the law as an essentially purposive enterprise through which many human aims and values are realized and vindicated. Summers gives due prominence to Fuller's famous eight procedural postulates which must be observed in practice if a legal system worthy of the name is to be maintained: law must be general, promulgated, prospective, intelligible, free from self-contradiction and must possess a measure of constancy; further, it must not demand the impossible and must be administered in a way which is congruent with its wording. The book further explains Fuller's opposition to a sharp differentiation between law and morals and his strong commitment to many of the values espoused by the natural law tradition. Whilst rejecting the more extreme variants of the natural law tradition (such as the view that there is an infinitely detailed "code of nature" to which all positive laws must correspond), he believed that many precepts of the law flow from the facts of human nature and from human reason which he saw as providing many objectively determinable, legally relevant standards. As Summers says (at 65): "Fuller's stress on the force of reason and his faith in reason were perhaps the most recurrent themes in all of his writings."

Chapters 6-8 show that Fuller's conception of "law" was complex and, perhaps, idiosyncratic in some respects. It accords with his anti-positivist bias that he tried to move as far as possible away from the Austinian position that all law somehow emanates from agencies of the State. Instead, Fuller saw much of the law (particularly of the common law) as simply an outflow of reason and considered a further vast body of law, in particular customary law and contractual arrangements, as flowing from interactions between private individuals. One problem with these views is that private contracts are not usually regarded as part of the legal system. Another problem is that customary law, though admittedly traditionally recognised as law, has fallen out of favour in most modern industrialized countries (though certainly not everywhere) almost to the point of obsoleteness, partly because of its inherent uncertainty, partly because customary practices in almost all areas of human life have become so unstable. One wonders whether Fuller, when he immersed himself in a large, but outdated, literature on customary law, was not out of touch with the legal reality of modern life. Summers does not make this criticism of Fuller; he is content to observe (at 48) that "Dworkin and others" do not consider customary law to be of great importance in the American legal system.

Fuller also examined "managerial direction" as a process of social ordering, particularly insofar as it emanates from governmental agencies. He thought, no doubt correctly, that legal systems depend very heavily upon such processes, but he does not seem to have taken the step of defining "managerial directives" as part of the law. That leaves us with the conventional forms of law, ie legislation and common law, and these were subjected by Fuller to astute scrutiny. His analysis of common law (he called it "adjudicative law") which he regarded mainly as an application of reason and only to a small extent as based upon *fiat,* shows Fuller at his most typical and also at his best.[1] Fuller gave particular attention to the processes by which the various forms of law come into being and sought to identify and delimit the social problem areas to which each of these processes is most appropriately applied (see particularly the account, at 97-100, of Fuller's work on "limits of adjudication", especially the problem of "polycentricity").

Fuller was a legal educator and shouldered his fair share of work in technical areas. Summers pays due tribute, in chapter 10, to Fuller's important scholarly contribution to contract law. Some of his contract articles, particularly "The Reliance Interest in Contract Damages" [2] have become classics and are frequently referred to in all common law jurisdictions. His casebook also seems to have endured, but its impact has understandably been limited to the United States.

It is not surprising to learn, in chapter 11, that Fuller also did a good deal of valuable and still influential work in the area of curriculum reform, his main concern having been to break away from the single-minded and exclusive pre-occupation of law teachers with appellate judgments in favour of more balanced concern with other forms of social ordering.

1 See particularly, "Reason and Fiat in Case Law" (1946) 59 Harv LR 376.
2 (1936) 46 Yale LJ 52, 373.

difficult to imagine him quarrelling seriously with the second of these postulates. His attacks were sometimes aimed at doctrines which, whether they were ever actually entertained by anyone or not, do not really bear critical scrutiny, whether from a natural law or any other position.

Summers thinks it likely (see 70) that Fuller misinterpreted the philosophical doctrine that "no ought can be derived from an is", creating a man of straw incapable of offering effective resistance when Fuller launched his attack upon him. Summers mentions no further examples of such an unfortunate procedure, but I should like to offer two more.

Fuller once charged that legal positivists are only interested in law as a finished product and not in the various processes by which it is generated.[7] It is difficult to imagine a positivist with any sense adopting such a position, for law inevitably derives some of its qualities as a finished product from the process by which it is generated.

A more serious instance is Fuller's assertion that legal positivism and legal formalism or conceptualism tend to go hand-in-hand.[8] It is difficult to see why that should be the case. Conceptualism appears to be the doctrine that genuine solutions to novel legal problems can be and should be derived from the logical and conceptual implications of the terms in which the legal system is already expressed. To the extent that such a procedure yields useful policy analogies, it may be defensible, but the writers of the school of interest jurisprudence have shown conclusively that, carried any further, such an approach is nothing more than an empty *petitio principii.*[9] Positivists can benefit, and have benefited, from this insight just as much as have the adherents of other jurisprudential schools. The alternative to conceptualist interpretation of law is the teleological method, an interpretation which resolves linguistic ambiguities in a way which promotes the policy or purpose upon which the provision or rule being interpreted is based. Fuller seems to have thought that no legal provision or rule can ever be applied or interpreted without reference to purpose,[10] and seems thus to have overstretched the function of purpose in the law. Fuller attacked Hart's distinction between core meaning and penumbra[11] and Summers seems to join in that attack with unmitigated enthusiasm.[12] Neither writer adduces convincing arguments for this attack. When in a less polemical mood, Fuller was quite aware of the existence of some limits to purpose-oriented application and interpretation, as is shown by the following statement: "The citizen preparing his income tax may properly ask his attorney how the Revenue Act will be interpreted and enforced, not how he may most effectively co-operate in helping to achieve its purposes." [13]

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7 "The legal positivist concentrates his attention on law at the point where it emerges from the institutional processes that brought it into being. It is the finally made law itself that furnishes the subject of his inquiries. How it was made and what directions of human effort went into its creation are for him irrelevancies." *Anatomy of the Law* (1968) 160.

8 Summers explains Fuller's views on this subject at 23.

9 See Schock (ed and transl), *The Jurisprudence of Interests* (1948).

10 See "Positivism and Fidelity to Law — A Reply to Professor Hart" (1958) 71 Harv LR 630, 661-669.

11 Ibid.

12 See the last chapter, particularly 155.

13 "American Legal Philosophy at Mid-century" (1954) 6 Journal of Legal Education 457, 464.

Summers attempts to establish Fuller's essential jurisprudential orientation by endorsing (see 62-73) the widely held view that Fuller was "uncompromisingly anti-positivist" and that he was "the leading standard-bearer of secular natural law thought". Fuller might not have objected to having these labels pinned on him for he found much in the natural law tradition which attracted him and much in the philosophy of legal positivism which he rejected. The problem with these labels, however, is that they emphasize the polemical aspects of Fuller's work at the expense of his really more important work as an astute and painstaking observer and analyst of legal phenomena and of their underlying fundamentals in his own and in other legal systems. That side of Fuller is apparent in the sense of awe which he felt when he pondered the "mystery [which] surrounds all biological phenomena which seem to project themselves from within the organism".[3] He enhanced our understanding of that mystery with his definition of the law as a "collaborative articulation of shared purposes".[4] Given due emphasis upon Fuller's positive, unpolemical and very original contribution to legal knowledge, Summers could have avoided these labels. Instead, he might have said of Fuller what Fuller once said of Cardozo: "his philosophy ... without being merely eclectic, remained outside the arena of clashing doctrine ... His insight was too rich and varied, his method too flexible and too finely modulated to the task at hand, to make it possible for him to feel comfortable under the banner of any philosophic faction." [5]

Fuller encountered positivist legal thinking at a time when it seemed to have all but vanquished the natural law tradition and when its triumph was occasionally proclaimed in terms of strident invective. An early and not atypical example is Holmes's pronouncement that his own supposedly sober and realistic analysis of contractual duties "stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can".[6] When young academics find their seniors conducting learned argumentation in this fashion, they are likely to feel called upon to adopt a partisan tone themselves. Natural law was the underdog and excited Fuller's sympathy. He formulated a moderate, secular version of the theory of natural law and defended it against the then superior forces of positivism. It does not seem to have occurred to him that he should first have subjected legal positivism to a similar process of sympathetic interpretation, stripping it of all the untenable assertions, distortions and misunderstandings which it had attracted in its short but triumphant career. Would he then still have attacked it?

A doctrine of legal positivism in keeping with the postulates of Comte would make two essential claims: (1) that religious and metaphysical explanations of legal phenomena are mistaken, and (2) that the only valid way of explaining the nature of law is to rely upon patient observation of the way in which law develops and functions in fact. Fuller would have endorsed the first of these postulates, as would, one suspects, the vast majority of modern lawyers who have given some thought to the problem. Fuller was such a wonderfully astute observer of the law, and in particular of the American legal system, that it is

3 "Human Purpose and Natural Law" (1958) 3 Natural Law Forum 68, 72.
4 Ibid 73.
5 Supra n 1 at 376.
6 "The Path of the Law" (1897) 10 Harv LR 457, 462.

Fuller thought that a teleological approach to interpretation could not be reconciled with the tenets of legal positivism. However, it seems undeniable that the purpose-oriented method of interpretation raises issues quite independent of the natural law/positivism dichotomy. Patterson, in a comment on some of Fuller's published work, once observed: "The teleological or purposive interpretation of statute or case law is not ... an exclusive property of natural law." [14] That comment seems entirely correct and lacks nothing in clarity, yet Fuller attacked it as hopelessly obscure,[15] perhaps revealing one of his jurisprudential blind spots. One regrets that Summers did not examine this important question in greater depth.

Despite the critical comments which have been made, the fact remains that this book gives a clear and convenient account of Fuller's many insights into the nature of law and of legal processes. It is recommended to all lawyers who aspire to be more than mere legal technicians.

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MEDIA LAW IN AUSTRALIA – A MANUAL *by M Armstrong, M Blakeney and R Watterson* (Oxford University Press 1983) pp x, 274; **ADVERTISING REGULATION** *by S Barnes and M Blakeney* (Law Book Co 1982) pp lii, 612; **GUILTY SECRETS – FREE SPEECH IN AUSTRALIA** *by R Pullan* (Methuen Aust 1984) pp 232; **THE VISUAL ARTIST AND THE LAW** *by S Simpson* (Law Book Co 1982) pp xiii, 182.

Writing in book form on media law in Australia is not the easiest of tasks. Those who essay a generalist approach as with *Media Law in Australia* must attempt to examine a daunting range of Commonwealth and State laws, the interacting effects of regulatory agencies like the Australian Broadcasting Tribunal and such things as the operation of self-regulatory practices which apply in varying degrees to a range of media outlets, which has few parallels elsewhere in the world. By the same token, others who set out to explore more limited aspects of media control as in *Advertising Regulation* or *The Visual Artist and the Law* can find it difficult, generally impossible, to eschew aspects of the more general working of the law in their presentations. One reason for this is that the law on any specialised topic relating to the media can rarely be isolated from others. Added to this, the situation is generally exacerbated by the requirements of book publication in Australia and the range of persons who need a practical, working knowledge of the law operating in this context. To be commercially viable, most publications in this area need to reach out beyond the normal range of traditional legal publications. There is also a practical need for working editors, writers and many others to have a meaningful understanding of the law in this field for a host of everyday reasons, not least in the case of journalists the rush of deadlines for daily newspapers and the almost simultaneous transmission of rapidly breaking news on the electronic media. Subsidiary to this, but no less important in the long run, the media professional is often an opinion maker, or aspires to be one, on the operation of the

14 See ibid 471, n 25.
15 Ibid.

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law in this field, as Robert Pullan shows in his *Guilty Secrets.* Such publicists and those who consider their writing require an acceptable understanding of the law on the media to ensure that reasonable balances can be set in the protection of freedom of expression without confusion and wrongly placed misapprehension on the nature of the laws they place under scrutiny.

Media Law is a brave but not completely successful attempt to provide a broad ranging "manual" on the subject. It is aimed primarily at "all those who work in the media, or deal with the media, or study them", as its Preface sets it out. Refreshingly, the authors set out to avoid oversimplification compared to some overseas publications in this field. They affirm, quite rightly, that principles and case-law are as relevant to media practitioners in developing their understanding of the law, as they are to lawyers. Unfortunately, however, there is too often a nagging lack of precision in the coverage of a number of topics which limits the value of their efforts to achieve this. On the law of civil defamation, for example, Sawer's now outdated *Law for Journalists* demonstrates that much more of a practical but still principled guide to the law on this topic is possible even within strict limitations of space. Burrows's *News Media Law in New Zealand,* although more ambitious in scope, also demonstrates just how topics such as the criminal law as it applies to the media might have been treated more effectively. The growth of the law on breach of confidence and the significance of this for the practising journalist also hardly receives the attention it deserves. It is surprising, too, that while several English cases on the subject are examined in some detail, at least two important ground-breaking Australian cases are seemingly neglected. More attention could also have been given to the range of laws applying to the media and their significance than sometimes appears to be the case. There may, for example, have been few prosecutions for criminal defamation in Australia in recent years but the mere existence of the law on this can provide a daily, practical limit on journalistic activities which deserves more attention than it receives here. Nevertheless, provided this volume is not treated as the last detailed word on the subject-matters it covers or a full compendium of the laws applying to the media it is a valuable starting point for those who need to learn of the basic elements of media regulation and how it works in this country.

Advertising Regulation and *The Visual Artist and the Law* are both major contributions to the literature on Australian media law. Barnes and Blakeney should become the basic, much used treatise on the subject of advertising for legal practitioners and other professionals working in this field. It is a monumental tome, well researched and presented with skill. It starts out with an examination of advertising control at common law moving through to discussions on modern governmental regulation, including detailed examinations of the Trade Practices Act and the labyrinth of State laws which affect advertising. To cap this off, advertising self-regulation is well explored, supplemented by extensive appendices which set out voluntary advertising codes such as those of the Media Council of Australia and the Advertising Standards determined by the Australian Broadcasting Tribunal. With all this, the authors demonstrate an acute awareness of the social relevance of advertising and its constant interaction with the requirements of regulation in a modern consumer society. The final chapter which evaluates advertising regulation in this country in its various forms deserves the careful attention of

legislators and the members of the advertising industry alike. *The Visual Artist and the Law* is a much more modest volume. Over-all, it sets a neat balance in providing a range of valuable material on the subject for both lawyers and others. For the non-lawyer it puts the topic into perspective with discussions on such matters as the law of contract, defamation and copyright. At the same time, the examination of matters such as artist-dealer/gallery relationships, the commissioning of art works and the inclusion of precedents on standard loan agreements, print makers' contracts and other arrangements provides an important guide for legal practitioners on the intricacies of dealings in this area which up to the present have not been so readily accessible. Along the way, more controverted issues such as the extent to which visual artists should have long-term, moral rights over the use of their work are dealt with sympathetically and perceptively.

Robert Pullan's *Guilty Secrets* is generally a good read. Where it explores the efforts of governments and others from colonial times onwards to shackle public debate on important issues it is well researched and has an important story to tell which deserves an honoured place in discussions on the reality or otherwise of freedom of expression as it operates in this country. But where the author has his heart on his sleeve, bemoaning the lack of media freedom in this country, as he views it, he betrays a lack of depth in his analysis which makes a good deal of what he asserts far from convincing. There is too much reliance on rhetoric and shibboleth about the existing state of media law in this country which detracts from the strength of the case he is purporting to make, particularly in relation to the reform of the law on defamation. The law as Pullan portrays it is not always as bad as he sets it out to be. There are manifest defects, not least in the impact of the differing legal regimes applying in the field of civil defamation and the considerable body of evidence which suggests that libel claims have increasingly become the preserve of public figures. But it remains very much of a moot point, despite what Pullan asserts, that the existing law on defamation provides the style of inhibitions on public debate which he claims. There is also an understandable and valid case for new forms of control to protect privacy against media intrusions which are not accorded the weight which many would think this deserves. Pullan also shows an almost myopic reverence which he and others have accorded to the protection given to the media under the First Amendment to the United States Constitution. This hardly rests easily with the reality of what goes on in that country. The so-called "public figure" doctrine developed under the First Amendment by the United States Supreme Court might meet some of the concerns which Pullan expresses with respect to the present working of the Australian law on defamation. But the uncertainties it has created for the media, the high even extraordinary damages awards which it may have helped to precipitate in a number of instances, are hardly the results which Pullan is seeking from reforms in this area of the law. He does not acknowledge sufficiently either the important growth of privacy rules affecting the media in the United States which might cloud a little the rosy-hued spectacles he seems to have put on in looking at his media utopia across the Pacific.

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