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PRIVATISATION, JURISPRUDENCE AND SPACE

by

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Abstract

The rapid development of private and commercial activities in space, together with the privatisation of activities formerly conducted by state agencies and international organisations, presents problems. Although their insights are important, the theories of the major 'Realist' schools of Jurisprudence, the Scandinavian and American, are inadequate explanations of legal activity. What purports to be a reliance on the doctrines of Adam Smith, ignores the context and presuppositions of the age in which he wrote. In relations between governments and space industries, a broader doctrine is necessary.

1. Please note

Please note that, in what follows I am not endeavouring properly to expound the views, doctrines or dogmas that are mentioned. Some may well consider that I misrepresent them. That is not the point. I am seeking to indicate the practical effect of the misunderstandings and misapplications of these views, doctrines and dogmas by those who appeal to them expressly or otherwise in their justification of business activities and practices. In a sense, and to my amusement, I am being a Realist, in a way I never imagined I would when I used to teach Jurisprudence.

Please note also that I am not arguing against privatisation. Private enterprise and fair competition provide many benefits in enterprise, efficiency and economy. The thrust of this paper is that these benefits should be available for all, as required by Art. I of the Outer Space Treaty, and similar statements, and should not be dissipated through ruthlessness self-seeking and attitudes towards law which can shelter behind phrases and slogans drawn selectively from economic and legal theories.

2. Privatisation

Those of us whose imaginations were reared on science fiction of the 1930s, 40s and early 50s are familiar with tales in which the hero built his own space-ship and set off at will on voyages of discovery. E.E. ('Doc') Smith's *Skylark* series comes to mind.[1] But, to our regret, when the real Space Age opened, it was quite apparent that only states, groups of states or international organisations would be able to afford entry to the new arena. The technology of launchers was expensive. It was also, by reason of its

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military connection, largely secret. Further, although scientific investigation was, and remains, a very important element of space activity, the two main areas of space development, remote sensing and telecommunications, were also enveloped by state interest. Remote sensing does not distinguish 'sensitive' from 'non-sensitive' information. Military considerations being paramount in the Cold War, governmental exclusivity and control of what was to be made publicly available, was felt to be important. The attitude to telecommunications had a longer root. Although the nineteenth century efforts in telecommunications were made by private inventors and companies, by the time space telecommunications became feasible the state was paramount. With the exception of the US, all countries considered that the provision and maintenance of telecommunications was a governmental responsibility, to be carried out as a monopolistic public service function.

Such was the position in the 1960s, 70s and into the 80s, but things altered in the 90s. Change has not been universal, but it has been sufficiently wide to shake and indeed to subvert prior assumptions, expectations, institutions, procedures and results. We live in an era where state activity has been (formally at least) rolled back, not only in space matters. Privatisation is expected. Commercialisation is the watch-word. In many countries now, when there is a choice between providing a public service by an organ of the state or by a commercial company, the expectation is that the commercial option will be chosen. The views of Reagan and Thatcher figure large, and have affected even those who opposed their policies when they were first put forward.

Two strategies have been adopted. First, some commercial entities have been created *de novo* to engage in various space businesses. Second, activities, formerly those of the state, such as Landsat, or intergovernmental bodies such as INTELSAT and INMARSAT, have been or will be privatised. Services, formerly provided in the public interest (i.e. 'public services') have been re-classified as 'services to the public' to be provided by undertakings whose ultimate interest is to run these services so as to derive profit from charges to their users. The profit goes to those whose capital provides the infra-structures and personnel which provide the service. It follows that in a healthy business, all elements of that business should identifiably contribute to the overall profit of the undertaking. Normally there is nothing to require a company to continue to provide a service which is not profit-making. Indeed there are strong pressures to withdraw non-profit-making services, for, if a company persistently trades at a loss, it will go out of business, and may indeed go into bankruptcy to the prejudice of its creditors. The liability of those who provide capital in the normal corporate structures, is limited to the extent of their capital contribution.[2]

The turning over of space activities to the private sector has made the commercial element of these activities fundamental to choices as to the services to be provided and the businesses in which to be engaged.. It also often involves questions of competition and monopoly. Where there is a provider and a user or purchaser of good or services, there is a market.

3. Competition and Monopoly

A current dogma is that competition within a market-place makes for efficiency on the part of those active within it, because loss-making or a failure to maximise profit can often be traced to inefficiency. Further, competition encourages innovation, as market-members strive to do better that which provides profit, and to invent new profit-making activities. Both outcomes are beneficial to the users (the customers) of the business.

In monopoly, the stimuli ascribable to competition are lacking. Inefficiency can be fostered. There may well be a degree of over-staffing by under-employed personnel. Prices of goods or services can be inflated, especially where the business is (or is thought to be) essential. Telecommunications was (it is said) a prime example of inefficiency, of failure to embrace new technologies and introduce new services, and of over-charging the customer for the service which was provided. And, of course, monopoly has a further danger. It is well-placed to discourage competition.

Many legal systems have sought to strike a balance between competition and monopoly. In the US there is the Sherman-Clayton Act and similar. In the UK we have the Monopolies Commission. The European Union (itself an intriguing thing to cite given the resignation of the Commission in 1999, and the EU reputation for a degree of inefficiency and overstaffing) pursues the matter of fair competition within the member states of the Union. Clearly the justification of such powers is that, while competitiveness may be a human characteristic, competition tends to eliminate competitors, and fairness is not a quality automatically to be found in competition.

4. Ego

An unacknowledged element in the modern privatised commercialised competitive arena should also be identified: the ego. While it is doubtless true that some engage in the 'space business' for altruistic reasons, others do not. Managerial skills are transferable across various businesses. The attraction of 'doing deals' is powerful. Let us not forget that the ego of the businessman, of the manager, of the empire-builder, will drive him or her on. And this is important for this paper. I will argue later that a particular approach to law is deleterious. In many modern societies, there is no longer a common religious base that is prescriptive of canons of acceptable behaviour. An understanding of (or even some familiarity with) basic questions of philosophy is no longer present. In post-modernism the ego is paramount. No-one may criticise, or apply ethical standards, for there is no basis for ethics, nor any ground for making such judgements. The ego may therefore not only be paramount; it may be unfettered.

5. Adam Smith

The 'patron saint' of the idea that the free market best serves the interests of all is Adam Smith (1723-1790), the Scot whose *Inquiry into the Nature and Causes of the Wealth of Nations* was first published in 1776.[3] Educated at Glasgow and Oxford Universities, Smith had an interesting career, being at different times a Professor of Logic, of Moral Philosophy, Commissioner of Customs (Taxes) in Scotland, and tutor to the young Duke of Buccleuch. It was during that latter employment (begun at age 43) that Smith travelled widely, staying with his charge for a period in Toulouse, Geneva and Paris. He knew Gibbon and Burke, Turgot and d'Alembert, and was a great friend of the philosopher, David Hume. Apart from economics, Smith also wrote on Philosophy,[4] and his lectures on Rhetoric and Belles Lettres,[5] as well as on Jurisprudence[6] have also been published.

Smith's analysis of the *Wealth of Nations* was seminal. While not the founder of Political Economy, his work gave it an impetus and coherence which it has not lost.[7] His analysis of how a country's wealth is to be assessed, and how it comes about, is systematic. The division of stock into immediate consumption and capital, and the use of capital into fixed and circulating capital was illuminating. Productive and unproductive labour (with lawyers, clergy and doctors falling into the unproductive category) are illuminating classifications. Trade, of course, is a way in which capital is used. In the Fourth Book of the *Inquiry* Smith discusses freedom of trade, though not requiring it as a matter of dogma. He

saw the necessity for measures of protection of industries and enterprises on appropriate occasions - e.g. when confronted by tariff walls, or threatened by what we would call 'dumping'. However, he did reckon that the 'mercantilist' approach, with many and often unjustifiable controls on trade, was not as satisfactory as free competition. In the Fifth Book, the longest of the *Inquiry*, Smith considers it proper that the expenses of the sovereign should include paying for what we would today call public services, including defence, the administration of justice, and the education of the populace. In our terms, 'the State' had important duties and responsibilities, and had to be adequately funded to meet these in the public interest.

That said, the overriding drift of his thought does seem to be that of governmental non-intervention in trading matters, intervention being justified only by necessity. The market, in which each acts according to his own self-interest, is most likely to increase the over-all wealth of a nation. The free market will produce the most economical services and goods.

We may note, however, that Smith's notions were founded on an understanding of the society and history of his times. The economic scene of which Smith wrote was far different from the one we face today. He was writing prior to industrialisation, and before technology had proliferated. In his day the multi-national or the conglomerate company such as may well turn up in the space business, was unknown.[8]

Of course Smith's ideas have been discussed, refined, challenged and re-asserted many times in later centuries, on occasion, one may feel, without the original text being scrutinised. Of his ideas, it is, of course, that of non-intervention by government which has been erected into a principle by those who most favour private enterprise unshackled by state regulation.

6. Jurisprudence

The word 'jurisprudence' has a number of meanings. The 'jurisprudence' of a court is the series of decisions that it makes, a series which, one hopes, contains a sufficient degree of consistency to allow principles to be discerned. This is not the meaning of 'jurisprudence' I am using in this paper, although it intriguingly does relate to the concern of American Realists.

For my purpose jurisprudence is 'theory of law'. Of course, there are many theories classified into a number of schools. Sociological, [9] economic, [10] historical and anthropological[11] jurisprudences all contribute their insights into the nature, function and functioning of the 'law' which is the business of lawyers. Positivism concentrates on law as it is (*positum*), clarifying concepts, and seeing Law as set by a superior.[12] The 'is' of law is its concern, not what law 'ought' to be.[13] Hans Kelsen's Pure Theory of Law takes such an approach to its furthest.[14] Other theories take a different approach. Natural Law theories trace law to God, or to axiomatic principles arising from the nature of man, [15] and may argue that law is binding (that is that it has to be obeyed) only in so far as it properly expresses revealed or axiomatic truth.

All such theories have something to teach us. But the problems with jurisprudence (as with theology) can be first, that the technicalities of debate may well be misunderstood, and second, that as they argue terms and concepts, the exponents of jurisprudence lose sight of the concerns of ordinary folk. The theory becomes remote from the practice of its subject. Worse, the theories may be misunderstood and segments of them misused or misapplied.

7. Realism

It is simplistic to suggest that the theories of law known as Legal Realism have been developed in reaction to the more philosophical or theological theories. But

that statement will do for our purposes. Legal Realism wants to get away from notions of a Natural Law, on sociology or on history and anthropology, on economics, or on abstract reasoning. Realism is concerned with what actually happens in the legal arena.

7. 1 Scandinavian Realism

Of the two schools of Realism, Scandinavian Realism is the less attractive and is the more academic. Axel Hagerstrom,[16] Karl Olivecrona,[17] Alf Ross[18] and Vilhelm Lundstedt[19] in various ways present 'law' as a way in which some manipulate others to act as they would have them do, often without the need for actual physical coercion, but with the ultimate sanction of organised force if necessary.[20] Law can be seen as disguising organised force, and inducing behaviour through the use of predisposing language such as 'obligation'. The 'binding element' of law, the 'obligation' is unreal, but effective, whether it is instilled by 'word magic', or conditioning. Law is used to produce results by those who can make the law, whether by legislation or by the determination of cases in a court. The concepts of law are tools for decision-making in accordance with what those exercising power wish. What is decided is what is important.

7.2 American Realism

That 'what is decided is what is important' is also the fundamental thrust of American Realism.[21] In my view, it is the primacy of that notion together with its interaction with two correlative notions which is corrosive and corrupting. The first correlative to which I refer is that idea that, until a matter is decided it is uncertain, and it is proper, not to say mandatory, to seek to have a matter decided in the way that best serves one's own interest. The second is that if you don't like the result you seek to have it overturned, by getting the law changed if necessary. Law is therefore something to be moulded as best suits one's interests.

How have we got here? I see faultily comprehended American Realism as one cause.

But before explaining that, I would state firmly that any other theory of jurisprudence can similarly be misconstrued or misapplied. Thus, a strict positivist analysis of law can be useful, establishing a chain of authority, say, through a hierarchy of norms, as in Kelsen's Pure Theory. But strict positivism alone leaves no room for the condemnation of such crimes as genocide. And that result is unacceptable. It stems from a faulty comprehension of positivistic theory, which deliberately excludes the content or effect of a norm, erecting the self-limited theory into a 'general theory'. We have suffered from legal philosophers seeking to 'general'-ise, in the way that can be attempted in the physical sciences. Put shortly, you can not do that in law, or in any of the other *soi-disant* 'social sciences'[22] and have a result which is satisfactory without further inquiry or moral input. The search for a 'general theory' of law is a chimera, evoked by envy of the apparent 'certainties' of science. *Sed quaere*!

American Realism can be traced to Oliver Wendell Holmes. It is unfair to do so, for Holmes's legal thinking is much more diverse and constructive than his 'bad man' concept. Nonetheless, it remains that he did say that to know what the law is, we should not overly concern ourselves with principles and deductions from them. We should consider how the 'bad man' looks at the matter - and he is concerned merely with what will happen to him if he does something or other. He is affected by the results for him, not the morality of his act.

'[I]f we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or English courts are likely to do for fact. I am much of his

mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the Law'[23]

As is the case of the Scandinavians, American Realists should be considered as a group rather than a School.[24] The differences and divergences among them are many. Nonetheless, the focus upon the law as actual decision, normally through a court or quasi-court process, is common among them. They point, for example, to the problem of 'what is the law' at a particular stage in a dispute. If one looks at a case involving a series of appeals, one can not usefully say what the law on its *materiel* is until the case if finally disposed of. Rules (legislation) can therefore be seen as guidance to judges in determining dispute, not as absolutes in themselves. If rules *simpliciter* were the law, there would be no place for courts. There would never be room for argument. That, of course, means that the judge becomes crucial in the process. A judge is not an automatic syllogism-applying machine. The personality, preoccupations and presuppositions of the judge can enter into a decision. What he had for breakfast may affect a decision. In a sense, therefore, the theoretical process of decision-making which is what jurisprudents mostly discuss, is inadequately reflected in the actual judicial process. The judge decides. But how does he decide? He arrives at his conclusion, by hunch as well as by reason, and then (in common-law tradition at least) constructs a written explanation of his judgement which justifies the decision. Even in interpreting a statute, he has a considerable degree of freedom. As Jerome Frank put it, the judge is like the soloist in a concerto interpreting the score (the law or statute he is to apply) - and we all know that different soloists and conductors can produce widely differing accounts of the same piece, while remaining broadly within the scope of the written score.[25] Certainty and uniformity of decision is weaker than the more philosophically based theories would pretend.[26]

This is crudely put - and I apologise to the proponents of Realism. But it is the way in which the valuable insights and correctives exposed by the Realists have been seen by those who (to use a Realist term) seek to justify what they have already decided to try to do.

8. International space law

All the above sits oddly with the impression that one gets from international space law. Ordinarily most space lawyers consider the United Nations space treaties to be law between their parties, and that certain principles affirmed in them are now part of Customary International Law. Although there is more dubiety about the status of UN Resolutions,[27] some of their content is similarly law. There are also the rules of the International Telecommunication Union,[28] and other international organisations. Some states have passed specific legislation to deal with space matters.

If one considers that body of 'law', one can easily see that privatisation and competition do not always sit easily with it. It is here that 'Adam Smith', Realism and the idealism of space law may interact to the detriment of the use of space for the benefit of all mankind. 'The market' argument and a sitting lightly as to 'law' is a potent mixture.

9. Synthesis

It is tempting to scrutinise the modern space business and to see justification for the scepticism expressed by Wendell Holmes. The 'bad man' seems to be alive and well. Lawyers advise business how to structure itself and seek a base in an appropriate jurisdiction so as to maximise profit and minimise taxation and governmental supervision. Loopholes are sought in incovenient law, and odd contructions are asserted for language which others thought clear and simple. In

short, analysis from the standpoint of the 'bad man' is something which lawyers do, so that clients or employers know the potential result of conduct, and act to avoid it. It is, as a result, clearly necessary that there be legally enforceable obligations as to the provision of public services which may not themselves be cost-effective: one can not trust the commercial providers.

There is something else, here, however. And the point may well be of broader interest than space law.

It is the mix of commercialism, the 'market' and the sitting lightly as to legal principle that is encouraged by Realism, which is at work. People do not usually sit down and carefully read and think things through. They tend to grasp at ideas, whose attraction is that they appear to provide a justification for what the individual or company wants to do in any case. Through an inadequate appreciation of what American Realism says, certainty of and in the law, and its settled nature on any matter, is undermined. The integrity of the court process is questioned. What is the 'law' which it purports to apply? And, should the reasoning of judges lead to inconvenient result, can not the law be changed by legislation? Law becomes relativistic, holding true for only as long as it is not changed by lobbying actuated by personal interest.

Attitudes to Law are affected. Law is emptied of its status. Some of us see Law as a way of settling that, under certain circumstances, a particular result will occur. It is a way of dealing with problems, and is not to be used to cause problems for others.[29] Others see it merely as a neutral tool to be employed as needed. Let me illustrate the difference by referring to the role of (and implicit attitude to) the rules of two major ball games, soccer and American football. In soccer, the rules determine how the game is played, and what happens when the ball goes out of play, or when there is an infringement of the rules. In American football while the rules also lay down how the game is played, in addition the rules are an element of the playing of the game. They are to be used to achieve victory, in just the same way as is the ball. The use of the rules, rather than skill with the ball, is often fundamental to winning. Some might say this is an abuse of the rules.

Where does Adam Smith fit? I would suggest that the 'free market' principle is a good thing, but, as Smith himself says, a totally free market is not. Smith spoke of a market operating in which people considered their own interest. But Smith was speaking of a society in which people knew each other, in which there was a basic shared morality and in which those who abused that freedom by selfish-ness would pay the penalty of being shunned. Yes, there were exceptional cases, but in general the system worked. Those controls are not present in our globally commercialised environment. Those who appeal explicitly or tacitly to Adam Smith as justification for their predatory activities should have that apparently benign and benevolent mask removed. The abuse and subversion of rules which simplistic legal relativism and an appeal to a hallowed icon can camouflage, requires to be confronted.

10. Zeitgeist?

I am aware that some will think I am writing about past matters, and citing material that are now obsolete. It is true that there are later discussions of both legal and economic theory, but my point is that it is the thought of former years that is having its effect now. The problem is the spirit of the age. Intellectual fashions take a couple of generations to pass through society. That is why in a discipline related to jurisprudence, that of theology,[30] the 'Death of God' theology invented by stragglers after Nietsche, has collapsed, and vitality has returned to traditional orthodoxy. But that has taken three decades. Realism was a creature of the 1930s to 1950s. It impressed me when I encountered it some thirty-five years ago and it still has benefits. Legislators should

be aware of its thrust. But those who encountered Realism briefly in law studies, management textbooks and journalism when they were younger are in power now, and pay the lawyers' bills. They take the odd phrase and partial notions from Realism and cod-Adam-Smith in order to veneer conduct, justify action and assuage gnawing fears as to the rightness of their actions. I hope they will soon pass from the scene. More balanced philosophies are coming into view.[31] I hope the students of today pay attention to them. I also hope that inadequate understandings of these new formulations do not in due course themselves cause problems.[32]

But, just to be safe, and taking due account of the theology I find most compelling, one has to recognise that not all businessmen will cease their current attitudes. Let us therefore recognise (while lamenting the fact) that we need legal rules and effective mechanisms to ensure that the goal of space as a benefit for all mankind is accomplished, and is not merely given lip-service or other cursory acknowledgement, by those whose entrepreneurial flair is otherwise to be welcomed.

NOTES

1 Doc Smith's *Skylark* series (*The Skylark of Space* (1928), *Skylark Three* (1930), *Skylark of Valeron* ((1935) and *Skylark Duquesne* (1966)) was begun in 1915, but, revised, achieved book publication only in 1946-1966.

2 The actual liability may depend on whether the 'share' is fully or partly paid. It has nothing to do with the price at which the share is traded.

3 For this paper I have used Adam Smith : *A Inquiry into the Nature and Causes of the Wealth of Nations*, K. Sutherland, ed., (Oxford: Oxford UP, 1993).

4 *Adam Smith: Essays on Philosophical Subjects*, W.P.D. Wightman, J.C. Bright and I.S. Ross, eds., (Oxford: Clarendon Press, 1980).

5 *Adam Smith: Lectures on Rhetoric and Belles Lettres*, J.C. Bryce, ed., (Oxford: Clarendon Press, 1983).

6 *Adam Smith: Lectures on Jurisprudence*, R.D. Meek, D.D. Raphael and P.G. Stein eds., (Oxford: Clarendon Press, 1978).

7 I assume some coherence to Political Economy.

8 Cf. C.R. Fay, *Adam Smith and the Scotland of his Day* (Cambridge: Cambridge UP, 1956).

9 R. Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1910-11) 24 *Harv. LR* 591-619; (1911-12) 25 *Harv. LR* 140-169 and 489-514.

10 H. Kelsen, *The Communist Theory of Law*, (London: Stevens, 1955; Aalen: Scientia Verlag, 1976); K. Marx, *Capital* (London: Penguin Classics, 1999).

11 H. Kantorowicz, 'Savigny and the Historical School' (1937) 53 *Law Quart. Rev.* 326-43. His main work is said to be F.C. von Savigny, *On the Vocation of our Age for Legislation and Jurisprudence*, 2d ed., trans A. Hayward (London: Littlewood, 1831).

12 On Positivism see John Austin (1790-1859), *Lectures on Jurisprudence*, for the seminal work which affected many successors. See also J. Austin, *The Province of Jurisprudence Determined*, H.L.A. Hart ed., (London: Weidenfeld and Nicholson, 1954) which is the first six of the *Lectures*. For the different meanings of Positivism, see H.L.A. Hart,

'Positivism and the Separation of Law and Morals', (1957-8) 71 *Harv. LR* 593-629. (Cf. the immediately following - L.L. Fuller, 'Positivism and Fidelity to law - A Reply to Professor Hart' (1957-8) 71 *Harv. LR* 630-72).

13 H.L.A. Hart, *The Concept of Law*, (Oxford: Oxford UP, 1961: 2d ed., 1994)..

14 H. Kelsen, *General Theory of Law and State* (Cambridge, Mass.: Harvard UP, 1949); 'The Pure Theory of Law' trans. C.H. Wilson, (1934) 50 *Law Quart. Rev.* 474-98, (1935) 51 *Law Quart. Rev.* 517-35; *What is Justice?* (Berkeley: California UP, 1957); *The Pure Theory of Law*, 2d ed., trans M. Knight (Berkeley: California UP, 1967).

15 A.P. d'Entreves, *Natural Law: An Introduction to Legal Philosophy*, (London: Hutchinson, 1970). See also L.L. Fuller, *The Morality of Law*, 2d ed., (New Haven and London: Yale UP, 1969); J.N. Finnis, *Natural Law and Natural Rights*, (Oxford, Clarendon Press, 180); See also H.L.A. Hart, *Law, Liberty and Morality*, (Oxford: Oxford UP, 1963), which is a response to a lecture 'Morals and the Criminal Law' contained in P. Devlin, *The Enforcement of Morals* (Oxford: Oxford UP, 1965) which contains other material in the Hart-Devlin debate on such matters.

16 A. Hagerstrom, *Inquiries into the Nature of Law and Morals*, K. Olivecrona, ed., (Stockholm: Almquist and Wiksell, 1953).; G.D. MacCormack, 'Hagerstrom on Rights and Duties' 1971 *Jur. Rev.* 55-78; N. Simmonds, 'The Legal Philosophy of Axel Hagerstrom', 1976 *Jur. Rev.* 210-8.

17 K. Olivecrona, *Law as Fact*, 2d ed., (London: Stevens, 1971)(1st ed., 1939).

18 Alf Ross, *On Law and Justice*, (London: Stevens, 1958); *Directives and Norms*, (London: Routledge and Kegan Paul, 1971).

19 V. Lundstedt, *Legal Thinking Revised*, (Stockholm: Almquist and Wiksell, 1956); C. Munro, 'The Swedish Missionary: Vilhelm Lundstedt', 1981 *Jur. Rev.* 55-77.

20 See generally, G.D. MacCormack, 'Scandinavian Realism', 1970 *Jur. Rev.* 33-55.

21 See N. Duxbury, 'The Evolution of a Mood' in his *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995), Ch. 2, 65-159.

22 The term 'social science' is to be deplored. As someone has pointed out, the placing of the adjective 'social' before such nouns as 'science' and 'justice' evacuates the noun of meaning.

23 O.W. Holmes, "The Path of the Law" (1896-7) 10 *Harv. LR* 457-76 at 460-1; *Collected Legal Papers* (London: Constable, 1920: New York, Peter Smith, 1952) 167-203 at 172-3. In fairness, Holmes elsewhere in the lecture speaks of the importance of theory, but it is this straining phrase which has resounded down the years.

24 Apart from Jerome Frank, cited n. 25, see also K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana, 1951, rep. of 1930 ed.), and Duxbury, cited above n. 21.

25 J. Frank, 'Words and Music: Some Reflections on Statutory Interpretation' (1947) 47 *Col. LR* 1259-78. Cf. J. Frank, 'Say it with Music', (1947-8) 61 *Harv. LR* 921-57, where he is speaking of the response to the evidence of witnesses. Frank's experience of music was c.1910-50. The improved consistency of performance occasioned by the wider knowledge of music through recording had not had a great effect when he was cogitating. Nonetheless there are still

striking contrasts between soloists and conductors of the same work.

26 J. Frank, *Law and the Modern Mind* (Gloucester Mass.; Peter Smith, 1951, rep. of 1930 ed.; with a new Preface, London: Stevens, 1949); *Courts on Trial: Myth and Reality in American Jurisprudence,* (Princeton, NJ: Princeton UP, 1950).

27 B. Sloane, 'General Assembly Resolutions Revisited (Forty Years Later)' (1987) 58 *BYIL* 39-130; A. Terekhov, 'UN General Assembly Resolutions and Outer Space Law' (1997) 40 *Proc. IISL* 87-107.

28 Constitution and Convention of the International Telecommunication Union, adopted by the Plenipotentiary Conference of the Union, Geneva, 1992, as amended by the Plenipotentiary Conferences of Kyoto, 1994, and Minneapolis, 1998, together with the Administrative Regulations of the Union. These latter, the International Telecommunication Regulations and the Radiocommunication Regulations, have the same treaty status as the Constitution and Convention (ITU Const. art. 4; ITU Conv. art. 54). They have been amended over the years by the appropriate conferences. All ITU documents are available from the ITU Headquarters, Place des Nations, Geneva.

29 The raising of court action so as to tie up and/or deplete the resources of a competitor is an abuse of the legal system which has come to be common in the struggles between competing businesses.

30 For the sake of this paper I assume theology is a discipline. Sometimes I am not so sure.

31 See, for example, L.L. Fuller, *The Morality of Law*, rev. ed., (New Haven, Conn: Yale UP, 1969); J. Rawls, *A Theory of Justice* (Oxford: Oxford UP, 1971); R. Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1981); Cf. H.J. Berman, *The Interaction of Religion and Law* (London: SCM Press, Ltd, 1974).

32 For a general survey of all the above, and many others, together with further reading, see J.W. Harris, *Legal Philosophies*, (London: Butterworths, 1997).