

Pragmatic Instrumentalism in Twentieth Century American Legal Thought-a Synthesis and Critique of Our Dominant General Theory About Law and Its Use

Robert S. Summers

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PRAGMATIC INSTRUMENTALISM IN TWENTIETH CENTURY AMERICAN LEGAL THOUGHT—A SYNTHESIS AND CRITIQUE OF OUR DOMINANT GENERAL THEORY ABOUT LAW AND ITS USE

Robert S. Summers†

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I have lectured on the subject of this Article at the University of Sydney, the University of Basel, the University of Louvain, and at Cornell University, Boston University and the University of Oregon. On January 28, 1981, I presented a Faculty Research Seminar at Cornell Law School on several of the topics treated here. In each of the foregoing instances, I profited from discussions that followed and I wish to record my indebtedness to participants.

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INTRODUCTION

Between 1881 when Oliver Wendell Holmes published *The Common Law*¹ and the 1930s, a dramatic reorientation in American legal thought occurred. Philosophical pragmatism, sociological jurisprudence, and certain tenets of legal realism coalesced to form America's only indigenous theory of law. During the middle decades of this century, this body of ideas was our most influential theory of law in jurisprudential circles, in the faculties of major law schools, and in important realms of bench and bar. Many of its tenets continue to prevail today.

This theory of law remains unfinished. It is more a body of general directions of thought than a fully developed set of views

¹ O. W. HOLMES, *THE COMMON LAW* (1881).

completely worked out in all major respects. Yet some of its tenets were the subject of extensive development, and, in my opinion, its substance and range qualify it as a full-fledged and distinctive jurisprudential tradition alongside such European predecessors as analytical positivism and natural law philosophy.

If America's special contribution fell short because it was undeveloped and errant in important ways, the same can be said of the other theories as well. Overall, our contribution did represent a salutary development. Moreover, it remains to this day a fertile stimulus to further theorizing of a kind likely to figure in that ultimate ideal of most jurisprudential thinkers: the perfect general theory of law and its use. In my view, a perfect theory must of necessity draw upon not only what is best in analytical positivism and natural law philosophy, but also what is best in pragmatic instrumentalist thought.

I

PRAGMATIC INSTRUMENTALISM

A. *The Name and the Theorists*

It is important to give the legal theory under study a name. I have chosen to call it "pragmatic instrumentalism." This phrase is cumbersome, yet more descriptively apt than any other.

The theory is instrumentalist in four related yet distinguishable ways. First, it views law not as a set of general axioms or conceptions from which legal personnel may formally derive particular decisions, but as a body of practical tools for serving specific substantive goals. Second, it conceives law not as an autonomous and self-sufficient system, but as merely a means to achieve external goals that are derived from sources outside the law, including the dictates of democratic processes and the "policy sciences." Third, it assumes that a particular use of law cannot be a self-justifying "end in itself." Uses of law can be justified only by reference to whatever values they fulfill. Finally, the law is considered to serve generally instrumental values rather than intrinsic ones. That is, law's function is to satisfy democratically expressed wants and interests, whatever they may be (within constitutional limits).

Does it add anything to say that instrumentalism is also "pragmatic"? After all, viewing law as essentially instrumental is itself pragmatic. Moreover, a theory of value largely devoid of intrinsic goods is open-ended, allowing wide scope for pragmatic modification of the law's goals over time. The adjective "pragmatic," nonetheless, is not redundant. It designates features of the theory that are not

implicit in the term "instrumentalism," some of which are pragmatic in either lay or philosophical senses.

First, the theory is pragmatic in its emphasis on the primacy of context in arriving at law's ends and means, stressing time, place, circumstance, and particular wants and interests rather than ideology, abstract theory, principle, and an *a priori* normative view of the "nature of things."

Furthermore, the theory treats the law "in action." It is concerned not only with the general nature of law as social means but also with law as it is actually used, and with the practical differences that law's uses make. This focus extends beyond law's external effects to the workings of its internal processes—the operation of its complex implementive technology. Thus, the theory necessarily addresses official legal personnel, their roles as "social engineers," and the technical skill they must deploy in those roles. More than any other theory of law, pragmatic instrumentalism is concerned with the effectiveness of legal action.

Another pragmatic feature of the theory is that it conceives of reality as something essentially for human use, which may be readily altered through human action. Social reality—including the law's own machinery—is relatively malleable.

A strong experimental strain runs through this theory: uses of law must be experimental, especially given the rapidity of social change. A pragmatic method of trial and error is appropriate. As evidence of law's successes and failures accumulates, we must modify the law accordingly.

In the foregoing ways, then, "pragmatic instrumentalism" is a descriptively apt name for the general theory of law under study here. Although it is new, I believe the introduction of some such name is long overdue.²

² Some readers may think that I am merely introducing a new name, "pragmatic instrumentalism," for a body of ideas that has long had a name—legal realism. My first response is simply that this is not so. "Legal realism" is an expression that has been used most often to refer to the work of a group of thinkers the bulk of whose writings appeared in the 1920s and the 1930s. See generally Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). Among the leaders of this group were Karl Llewellyn, Jerome Frank, and Walter Wheeler Cook. The phrase "legal realism" has not regularly been used to refer to the general coalescence of pragmatism, sociological jurisprudence, and legal realism that is the subject of this study. If I am right about this, and, of course, conventional usage in such matters is never wholly consistent, then it is not true that the body of ideas I am addressing has long had the name "legal realism."

But even though "legal realism" is today sometimes used more widely to encompass the entire body of ideas, there are compelling reasons to cease this practice and to use instead the name "pragmatic instrumentalism" or some other suitable name. First, the practice of continuing with both a wide use (all the ideas) and a narrow use (the ideas mainly of Llewellyn,

The classical pragmatic instrumentalists, except for Gray and Cohen, were all contemporaries for about two full decades. They include:

John Chipman Gray	1839-1915
Oliver Wendell Holmes, Jr.	1841-1935
John Dewey	1859-1952
Roscoe Pound	1870-1964
Walter Wheeler Cook	1873-1943
Joseph Walter Bingham	1878-1973
W. Underhill Moore	1879-1949
Herman Oliphant	1884-1939
Jerome Frank	1889-1957
Karl N. Llewellyn	1893-1962
Felix S. Cohen	1907-1953

This list is not exhaustive. Many readers will see what seem to be significant omissions. Only the principal progenitors and enough others are included to provide substance to the rise and continuity of the general movement in legal thought singled out here for study.

These thinkers were all lawyers, law professors, or judges, except Dewey, the only professional philosopher. Dewey wrote several essays on law, however, and his general philosophy influenced most instrumentalists.

Frank, Cook, et al.) only invites confusion, especially if this involves use of a name for the whole that in its more common meaning is associated only with a part. Second, using "legal realism" in a wide sense invites the impression that the earlier theorists—who are not the ones most commonly designated by this phrase—were mere precursors of the main event. Yet Holmes, Gray, Pound and Dewey were not mere precursors. The work of these earlier thinkers was seminal. It may be true that such paradigm realists (in the narrow sense) as Llewellyn, Frank, and Cook seem closest to us today in time, but this proves nothing. One must be wary of treating the past as a mere backward extension of the present. Third, some tenets of legal realism (in the narrow sense) do not form part of the general directions of thought considered here. These tenets, the more extreme kind, were not as influential. They include, for example, a radical value skepticism and an emphasis on non-rational and even irrational factors in the judicial process (*e.g.*, "gastronomic jurisprudence"). Fourth, the term "legal realism" has misleading philosophical connotations. Most of the pragmatic instrumentalists were not realists in traditional philosophical usage. They did not hold that general or abstract words name independent and unitary entities that "exist" outside the mind. They might, of course, be called "realists" in literary parlance, for they were concerned with fidelity to real life and with accurate representation of life. Finally, the expression "pragmatic instrumentalism" is, for the reasons given in the text, a descriptively appropriate name. I might add that it is not my invention. Dewey sometimes used it, although for a somewhat different purpose, and glimmerings of it appear in Llewellyn's work. *See, e.g.*, J. DEWEY, *THE QUEST FOR CERTAINTY* 37 (1929); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431, 447 n.12, 454 (1930). The words "instrumentalist" and "instrumentalism" in this Article refer to the tenets of pragmatic instrumentalism.

Of course, these thinkers did not hold identical views. Pioneers, even in the same general directions of thought, seldom do. Some of them were skeptics about reason, at least in their theoretical moments, while Dewey had great faith in the power of reason, or at least his own empiricist view of it. Several of these thinkers actually attacked each other in print. A few changed their views significantly over time. For example, the earlier writings of Pound, Frank, and Llewellyn more fully qualify them as pragmatic instrumentalists than do their later ones. There were also important differences in the sophistication of these thinkers. Yet all joined in the same general directions of thought about law. Even the well known polemic between Pound and Llewellyn³ was really an "inside" affair.

The thinkers I have listed did significant original or critical work, or otherwise shared in the rise of instrumentalism before the beginning of World War II. Although more than half lived and worked past 1950, I will not treat that part of their work done after 1940. By then the coalescence of general directions of thought was more or less complete, and in "full flower." These ideas dominated legal thinking during the middle decades of this century.

B. *Origins of the Theory*

A systematic inquiry into the origins of pragmatic instrumentalism would itself call for a book-length study. For introductory purposes it will be enough merely to provide a sketch. A rough but useful distinction may be drawn between reactive and affirmative influences. Pragmatic instrumentalism was partly a reaction to certain conditions in the world of American law during the last part of the nineteenth and the early part of the twentieth centuries. I will begin with these.

Holmes, Dewey, Pound, and other pragmatic instrumentalists reacted critically to what they perceived to be "formalism" in judicial reasoning, in legal education, and in legal theory. They did not subject the precise nature of formalism to detailed inquiry. No simple definition of formalism can be adequate, for the distinction between a formalistic and a non-formalistic view really breaks down into a vari-

³ See Llewellyn, *supra* note 2; Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). Llewellyn's overall place is illuminatingly treated in W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

ety of possible contrasts, with the meaning of "formalism" and its derivatives varying in different contexts.⁴

⁴ Consider this table of examples:

CONTRASTS OF FORMALISTIC AND NON-FORMALISTIC VIEWS

CONTEXT	FORMALISTIC VIEW	NON-FORMALISTIC VIEW
1. ambit of legal creativity and legal change	scope narrow; law is like a static and closed logical system	scope wide; law is like a dynamic and open framework
2. judicial power to make law	due to separation of powers, judges may only discover, declare, and apply the law as it already exists	judges have power to make law, and regularly do so, covertly as well as overtly
3. Responsibility of Supreme Court to test constitutionality of legislation	responsibility broad; legislation at least presumptively invalid if conflicts with literal text of constitutional phrase	responsibility narrow; legislation presumptively valid
4. whether there is a single "perfect" form of law as a solution to each problem	always one "true rule," ascertainable by reason; laws of governance are thus similar to universal laws of nature	plurality of plausible forms of law for the usual problem
5. considerations relevant in lawmaking	coherence, harmony, and consistency with existing law	social facts and existing wants and interests
6. tests for identifying valid forms of law	whether law is traceable to an authoritative source	whether law has defensible substantive content
7. nature of reality of valid law	general rules "in books"	predictable law "in action"
8. structure of valid law within a field	reducible to a unitary general theory, as in science	pluralistic and irreducible
9. correct statement of valid law	susceptible to statement only in a limited number of abstract and wide generalizations	susceptible to statement only in many concrete and narrow generalizations
10. interpretation and application of case law	words of opinion and their "logic" control	judge's action in light of facts controls

In due course, I will consider instrumentalist reactions to the varieties of formalism. It is enough for now to illustrate two of the most common types. These thinkers singled out as formalists such legal educators as Christopher C. Langdell, Dean of Harvard Law School from 1870 to 1895, and Joseph H. Beale, Professor at Harvard Law School from 1890 to 1938. Langdell claimed, for example, that an "irrevocable" offer to enter into a contract was simply a "legal impossibility." In his view, the inherent logic of the concept of an offer dictated that it must always be revocable at will, regardless of whether the offeror had induced reasonable reliance on the part of the offeree.⁵ Similarly, Beale proclaimed that varied issues in the field of conflict of laws were governed by a conception of domicile that was, in his view, being perfected as a unitary conception in the course of our law's evolution. According to Beale, once the domicile of the party or parties was determined, certain legal consequences always followed automatically, even in cases as diverse as those involving the right to vote, choice of law for divorce, and jurisdiction to tax.⁶ Pragmatic instrumentalists repudiated such formalism, and contended that existing law should be extended or elaborated not in light of the supposed inherent logic of its concepts or "perfect" unitary conceptions, but in light of policy goals derived from prevailing wants and interests.⁷

Formalism was not confined to legal educators; judges were guilty of it, too. Oliver Wendell Holmes and Roscoe Pound, two of the leading pragmatic instrumentalists, were particularly vigorous in their condemnation of those judges of the federal and state supreme courts who invalidated social legislation partly on the ground that the

Table (Continued)

11. interpretation and application of written law	authoritative language and "logic" of the concepts expressed controls	goals of lawmaker infuse the language and these together control
12. elaboration and extension of existing law	"logic" of existing concepts controls	"policy" controls

⁵ C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 178 (2d ed. 1880). Langdell, of course, takes a different view if the offer is a binding option.

⁶ J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 92-94 (1935). Beale seems to have come to this viewpoint early. See Beale, *Residence and Domicil*, 4 IOWA L. BULL. 3 (1918).

⁷ See, e.g., W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICTS OF LAWS 196-97 (1942); Holmes, Book Review, 14 AM. L. REV. 233, 233-34 (1880). For Cook's general description of formalist legal education as late as 1927, see Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303, 307-08 (1927).

“logic” of such very general constitutional conceptions as liberty of contract and substantive due process dictated that outcome.⁸

Pragmatic instrumentalism, however, was much more than a reaction against formalism. It was also a reaction against substantive ideas underlying formalism such as laissez-faire theories of government and judicial conservatism. Moreover, instrumentalism was born of affirmative influences. Some of these were jurisprudential. Pound, for example, borrowed from Rudolf Von Ihering's conception of law as a means to accepted ends.⁹ By the close of the nineteenth century, some of Jeremy Bentham's work on the uses of law for social improvement had become well-known in America.¹⁰ Much pragmatic instrumentalism was Benthamite in spirit. Of the leading theorists only Holmes was not a reformer.

The reform effort within American politics known as the Progressive Movement (1890-1920) was another affirmative influence.¹¹ Several leading instrumentalists were themselves progressives, including Dewey and the young Pound. And although later figures such as Llewellyn, Oliphant, and Frank were not yet of mature age during the heyday of Progressivism (1895-1915), it is very likely that they would have joined up had they been. The Progressives were not radical socialists, but they believed that democracy had been corrupted and political power concentrated in big corporations, trusts, and political bosses, that the voting franchise should be extended, especially to women, that industry needed to be regulated, that poverty and old age hardship must be relieved, that workers needed protection, and that natural resources must be conserved.¹²

The Progressives and their forebears were partly responsible for numerous laws purporting to achieve Progressive aims, including the Sherman Act,¹³ the Pure Food and Drug Act,¹⁴ and the 17th amend-

⁸ See, e.g., *Lochner v. New York*, 198 U.S. 45, 76 (1904) (Holmes, J., dissenting); Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 16 (1910); Pound, *Liberty of Contract*, 18 YALE L.J. 454, 457, 480 (1909). For an unusual view of Holmes, classifying him as a formalist, see G. GILMORE, *THE AGES OF AMERICAN LAW* 48-56 (1977).

⁹ R. VON IHERING, *LAW AS A MEANS TO AN END* (1877, Eng. trans. 1914). Pound regularly drew on Von Ihering's work. See, e.g., Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908).

¹⁰ See, e.g., J. BENTHAM, *WORKS OF J. BENTHAM* (J. Bowring ed. 1843).

¹¹ See generally R. HOFSTADTER, *THE AGE OF REFORM* (1955).

¹² See, e.g., W. LAFEBER & R. POLENBERG, *THE AMERICAN CENTURY* 37-48 (1975). Cf. C. STROUT, *THE PRAGMATIC REVOLT IN AMERICAN HISTORY: CARL BECKER & CHARLES BEARD* (1958).

¹³ Sherman Act, ch. 647, 26 Stat. 209 (1890).

¹⁴ Pure Food and Drug Act, ch. 3915, 34 Stat. 768 (1906).

ment¹⁵ providing for popular election of senators. It is hardly surprising that pragmatic instrumentalism in legal theory took root during the Progressive Era. If the Progressives themselves had articulated a theory of law, it almost certainly would have been instrumentalist, pragmatic, and mindful of social change. Moreover, the very force of the Progressive example—extensive resort to law as a tool to serve social goals—led legal theorists to conceive of law in the same terms and to repudiate the formalistic, static, and conservative conceptions of law's nature so influential in many quarters at the end of the nineteenth century.

The scientific ethos of the day influenced terminology and permeated basic conceptions. All instrumentalists wrote and spoke of "scientific" lawmaking and administration. Holmes said "an ideal system of law should draw its postulates and its legislative justification from science."¹⁶ These thinkers viewed uses of law as hypotheses to be tested experimentally in the laboratory of social experience. They called for empirical research on the effects of law. Fields as diverse as behaviorist psychology, biology, and physics provided models. Thus, for example, many of these theorists conceived of law as overt action—observable official behavior. One can see a striking parallel between Darwin's earlier rejection of the use of static categories to classify evolving species and the instrumentalists' rejection of the use of formalistic judicial method in a changing society. The overthrow of Newtonian physics, with its model of a comprehensive deductive system of natural laws, appears to have led some of the new legal theorists to reject a similar model for civic law and to substitute as a theory of law predictions of official behavior.

Another major factor in the rise of instrumentalist thinking within the law was the technological advance of the late nineteenth and early twentieth centuries. In many respects this new technology was even more visible than that developed during the Industrial Revolution; it spread beyond the factory gates and transformed the very social setting in which people conducted daily life. The period from 1880 to 1920 saw the development of the automobile, the electric light, the telephone, a whole new range of business machines, and the airplane. This reinforced the instrumentalist view that by his own effort, man could transform the social order. Instrumentalist writings are filled with analogies and metaphors that relate law and government to "instruments," "tools," "machines," and even "engines."

¹⁵ U.S. CONST. amend. XVII.

¹⁶ O. W. HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS 138, 139 (1920).

These thinkers viewed law as a technology, legal personnel as "social engineers," and law's uses as "social engineering."

Certainly the most important intellectual influence on the founders of pragmatic instrumentalist legal theory was the philosophy of pragmatism, a body of thought that ramified into many fields. Charles S. Peirce (1839-1914) and William James (1842-1910) were the principal progenitors.¹⁷ John Dewey was a leading pragmatist philosopher, and a legal theorist only secondarily.¹⁸ Naturally, he imported pragmatist tenets into his legal theory, including some that were largely of his own making.

The pragmatists were themselves anti-formalist. James, for instance, stressed that theorists should turn "away from abstraction . . . , from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins."¹⁹ Instead, they should look "towards last things, fruits, consequences, facts."²⁰

James also profoundly influenced the value theory in instrumentalist legal thinking. He held that the social order should endeavor to maximize the satisfaction of wants and interests of the time.²¹ Similarly, Dewey stressed that laws are social means—instruments of progress. He rejected Spencer's social Darwinism. More than any other philosopher, he was responsible for the optimism in the newly evolving theory of law.²²

The "pragmatic method," James wrote, was concerned with the "ways in which existing realities may be changed."²³ Because society is constantly changing, needs for law regularly arise. On the pragmatist view, lawmakers will find that reality, including the machinery of the law, is relatively malleable and thus adaptable to man's own ends.²⁴ In lawmaking, moreover, context—not ideology—is to govern substantive content. Indeed, questions of value that arise in the process can be reduced very largely to questions of fact.²⁵

To the pragmatists, solutions to legal problems would have to be specific, and above all, plural. Given the nature of knowledge and the

¹⁷ See generally COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (1931-58); THE WRITINGS OF WILLIAM JAMES (J. McDermott ed. 1967).

¹⁸ See generally M. THOMAS, JOHN DEWEY: A CENTENNIAL BIBLIOGRAPHY (1962).

¹⁹ W. JAMES, *supra* note 17, at 376, 379.

²⁰ *Id.* at 380 (emphasis omitted).

²¹ See W. JAMES, *supra* note 17, at 610, 617, 623.

²² See, e.g., Dewey, *Progress*, 26 *ETHICS* 311 (1916).

²³ W. JAMES, *supra* note 17, at 380.

²⁴ See H. THAYER, MEANING AND ACTION: A CRITICAL HISTORY OF PRAGMATISM 426-27 (1968).

²⁵ See text accompanying notes 65-67 *infra*.

nature of social reality, particularly its changing character, lawmakers cannot be certain of the efficacy of particular uses of law. Hence such uses must be "experimental."

Dewey stated that "the task of philosophy is to clarify men's ideas as to the social and moral strifes of their own day. Its aim is to become so far as is humanly possible an organ for dealing with those conflicts."²⁶ He called for "use of scientific method in investigation and of the engineering mind in the invention and projection of far-reaching social plans."²⁷ To this end, Dewey developed an influential "new logic"—not a logic of demonstration in the tradition of logical theorizing, but a logic of inquiry, particularly into the likely consequences of social decisions and actions.²⁸

Probably the most widely accepted tenet in pragmatic instrumentalist legal theory passed under the name of the "prediction theory" of law. On this view, first set forth by Holmes,²⁹ laws are nothing but predictions of what officials will do. Although developments in physics presumably help account for the reception of this theory, it is not difficult to identify pragmatist influence as well. Both Peirce and James espoused "predictive" conceptions of meaning and truth. They wrote that the true significance of any concept is found in its consequences.³⁰

As we will see,³¹ most instrumentalists held that the success of a use of law should be judged by its effects. This "efficacy" criterion also had antecedents in pragmatist philosophy.³²

²⁶ J. DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 26 (1920).

²⁷ J. DEWEY, *LIBERALISM AND SOCIAL ACTION* 73 (1935).

²⁸ See J. DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC* (1916); J. DEWEY, *HOW WE THINK* (1910); J. DEWEY, *LOGIC: THE THEORY OF INQUIRY* (1938); J. DEWEY, *STUDIES IN LOGICAL THEORY* (1903).

²⁹ See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897); Holmes, *Book Review*, 6 AM. L. REV. 723, 724 (1872).

³⁰ See generally Fisch, *Justice Holmes, The Prediction Theory of Law*, 39 J. PHILOSOPHY 85 (1942).

³¹ See section XI *infra*.

³² Many tenets and corollaries of pragmatic instrumentalism must be traced out and pieced together from the diverse writings of a number of thinkers. Those who wish to study a legal theory can usually be directed to single volume works that articulate and draw together most of the leading ideas. Thus, a student of analytical positivism may read John Austin's *Lectures on Jurisprudence* (5th ed. 1885), Hans Kelsen's *General Theory of Law and State* (1945) or H. L. A. Hart's *The Concept of Law* (1961). Not a single comparable treatise or textbook of general theory exists for pragmatic instrumentalism. (Pound's five volume treatise, *Jurisprudence* (1959), is too diffuse and eclectic to qualify). Two substantial articles published 40 years apart, however, each contain nearly all of the leading ideas of pragmatic instrumentalism: Holmes, *The Path of Law*, *supra* note 29; Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937).

C. *Importance of Pragmatic Instrumentalism*

The study of general ideas can be justified simply as the pursuit of knowledge and understanding. The study of general ideas that relate to law is even easier to justify, because uses of law affect daily life, and general ideas influence how law is used. General theory about law is not a mere plaything of academic scribblers, with no meaning for men of action.³³ Officials and ordinary citizens are guided by such theory whether or not they acknowledge as much.³⁴ Judges, for example, have their own conceptions about the scope and force of precedent, about the appropriate court-legislature relation, about statutory interpretation, about what kind of an argument can be a good one, about what values appropriately shape law's goals, and so on. These are not merely technical matters. They are necessarily informed by general ideas—by theory.

In the same vein, the law is a form of social reality, the shape and content of which is determined in part by what those subject to it believe to be its nature and uses. How citizens conceive of law must—if their conceptions are widely enough agreed upon—affect what the law actually is or becomes. If, for example, citizens and legislators come to believe that good law is whatever the majority wants, then they will be less likely to subject actual and proposed law to independent rational scrutiny in light of basic values such as justice, liberty, or equality. As one thinker has put it, “[I]n human affairs [even] what men mistakenly accept as real tends, by the very act of their acceptance, to become real.”³⁵

In my view, pragmatic instrumentalism will be recorded as America's only indigenous general theory of law. It was also our most influential legal theory during the middle decades of this century. This is not to say that it ousted all others, or that all its tenets were equally accepted, or even that every one of its tenets commanded a majority in all quarters. It is at least to say, however, that its influence in America exceeded that of any other general body of thought about the law. Certainly it dwarfed analytical positivism as well as Catholic and secular natural law philosophies. Indeed, many tenets of pragmatic instrumentalism prevail today.

³³ Cf. J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 383 (1935).

³⁴ As Pound once remarked, men of affairs should be “conscious of a philosophy of law, and examine its tenets scientifically instead of taking for granted a naive philosophy while disclaiming all philosophical ideas.” Pound, *The Philosophy of Law in America*, 7 ARCHIV FÜR RECHTS UND WIRTSCHAFTSPHILOSOPHIE [A.F.R.U.W.] 213, 214 (1913).

³⁵ Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631 (1958).

In this Article I will identify, draw together, and discuss the leading general directions of thought that made up pragmatic instrumentalist theory. My effort will not be primarily historical, however, nor will it be a series of studies of the contributions of individual thinkers. Rather, my focus will be more aggregative in nature.³⁶ The reader should be warned that I will not dwell at any length on most of the specific virtues of pragmatic instrumentalism. Indeed, in the rest of this Article I will offer mainly evaluative commentary and demonstrate the fertility and suggestiveness of instrumentalist thought. In so doing, I will draw upon the writings of leading critics of pragmatic instrumentalism, including Lon Fuller, Morris Cohen, and John Dickinson.

II

VALUE THEORY

A theory of value is normative. It sets forth what ought to be, not what actually is occurring. The central elements of a theory of value are twofold: notions of the right and good, and principles for resolving conflicts between particular forms of these conceptions. A theory of value provides a general and systematic account of these elements and their inter-relations. Thus, although it may be consistent or inconsistent with a particular political program, it is not to be identified with any such program.

A general theory of law may or may not explicitly incorporate value theoretic tenets. In the analytical positivism of the Austrian jurist Hans Kelsen, for example, one does not encounter an explicit theory of value.³⁷ The English theorist, Jeremy Bentham, however, was both a legal positivist and a leading progenitor of a value theory utilitarian in tenor.³⁸

³⁶ This orientation and emphasis will disappoint and dismay some of the foxes. Most lawyers, in their professional moments, tend to be of an analyzing rather than a synthesizing bent. With the rise and dominance of analytic philosophy in this century, the foxes have been having their day among legal theorists. Thus, there is perhaps even more reason for me to assume the stance of the hedgehog here. I may invoke the authority of both Archilochus and Erasmus: "The fox knows many things, but the hedgehog knows one great thing," (fragment 103); "The Fox has many tricks, and the hedgehog has only one, but that is the best of all," (fragment 85) (quoted in I. BERLIN, *THE HEDGEHOG AND THE FOX* 1 (1953)). Of course, in his labors, the hedgehog cannot dispense with all foxiness.

³⁷ See generally H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945); Kelsen, *The Pure Theory of Law*, 50 *LAW Q. REV.* 474 (1934).

³⁸ J. BENTHAM, *A Fragment on Government*, in *WORKS OF JEREMY BENTHAM*, *supra* note 10, at 221, 289-90; J. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* (1948).

A general theory of law that does not address issues of value is, in my opinion, fundamentally incomplete. The law is not a mere formal receptacle. It includes substantive content. Insofar as law is consciously made and applied, its content is necessarily determined by values. These values show themselves in the reasons that lawmakers, judges, and other officials give for what they do, and in the very formulations of the law itself. Values figure not only in the making and application of law; they necessarily figure in its evaluation and criticism as well. It may be said that in a free and otherwise well-ordered society the life of the law has not been either logic or experience but vigilant critical scrutiny.

The pragmatic instrumentalists addressed basic issues of value. To begin with, many of them insisted on distinguishing sharply between the law as it ought to be and the law as it actually happens to be.³⁹ In this, they followed the English jurists Bentham and John Austin.⁴⁰ Several became value skeptics, however, and thus in varying ways and degrees denied the very possibility of a genuine value theory.⁴¹ But most of the leading instrumentalists should not be classed as value skeptics. They followed not only Bentham and Austin but also the American pragmatist philosophers in subscribing to a theory of value that may be characterized as utilitarian, quantitative, conventionalist, and majoritarian. This is not to say that the instrumentalists systematically developed a full-fledged theory of value for use by legislators, judges, and other legal actors. Several value theoretic themes recur either explicitly or implicitly in the writings of most of the leading figures. Only two of those themes can be considered here.

A. *Maximal Satisfaction of Wants and Interests*

Most pragmatic instrumentalists believed that values in general and the goals of rules and other legal precepts in particular must derive from prevailing wants and interests. The views of the pragmatist philosopher William James were widely shared:

Take any demand, however slight, which any creature, however weak may make. Ought it not, for its own sole sake, to be

³⁹ See, e.g., J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 94 (1st ed. 1909); Holmes, *supra* note 29, at 2-3; Llewellyn, *supra* note 2, at 1236.

⁴⁰ See J. BENTHAM, *A Fragment on Government*, in *WORKS OF JEREMY BENTHAM*, *supra* note 10; J. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION*, *supra* note 38; J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H. L. A. Hart ed. 1954).

⁴¹ J. FRANK, *LAW AND THE MODERN MIND* (1930); Moore, *Rational Basis of Legal Institutions*, 23 *COLUM. L. REV.* 609, 612 (1923).

satisfied? If not, prove why not. The only possible kind of proof you could adduce would be the exhibition of another creature who should make a demand that ran the other way. The only possible reason there can be why any phenomenon ought to exist is that such a phenomenon actually is desired.

. . . .

Since everything which is demanded is by that fact a good, must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times as many demands as we can? That act must be the best act, accordingly, which makes for the best whole, in the sense of awakening the least sum of dissatisfactions. In the causistic scale, therefore, those ideals must be written highest which prevail at the least cost, or by whose realization the least possible number of other ideals are destroyed.⁴²

On the foregoing view, we are to take wants and interests of individuals as they are expressed, and we are not to distinguish between them in qualitative terms; one interest is intrinsically as good as any other. The interests of individuals, of course, may conflict. How then, are such conflicts to be resolved? We are to adopt one basic utilitarian injunction: maximize the realization of as many interests of individuals as possible. In light of this directive, particular interests can be evaluated, though only in quantitative terms. The pursuit of interest A should be chosen over conflicting interest B if (1) the pursuit of A will on its own terms be more successful, and (2) the pursuit of A will interfere less with the satisfaction of other interests. This is an essentially conventionalist view. We are to take the worth of existing interests for granted, at least if it can be assumed that the public endorses them, or that their fulfillment will serve other acknowledged interests. The true province of reasoned evaluation of matters legal, therefore, was assumed to be confined largely to the aptness of means to ends.⁴³

Many pragmatic instrumentalists, including Oliver Wendell Holmes, Jr.,⁴⁴ Roscoe Pound,⁴⁵ John Dewey,⁴⁶ John Chipman

⁴² W. JAMES, *supra* note 17, at 617, 623 (emphasis omitted).

⁴³ Dewey even argued that we should abandon the notion that anything can be a general "end in itself," and therefore valuable in its own right. J. DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 163, 186 (1920); J. DEWEY, *THEORY OF VALUATION* 43 (1939).

⁴⁴ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); O. W. HOLMES, *supra* note 1, at 41; 1 *HOLMES-POLLOCK LETTERS* 163 (M. Howe ed. 1941); Holmes, *Law in Science and Science in Law*, 12 *HARV. L. REV.* 443, 460-61 (1899).

⁴⁵ See Pound, *Legislation as a Social Function*, 18 *AM. J. SOC.* 755, 763-65 (1918); Pound, *supra* note 34, pt. 2, at 385, 398-99.

⁴⁶ See, e.g., J. DEWEY, *THE QUEST FOR CERTAINTY* 254-86 (1929); J. DEWEY, *THEORY OF THE MORAL LIFE* 98-101 (1960).

Gray,⁴⁷ Walter Wheeler Cook,⁴⁸ and Herman Oliphant,⁴⁹ wrote in their theoretical moments as though they subscribed to the kind of value theory that James expressed. Most of them adopted the terminology of "satisfying wants" or "serving interests." This in itself proves nothing. Such ways of speaking and writing might merely have been linguistic common currency that ultimately translated into independent and qualitative ideas of value rather than into the theory James set forth. But there is considerable evidence that most of these thinkers usually subscribed to James's general view. This is not to say that they sought to develop devices for systematically measuring interests, or that they prescribed overtly calculational analysis. In determining interests to be served, they seemed ready to rely mainly on the outcomes of duly reformed democratic processes and on rough and ready judicial judgment.

One aspect of the value theory of these thinkers was especially salutary. It purported to exalt the interests of the many above those of the few. In this respect, instrumentalist legal theory joined forces with the Progressive Movement. The Progressives were dedicated to rooting out undemocratic concentrations of power in politics, in the economy, and in American society at large. They believed that judges, legislators, and other officials ought not to be tools of the monied classes or of political bosses, but should serve the populace as a whole.

But other aspects of the kind of value theory expressed by James and his followers have long been the object of philosophical criticism.⁵⁰ Since this is not the place for yet another philosophical critique of utilitarianism, I will instead recount some of the reactions of American legal theorists. Among these, Lon Fuller was foremost.⁵¹ He did not believe that the mere existence of interests, even when backed by wide popular acclaim, justifies legal intervention on their behalf. Rather, he held that such interests must be subject to *qualitative* tests—to the scrutiny of reason in light of substantive notions of right and good. He insisted on the primacy of reason with respect to *goals* as well as means.⁵²

Majoritarianism, of course, is an imperfect index of maximally realizable interests, and representative democracy often is promis-

⁴⁷ J. GRAY, *THE NATURE AND SOURCES OF LAW* 12-26, 307 (2d ed. 1921).

⁴⁸ Cook generally followed Dewey. See, e.g., Cook, *Walter Wheeler Cook*, in *MY PHILOSOPHY OF LAW* 49, 62-64 (1941).

⁴⁹ See Oliphant, *Current Discussions of Legal Methodology*, 7 A.B.A.J. 241 (1921).

⁵⁰ Thus, among other things, there has been a long tradition of criticism of utilitarianism. See, e.g., A. QUINTON, *UTILITARIAN ETHICS* 82-105 (1973).

⁵¹ See generally Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978).

⁵² See, e.g., L. FULLER, *THE LAW IN QUEST OF ITSELF* 88-95 (1940).

cuous. It can accommodate virtually any interest, whether bad or good. All it asks is that enough people subscribe. Moreover, it institutionalizes a colossal and irresponsible excuse that legislators, judges, and other legal actors may invoke to try to justify abdicating their duty to bring reason to bear—namely, that matters may always be “appropriately settled by vote,” whatever the dictates of reason.

Critics like Fuller who insist on making every effort to accommodate reason within democratic process presuppose objective criteria by which interests can be evaluated qualitatively, rather than just quantitatively. To these thinkers, reason has something to work on and with beyond the instrumentalist maximization criterion. Thus the ancient issue of the relative validity of objective and subjective theories of value arises, an issue that cannot be addressed systematically here.

Some instrumentalists assumed that objective criteria for qualitative evaluation of interests are ultimately silent, empty, or easily stalemated and thus would call the majoritarian principle into play as the only tie-breaker. In contrast, Fuller contended that on most issues the weight of reason is clearly and heavily on one side.⁵³ He and other critics called upon instrumentalists to look more closely at evaluative disputes and see for themselves whether the only thing having any initial appeal is the fact that more people happen to want A rather than B. A closer look, they argued, leads one to construct and reflect upon the arguments for and against the interests expressed in A and B. They concluded that any such process will show that it is simply not the case, as James thought, that “the only possible reason there can be why any phenomenon ought to exist is that such a phenomenon actually is desired.”⁵⁴

Thus, even in the context of democratic processes the objective resolution of issues by reason is one alternative to the value theoretic notions embraced by many instrumentalists. This is not to say that anyone today has worked out a satisfactory general theory of value for use in the law, although there have been valiant efforts of late.⁵⁵ Nor is it to say that reasoned analysis is always easy or readily determinant. Even Fuller did not hold that reason rules all or ought to rule all. He acknowledged that “[w]e know in advance that we cannot reach our goal of a social order founded solely on reason. But we know equally well that it is impossible to set in advance a stopping place short of our goal beyond which all effort will be in vain.”⁵⁶ It is

⁵³ See generally Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946). See also Fuller, Book Review, 9 U. CHI. L. REV. 759, 760 (1942).

⁵⁴ W. JAMES, *supra* note 17, at 617.

⁵⁵ See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

⁵⁶ L. FULLER, *supra* note 52, at 110.

sobering to contrast this remark with Holmes's deference to the "wants of the crowd" and Holmes's general skepticism about moral "preferences," which he viewed as "more or less arbitrary . . . Do you like sugar in your coffee or don't you?"⁵⁷

Furthermore, the Constitution itself can be cited by critics of quantitative value theory to support the proposition that our society actually has recognized and institutionalized qualitative standards of reason both in matters of process and substantive outcome. As Fuller stressed, the Constitution provides guarantees of deliberateness in the processes of making and applying law that evince far more of a commitment to reason than does the principle of majority rule itself.⁵⁸ Moreover, citizens have certain substantive rights under the Constitution that cannot be violated or compromised even when this would satisfy a greater number of wants. It is hard to see how a consistent instrumentalist value theory could rationally accommodate these constraints. It would not do to say that enforcing such rights tends to promote the greatest satisfaction of wants and interests in the long run, for that simply does not seem to be true.

The gulf between the value theoretic tenets of many instrumentalists and "objectivist" critics is vast. Its main significance, at least for the actual course and tenor of legal practice, probably lies in its effects on dispositions and propensities. For example, those who see a greater qualitative role for reason in evaluative matters will be less willing to resolve differences by immediate resort to the principle of majority rule inside the body politic and the judicial conference room. Instead they will try harder and longer to work out conflicts of wants and interests through reason and, more importantly, try harder to articulate reasoned justifications for what finally is done in the name of law.

It must be said that one encounters in the writings of some instrumentalists an extreme value skepticism that might be interpreted as a repudiation even of the limited role for reasoned justification that I have allowed instrumentalist theory here. Holmes sometimes seemed an extreme subjectivist,⁵⁹ and Frank, at least before the war,⁶⁰ dismissed efforts at all reasoned justification as "rationalization."⁶¹ Bingham believed that judges could dispense with opinion writing.⁶² Even Llewellyn in his early years despaired that reason

⁵⁷ 1 HOLMES-POLLOCK LETTERS, *supra* note 44, at 105.

⁵⁸ Fuller, *Jurisprudence*, 13 ENCYCLOPEDIA BRITANNICA 149, 152 (1965).

⁵⁹ 1 HOLMES-POLLOCK LETTERS, *supra* note 44, at 105.

⁶⁰ J. FRANK, *supra* note 41, at 27-32, 100-06.

⁶¹ See also Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928).

⁶² See Bingham, *Joseph Walter Bingham*, in *MY PHILOSOPHY OF LAW* 13 (1941).

lacks inherent force.⁶³ Yet an extreme value skepticism is not a necessary corollary of any of the general directions of instrumentalist thought. Nor can it be said that such skepticism was a widely shared tenet in legal circles beyond a few of the thinkers under study here. Hence I have chosen not to consider it a tenet of pragmatic instrumentalism.⁶⁴

B. *An Empirical Approach*

A related facet of pragmatic instrumentalist value theory was its strong empirical flavor.⁶⁵ These thinkers held or assumed that questions of value arising in the course of making and implementing law are largely reducible to questions of fact. Their empirical approach might be elaborated in the following general way. The job of legislators, judges, and other legal actors is to devise and administer law and thereby resolve or alleviate concrete problems. Legal actors begin with some facts suggesting a problem. They then ascertain the existing interests involved in the problem. The interests, including those that emerge from any conflict, ultimately are translated into goals that might be pursued to resolve the problem. Of course, facts about the more specific nature of the problem must be determined, and available legal means must be identified.

On this analysis, what these means are is essentially a factual matter, as are differences between these means. Factual estimates must be made about the efficacy of alternative means and about likely further consequences and side effects. Factual estimates about which means would serve what interests most fully enter into the analysis. Once all these facts and estimates are in, the choices of legal actors are essentially dictated by factual considerations, many of which are determinable by scientific method.

The foregoing summary is faithful to much instrumentalist thinking. Dewey explicitly and systematically formulated his legal empiricism along these lines.⁶⁶ His approach was but an application of a more general "instrumental" theory of logic and value that he worked out over some time, and which appears to have been highly influential.⁶⁷

⁶³ For an extended account see Purcell, *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969).

⁶⁴ Aspects of another tenet of instrumentalist value theory closely related to maximal satisfaction of wants and interests—that law, legal decisions, and legal actions are to be judged by their consequences or effects—will be treated in section XI *infra*.

⁶⁵ See text accompanying notes 44-49 *supra* and notes 66 & 67 *infra*.

⁶⁶ Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

⁶⁷ See generally works cited at note 28 *supra*.

The seemingly all-encompassing empiricism of these thinkers was to some extent a healthy reaction to past excesses. For example, Christopher Langdell, Dean of the Harvard Law School from 1870 to 1895, conceived of law as consisting solely of materials "contained in printed books."⁶⁸ Yet law must be applied to fact, and in judicial processes there is a constant interaction between the applicable law and the facts of the case. As late as the first decade of this century, Roscoe Pound had to call attention to the excessively technical procedures of American courts that frequently kept them from resolving disputes on the basis of their factual merits.⁶⁹ Furthermore, courts of the day hardly recognized what lawyers now call "legislative facts"—the essential factual premises of legal rules. Indeed, it was not until 1908 that the "Brandeis brief" was born—an appellate brief that recited general social facts relevant to the issues of rule-making before a court.⁷⁰ Even legislatures were relatively unconcerned with legislative facts. Through the first half of this century, state legislatures rarely conducted systematic factual inquiries. Although Congress regularly conducted "investigations," the art of legislative fact-finding remained relatively primitive until quite recent times.

But the law also constantly raises issues about what *ought* to be done, and these cannot, even under the foregoing "empirical approach," be reduced simply to issues of fact. In this respect the instrumentalists went too far. Even Karl Llewellyn, one of the most sophisticated, stood ready to try to convert value questions into wholly factual ones, a tendency evident in his work on the Uniform Commercial Code. For example, in the law of warranties in sales of goods he provided that a warranty of fitness of goods for a particular purpose may be excluded by trade usage. Yet he stated that the usage had to be one that is "currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree."⁷¹ It should be clear that not even Llewellyn can reduce the ultimate question for decision in a particular case to one of pure fact in this way. What is to count as "decent dealing"? As "not decent"? No amount of factual evidence of trade usage can answer such questions.⁷²

⁶⁸ Langdell, *Teaching Law as a Science*, reprinted in 21 AM. L. REV. 123, 123 (1887); Langdell, Speech at Harvard Law School (Nov. 5, 1887), reprinted in 3 LAW Q. REV. 123, 124 (1887).

⁶⁹ Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738-39, 742-47 (1906).

⁷⁰ See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908).

⁷¹ U.C.C. § 1-205 (Official Comment 5).

⁷² Among other important value theoretic tenets of pragmatic instrumentalism not considered here are (1) that in making practical decisions the concrete and the particular, rather than

III

MEANS AND GOALS

That law is, in essence, a means, and only a means, to goals derived from sources outside the law, was perhaps the most characteristic tenet of pragmatic instrumentalism. Oddly, these thinkers did not treat this fundamental tenet at all fully. Their general instrumentalist orientation, however, is itself fertilely suggestive, and marks a deep difference between their theory and that of many European, including British, analytical positivists.⁷³

A. *Law as a Social Instrument*

Virtually all the classical instrumentalists believed that law is an instrument to serve ends. Oliphant's view is representative. He wrote in 1930:

A century ago, Jeremy Bentham saw law not as an ultimate but merely as a means to an end and argued that it should be scientifically exploited as such. . . . Then came the pragmatism of James and the instrumental logic of Dewey, with the result that we are beginning to catch up with Bentham. Liberals now venture to talk of law as a means to an end. . . . [M]any are eager to stop talking and begin studying law as a means to present ends. . . .⁷⁴

This very view was an obvious advance over certain earlier notions. Some formalists tended to assume that law is a self-justifying body of precepts to be discovered by reason⁷⁵ and applied in light of the "logic" of the language expressing these precepts.⁷⁶ To an instrumentalist, a legal precept cannot be self-justifying. To justify having a form of law, it is at least necessary to inquire into its ends and its effects. Does it maximize present wants and interests? By apposite and defensible means? If so, this use of law is justified. In addition, the law does not consist of precepts that may be applied formalistically. Rather, law must be applied in light of its substantive ends.

the abstract and the general, have primacy; and (2) that the law as it is can and should be sharply distinguished from the law as it ought to be.

⁷³ Even in this day one encounters articles and books in the analytical positivist tradition that systematically neglect the elemental fact that particular forms of law exist to serve particular goals. Such writings, for example, inquire whether a precept at hand is a rule or merely a principle, whether it imposes a duty or confers a power, whether it is a member of this system or that system, but they do not inquire whether it embodies or reflects a means-goal hypothesis, and if so what the nature of that hypothesis is.

⁷⁴ Oliphant, *The New Legal Education*, 131 *NATION* 493, 495 (1930).

⁷⁵ *See, e.g.*, 1 *WORKS OF RUFUS CHOATE* 436 (S. Brown ed. 1862). *See also* *Lochner v. New York*, 198 U.S. 45, 53 (1904) (Peckham, J.).

⁷⁶ *See, e.g.*, C. LANGDELL, *supra* note 5.

It is not too much to say that the instrumentalists reconceptualized the nature of law. For them law was essentially a set of means to be used to serve social goals derived from conventional wants and interests.⁷⁷ Yet Holmes, Pound, and nearly all the other leading pragmatic instrumentalists failed to carry matters of theory much further. With the principal exception of Dewey, these thinkers theorized little about the general nature and relationship of ends and means in legal ordering.

B. *Law's Goals and Structures*

The theorists of pragmatic instrumentalism did not come to grips with the nature of law's goals and goal structures. In this they were not alone; most adherents of the theory of analytical positivism, for example, also neglected this subject. Yet the goals of law constitute a remarkably fertile and complex field for study. Although in this Article I can only indicate in a general way how these matters might be carried beyond the instrumentalists' fundamental reconceptualization of the nature of law, it will still be possible for the reader to see that most of what follows could be accommodated within a more sophisticated pragmatic instrumentalism. There are few, if any, inherent inconsistencies between instrumentalist theory and what will be offered here.

We have already seen⁷⁸ that for most leading instrumentalists the primary tenet of value theory was that law should attempt to maximize the realization of existing interests. Of course this qualifies as a meaningful goal for law only at the most abstract level. Within a society, the interests of the people translate into a number of basic goals that are more or less continuous and pervasive. These include not only goals of traditional legal concern such as preserving order and securing evenhanded administration, but also goals having to do with such matters as the promotion of community health and reinforcement of the family.⁷⁹ Of course many other goals that society will want the law to pursue will be far less fundamental.

After a rule or other law is formulated, it still may be difficult to determine the goals that should be attributed to it. This is so for two reasons. First, the lawmaker may not have explicitly incorporated the goals that determine the law's content in the law itself. This often

⁷⁷ This instrumentalist revolution occurred in America several decades after the one on the Continent led by Rudolph Von Ihering. See R. VON IHERING, *supra* note 9.

⁷⁸ See text accompanying notes 44-49 *supra*.

⁷⁹ Law's fundamental goals, particularly those of natural legal concern, call for extended treatment and are beyond the scope of this Article.

occurs in part because intelligible forms of law can ordinarily be formulated without incorporating goals. Intended goals, however, may be ascertained from available evidence in records of legislative bodies, in court opinions, in proceedings of administrative agencies, and the like. Even when not ascertainable, there may still be accepted types of argument for attributing goals to law. Second, the various goals that could be attributed to a form of law are usually ones that have come into conflict in the course of constructing the law. The emerging law is often the result of complex reconciliations, and this may make it difficult to map the extent to which various goals figured in the process.

Rules and other legal precepts characteristically have more than one goal. It is commonly possible to differentiate several goal levels along a means-end continuum of ascending generality, in which the realization of a low-level goal explicitly formulated in the law serves higher-level goals, usually not so formulated. Thus, we may usually attribute to a rule or other precept directing behavior one or more "immediate" goals, one or more "intermediate" goals, and one or more "higher-level" or "ultimate" goals.

Consider, for example, a law requiring private parties to register handguns with the police. In terms of the foregoing analysis, we might distinguish at least the following different goals: "registration of all privately owned handguns" (immediate); "deterrence and control of violence with firearms" (intermediate); and "general community peace" (ultimate). The nature of these goals and the relations between them are such that they cannot be reduced to one and the same goal. We can imagine ways of serving the immediate goals that do not also serve the intermediate goal. For example, if the public knows that more prosecutorial resources are needed to reduce handgun violence, and these are not provided, then registration of handguns, the immediate goal served, may have little or no deterrent effect on their use, the intermediate goal. Although realization of the immediate goal may actually serve the intermediate one, so might realization of many other imaginable immediate goals. For example, handgun violence might be deterred by increasing penalties.⁸⁰

At least on the second and third of the three goal levels, one can usually identify a number of possible goals. Indeed, this will usually be the case even for a single precept. Consider, for example, the

⁸⁰ Of course, one cannot draw such distinctions between the types of goals of a single law in the abstract. They can only be drawn in relation to a specific law and a scale or continuum appropriate to it. Thus, one must begin with the immediate goal and trace out how the pursuit of this lowest-level goal would in turn serve higher goals along the appropriate means-end continuum.

ultimate goals for the hypothetical firearm-registration law. These might consist of community peace, facilitation of economic activity, the intrinsic good of preserving life, and enhancement of freedom of movement. Furthermore, aside from affirmative goals, lawmakers understand that almost any law has its costs in the form of expense, time, trouble, and the sacrifice of conflicting values. Lawmakers will therefore pursue the goal of minimizing such costs, too.

Thus, there usually will be no simple, single goal for a legal precept. The goals of a given precept form a goal "constellation" or "synthesis" that usually reflects some effort to accommodate conflicts in an optimal way. Only the most naive pragmatic instrumentalist would have denied these truths but even the most sophisticated did not address them, and much work remains.

C. *Should Law Be Described Merely as a Means?*

With few exceptions, the instrumentalists wrote as if rules and other legal precepts are to be described merely as a means. Thus Pound remarked, "Law is a means, not an end,"⁸¹ and "the life of the law is in its enforcement."⁸² Llewellyn, characterizing the group of which he claimed to be a member, added: "They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends."⁸³

One way to interpret writers like Pound and Llewellyn is to say that they believed a description of a particular form of law can be essentially complete even if it includes no account of, or reference to, its intermediate or ultimate goals. This mode of describing any particular form of law may be called *technological*. A description of a particular form of law in this mode goes only into such things as the wording of the law, its behavioral directives, if any, its sanctions or other implementive devices, and the like. A description of this kind may sometimes imply particular intermediate or ultimate goals, but more often it will be quite ambiguous in this respect, and will say nothing about the priority of any conflicting goals.

As an alternative to technological descriptions, one may claim that a description of a particular form of law is essentially incomplete if it does not include *some* account of, or reference to, its intermediate or ultimate goals. According to this view, a form of law is a "means-goal" complex; it incorporates *teleological* content.

⁸¹ Pound, *The Need of a Sociological Jurisprudence*, 29 GREEN BAG 607, 612 (1907).

⁸² Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 514 (1912).

⁸³ Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, *supra* note 2, at 1223.

Which of these descriptive modes, the technological or the teleological, is more faithful to the reality of law? Several arguments favor the teleological. It must be said that although many or even most instrumentalists might ultimately have agreed with this view, they did not confront the issue explicitly. Yet they were, after all, antiformalist. In proclaiming that "law is merely a means" the instrumentalists may only have meant that no particular form of law can be self-sufficient or self-justifying—that a form of law exists only to serve goals and is to be judged accordingly.

Still, the temptation to describe particular forms of law in the technological mode is powerful and recurrent among lawyers. Instrumentalists did adopt general slogans that are technological in tone, such as "law is merely a means." Moreover, some of them did undertake to describe particular forms of law solely in terms of generalities about what officials were doing, not what they were trying to do.⁸⁴ But it would be more natural for a full-fledged instrumentalist to insist that an essentially complete description of a particular form of law must include some account of or reference to its goals.

Three arguments favor teleological descriptions—characterizations which reveal particular forms of law as complexes of means and goals. First, it is frequently not possible to separate and distinguish means from goal without artificiality. Legal means may not be readily understandable, even as means, unless brought into relation with relevant goals. Consider, for example, the elaborate system of government transfer payments in modern societies. These are embodied in complex forms of law. One cannot adequately grasp the particular forms of law involved without taking account of what they are for—to relieve poverty, lessen inflation, equalize wealth, enhance liberty, or whatever. A particular form of law will vary depending upon which such goals are primarily at work. Thus, an essentially complete description of any such form of law requires an account of these goals.

Similarly, legal means may be constituents of a goal to such a degree that the abstract goal, standing alone, is not very meaningful. A society may proclaim the goal of equalizing wealth. Until a mode of equalization is prescribed, however, the goal remains abstract, indeterminate, and not very meaningful. This familiar interdependence of means and goal further supports the characterization of particular forms of law as means-goal complexes.⁸⁵

⁸⁴ See, e.g., Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 381 (1931).

⁸⁵ The preceding remarks follow Fuller to some extent. See generally L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Fuller, *supra* note 35.

Second, descriptions of law that take account of or refer to goals are more faithful to the reality of law as a human artifact than are merely technological descriptions. We generally understand legal precepts as characteristically designed to serve goals and thus as phenomena adapted, at least to some extent, to those goals. This should hardly surprise anyone, least of all pragmatic instrumentalists. We make laws to accomplish ends. Thus, if a form of law is so ill adapted to its goals that it cannot reliably serve them, we are inclined at least to say it is much less a form of law and, sometimes even to say it is not law at all. Of course, this does not mean that to be law a given precept must be highly effective or that it must serve a good goal. And it is not to rule out, in the case of a totally functionless law, the appropriateness of saying: "This law is useless." Rather, when we think of law we ordinarily have in mind something that is at least minimally effective for its purpose. And the usual phenomena of law that we confront in daily life is, in fact, thus effective. This reinforces the appropriateness of *describing* particular forms of law in terms that take account of or refer to relevant goals.

The third argument for a teleological view derives its force from the requirements of an interpretive method that effectively implements the goals of particular forms of law. Indeed, the argument ought to have appealed to instrumentalists, for they generally subscribed to "goal-oriented" interpretation. In general, the language of a legal precept cannot be appropriately interpreted if divorced from all conceptions of the goals that this precept is to serve. Such language is not self-defining for legal purposes, and the authoritative goals it is meant to serve may not even be stated in this language. Yet these goals may dictate a different interpretation from that which the ordinary lay meaning of the language would suggest. Hence, one must infuse the language with relevant intermediate or ultimate goals in order to determine what the language means for legal purposes. When applying the law to particular circumstances, one can never determine what a legal precept means without considering its purposes. In this view, a particular form of law, considered as a whole, is a complex of means and goals.

The descriptive accuracy of the teleological view could be thought to depend on whether we really do generally interpret law in our system by reference to its goals. Interpreters might choose to ignore even reliable evidence of goals not explicitly incorporated in the law itself. But in fact, goal-oriented interpretation is widespread, and even if it were not it still would not follow that particular forms of law can be properly interpreted apart from the purposes they are to serve. It would follow instead that those who interpret law are in the dark

about their responsibility. Their presumptive responsibility is to interpret law to serve goals. This can only be done by keeping goals in view.

Perhaps a brief example will reinforce this argument. Suppose an ordinance says only that "No vehicles shall be taken into public parks." The goals that this language is to implement (found in city council meeting records) are to keep down noise and enhance park safety. Without reference to these goals, a person who interpreted the language solely in light of the ordinary dictionary meaning of the words would be very likely to conclude that bringing a World War II jeep into the park and placing it on a concrete slab as a memorial qualifies as taking a "vehicle" into the park and therefore is a prohibited act. But in light of the goals that a "purposive" interpreter should resort to in order to infuse "vehicle" with appropriate meaning, the jeep would not offend the ordinance.⁸⁶

D. *Relations Between Means and Goals in Effective Thought*

Although pragmatic instrumentalists saw law as a means to goals, all but Dewey and Cook (whom Dewey influenced on this point⁸⁷) were generally silent about the subtle and complex relations between means and goals in effective legal thought. Many assumed or claimed that problems of legal ordering are essentially divisible into two distinct stages: setting goals and devising means. A few were quite explicit. Moore, for example, held that "A rational or logical process is directed towards an end chosen before the process is begun. The process is judging that certain means will tend to that end."⁸⁸ On this, Lon Fuller also had much to teach naive instrumentalists. He thought that a view like Moore's inaccurately portrayed the actual thinking of legal actors, and that it is not *possible* to think effectively about means and goals in this way.⁸⁹ Of course, when starting to think about a problem, a legal actor may profitably formulate some rather general and tentative goals. By stubbornly holding to these, he might even occasionally invent new legal means. But in law, the proverb that "where there is a will, there is a way" is false, or at least narrowly limited. Moreover, some delimitation of means at the outset is usually necessary to liberate the creative spirit and sharpen judgment. Otherwise, one is likely to flounder in generalities.

⁸⁶ See Fuller, *supra* note 35, at 662-64; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

⁸⁷ See J. DEWEY, *THEORY OF VALUATION* (1939); Cook, *supra* note 48, at 59-65.

⁸⁸ Moore, *supra* note 41, at 612.

⁸⁹ See L. FULLER, *ANATOMY OF THE LAW* 36-39 (1968); Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 473-81 (1954); Fuller, *Means and Ends* (1960) (unpublished manuscript on file with the author).

In the course of thinking about a problem, one must bring goals and means into relation. Goals acquire power to orient and discipline analysis when conceived in relation to available means. It is seldom possible to define a social objective meaningfully apart from all means of realizing it. Instrumentalists tended to assume that setting goals is relatively straightforward; the act of setting the goal goes far to determine means. But means also delimit and help determine goals. Indeed, the time is not ripe for a faithful description of society's commitment to, say, the goal of "equal treatment" until after it has settled upon the means of defining and administering the goal. In effective thought, goals and means interact. Goals tentatively point to means. Means then indicate some reformulation of goals. This interactive process continues until the thinker adopts a means-goal hypothesis, or abandons goals because acceptable means are unavailable.

In the course of lawmaking and law administration, a specific means-goal complex or hypothesis is the usual object of evaluation, not goal alone or means alone. The desirability of a goal depends not only on any intrinsic worth it may have. Its attractiveness depends also on any "means deficit"—the likely costs of serving it, including goal sacrifices, sacrifices of means that could serve other goals, and economic costs. It depends also on any "means surplus"—likely collateral gains from a projected means. Thus, goals must be viewed and means considered, in clusters. It follows that problems of means are not merely technical and factual; they too inevitably call for evaluative judgment.

Most of what is said in this section is addressed to omissions or naive corollaries, implicit or assumed, in the instrumentalist tenet that law consists of means to ends. A sophisticated instrumentalism could readily accommodate nearly all of the foregoing critical reactions.

Perhaps the most fundamental pragmatic instrumentalist tenets are the ones we have so far considered: the notion that law should maximize existing interests; the view that questions of value will prove to be largely reducible to matters of fact; and the basic conception of law as social means. We now turn to other elements of the theory dealing with lawmaking (Section IV), with the criteria accepted within our system for identifying precepts as valid law (Sections V and VI), and with the interpretation and application of valid law (Section VII).

IV

CHANGE, SCIENCE, AND THE CREATION OF LAW

Formalists generally viewed the law as a relatively closed system of conceptions and axioms from which judges and others could deduce

resolutions of almost any issue.⁹⁰ In their view there was little need, let alone scope, for creating new law. Pragmatic instrumentalists, on the other hand, saw great potential for the effective use of law. Thus, they envisioned vast scope for legislators, judges, and other authorized legal actors to make wholly new law as well as to modify existing law. To them, social change was the major stimulus of legal change. Although some legal change would have to be brought about by legislators, these thinkers proclaimed that judges not only may interpret and apply pre-existing law, but may create law as well. The instrumentalists believed in scientific method and were the first to champion the relevance of empirical research to lawmaking of all kinds.

A. *The Creation of Law—Methodology*

Insofar as formalists and conservative theorists at the turn of the century did recognize proposals for genuinely new law, they often assumed that these proposals should be judged primarily by how well they meshed with existing law. Consistency, analogy, coherence, harmony, and symmetry were their main tests of soundness.⁹¹ The pragmatic instrumentalists rejected this view. They did not look to the past and ask: Is this proposal consistent with X? Analogous to Y? Harmonious with Z? Rather, they looked forward and asked: What can now be done to alter the future? What substantive goals, derived from popular wants and interests, are relevant? What rules or other precepts are required to further them? Thus, the new theorists subscribed to a *substantive* means-goal rationality. Today, it may be difficult to believe that theorists could ever have thought differently about law. Yet in its time, this was a signal advance, especially in regard to the judicial role.

It was part of the creed of these thinkers that lawmakers must turn to social science to ascertain facts relevant to the creation and modification of law. At this time, the social sciences had not yet accumulated a store of knowledge which lawmakers could use. Accordingly, lawmakers usually had to commission an inquiry in regard to each problem as it arose. Several kinds of inquiry might be required for any given problem.

⁹⁰ Pound conceived the formalist position in precisely these terms. See generally Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

⁹¹ See, e.g., J. BEALE, *supra* note 6; C. LANGDELL, *supra* note 5. See also *Lochner v. New York*, 193 U.S. 45, 52 (1904) (Peckham, J.) (existing law widely requires liberty of contract); 1 R. CHOATE, *supra* note 75, at 436.

First, lawmakers had to find facts about the nature and extent of the problem knocking on the law's door. What were the effects of a monopoly practice on economic efficiency? What kinds of official corruption were commonplace? How many women employees were being worked beyond a forty-five hour week? What impure foods and drugs were finding their ways onto the market? In all such inquiries, the lawmaker also had to determine the social effects of these events and states of affairs. What, for example, were the effects of long hours on the health of a woman and her family? Holmes and Pound were among the first to advocate the use of social science methods in such inquiries. In a famous essay, Holmes urged the use of statistics, economics, and science generally.⁹² Pound stated that

[t]he main problem to which sociological jurists are addressing themselves today [1912] is to enable and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied.⁹³

Second, it was assumed that lawmakers must ascertain the causes of economic inefficiency, of official corruption, of excessive hours of labor, of practices that led to impure food and drugs entering commerce. Better yet, if social science methods were to be applied most faithfully, the very laws of social causation, which account for the occurrence of such states of affairs, and in turn their effects, would have to be scientifically formulated. A law of social causation would take the general form: "If certain conditions are satisfied, then certain effects will invariably occur or will occur with some specified degree of frequency." With knowledge of such laws, legislators would be in a better position to identify the "pressure points"⁹⁴ to which they could best direct their energies to prevent or remedy these occurrences and states of affairs. Also, with knowledge of such laws of causation, legislators could predict the social effects that would occur depending on the legal means deployed.

Third, science could help determine alternative legal means for coping with problems, and could even help construct such means by discovering or adapting technology. What if criminal penalties were used against monopolies? Or private treble damage actions? What new inventions in the fields of health and safety might be introduced and legally prescribed to cope with the effects of long hours for women? Should something more radical be attempted? John Dewey's

⁹² See Holmes, *The Path of the Law*, *supra* note 29, at 467.

⁹³ Pound, *supra* note 82, at 512-13.

⁹⁴ See Cohen, *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238, 252 (1950).

“logic of inquiry”—rather than demonstration—was viewed by some as suggesting fruitful ways to ascertain the likely consequences of using alternative means. Several of these thinkers, notably Oliphant, Bingham, Cook, and Moore, were particularly interested in how varying the legal means might produce desired consequences.⁹⁵ Indeed, some appear to have assumed that over time it would be possible to construct laws of legal causation similar to laws of social causation in which antecedent variables include the use of legal means. On this view, it would be possible to state that “If legal means X were used in circumstances Y, results Z would be expectable.”

Armed with these tools, lawmakers could be truly scientific. They could invoke laws of social and legal causation to predict the likely efficacy of alternative legal means, determine costs and benefits, choose the preferred means, and implement them. Pragmatic instrumentalists generally prescribed this approach not only for legislators but for courts, too.

Once new law was made by legislature or court, the instrumentalists urged that social methods be continuously applied to monitor and evaluate whether the law was working out as envisioned. Fact-finding of this nature would prove useful in deciding whether to modify or perhaps even abandon the current law. Pound stressed that “[t]he compromises and adjustments that will achieve the largest securing of social interests with the least sacrifice, must be sought through a process of trial and error.”⁹⁶ Holmes and many others wrote of uses of law as “experiments” and of society as a legal “laboratory.” Holmes even viewed the Constitution in this spirit; “It is an experiment, as all life is an experiment.”⁹⁷

Instrumentalist trumpeting for vast infusions of empirical research into legislative and judicial processes of lawmaking was much needed in its time. At the turn of the century, our courts were regularly striking down social legislation, apparently in ignorance of social facts behind it.⁹⁸ Today it has become a truism that knowledge of social facts is essential to sound lawmaking.

⁹⁵ See, e.g., Bingham, *What Is the Law?* 11 MICH. L. REV. 1, 9-11 (1912); Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303, 308 (1927); Moore & Callahan, *Law and Learning Theory*, 53 YALE L.J. 1, 3 (1943); Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEXAS L. REV. 127, 137 (1938).

⁹⁶ Pound, *Jurisprudence*, in HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES 444-72 (H. Barnes ed. 1925).

⁹⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919). See also *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (“There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments . . . in the insulated chambers afforded by the several States. . . .”).

⁹⁸ See generally Pound, *Liberty of Contract*, 18 YALE L.J. 454, 480 (1909); Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 16 (1910).

B. Excesses and Myopias

Pragmatic instrumentalists overstated, perhaps understandably, the need for systematic scientific inquiry into social facts in lawmaking. Some important problems call for little or no inquiry beyond what is already known. Sometimes the main problem before a legislature is simply to state and codify a widely held moral tenet. This is true, for example, of many aspects of promulgating a criminal code. The problem may be that of codifying widely accepted case law and customary business practices in a new commercial code, formulating widely accepted norms for contract law, adopting a fair and efficient set of procedural rules, or specifying formalities for the valid exercise of private power to enter into contracts, make wills, or set up secured transactions. In all such instances, empirical research may either be largely irrelevant or relevant but of so little consequence that its cost would easily exceed its value.

Even when social science research is relevant and useful it frequently need not take so ambitious a form as the formulation of laws of social or legal causation. Commonly, the research will take the form of information gathering, as when a legislative body inquires into how many employers employ women beyond a forty-hour week, when it sends out inspectors to determine the living conditions in housing subject to rent control, or when it inquires into average prices of necessities to determine the sufficiency of existing welfare payment levels.

Similarly, research to determine the success of a means-goal hypothesis may in some circumstances call for nothing very ambitious or systematic. For example, a new system prescribed in regulations for coordinating aircraft over large cities will either be followed by a reduction in accidents and near misses or it will not.

Furthermore, not all problems of lawmaking must be approached in accordance with the instrumentalists' one basic method: ascertaining the problem, determining its causes, and deploying legal means to operate directly on those causes or "pressure points." Frequently it is enough for the lawmaker to address the effects directly, without inquiring into causes at all. This is true, for example, of many legal programs for the distribution of such substantive social benefits as education, welfare, and the like. If lawmakers want basic literacy and minimum subsistence for all, they may simply raise the tax dollars and proceed accordingly. They need not worry much about why literacy would fall without public schools or why people would starve without food.

Pragmatic instrumentalists were unduly optimistic about what social science can contribute to sound lawmaking. We have already

seen that once the facts are in, important questions of value always remain for the lawmaker to confront.⁹⁹ These theorists were wrong to assume that science can determine our ends as well as identify our means.¹⁰⁰ Rather, the lawmaker must compare and evaluate alternative means-goal hypotheses in some qualitative way. An ultimate judgment must be made in light of reasons. The force of such reasons depends not only upon empirical facts available in the decisional context, but also upon principles and ideas of what is good, right, and appropriate, beyond mere de facto wants and interests. A few instrumentalists, Pound included, sometimes wrote as if they believed that social sciences could generate not just findings of social fact but their own "normative" theories of value as well—theories peculiarly relevant to lawmaking.¹⁰¹ This, too, was deeply misconceived. The social sciences do not each have a "normative side"—a theory of value—that is also the special scientific province of each discipline. No doubt the findings of these disciplines may interact with general notions of value which are not the province of any special discipline, and thereby give rise to policy recommendations.¹⁰² These recommendations might or might not accord with existing wants and interests.

Nearly all of the pragmatic instrumentalists greatly underestimated the methodological and other limitations of social science. These limitations are especially acute insofar as the objective is to establish laws of social or legal causation so that legislators may predict the effects of uses of legal means to cope with problems. As early as 1927, the philosopher Morris R. Cohen wrote illuminatingly on the difficulties that plague efforts to establish causal laws in social affairs.¹⁰³ He set forth the following procedure for determining a causal law in most natural sciences: first identify all possible variables that one may hypothesize to be causes of the event or state of affairs in question; isolate each variable while holding the others constant, and determine whether the event or state of affairs in question nonetheless occurs; repeat this process for each of the variables and plausible combinations thereof; and, finally, formulate a statement of the variable or variables that turn out to be causal.

⁹⁹ See text accompanying notes 70-72 *supra*.

¹⁰⁰ See, e.g., Holmes, *Law in Science and Science in Law*, *supra* note 44, at 462.

¹⁰¹ See, e.g., Pound, *supra* note 81, at 609, 615; Pound, *Enforcement of Law*, 10 GREEN BAG 401, 403 (1908). See also Oliphant, *supra* note 95, at 137-38.

¹⁰² See Summers & Kelley, *Economists' Reasons for Common Law Decisions—A Preliminary Inquiry*, 1 OXFORD J. LEGAL STUDIES 213 (1981).

¹⁰³ See M. COHEN, *Law and the Scientific Method*, in LAW AND THE SOCIAL ORDER 184-87 (1933); Cohen, *The Social Sciences and the Natural Sciences*, in THE SOCIAL SCIENCES AND THEIR INTERRELATIONS 437 (W. Ogburn ed. 1927), reprinted in part in READINGS IN JURISPRUDENCE 724-47 (J. Hall. ed. 1938).

Cohen stressed that this procedure is not as applicable to social affairs as it is to nature. It is more difficult in social research to identify all possible causal variables. There are also special problems of access. For example, a relevant variable may consist of motives and reasons behind individual or group action, yet reliable evidence of these may be hard to find. In addition, the variables tend to be far more diverse, and thus less susceptible to definition and to measurement in a common unit. As a result, we cannot tell how much of a variable, or combination of variables, will be required to bring about an event or state.¹⁰⁴ Moreover, some antecedent variables may be "opposed" to other variables. For example, an economic motive may be pitted against a religious one. If we cannot measure these, we cannot know how much of one variable would counteract another. Furthermore, it is less easy to isolate the possible effect of a single variable, that is, less easy to vary one at a time. As Cohen put it, social situations are networks in which one cannot alter a single variable without affecting a great many others. Finally, it is rarely possible to repeat the sequence of events over and over again to determine the possible causal efficacy of each variable under consideration.

According to Cohen, all these factors drastically limit the availability of many kinds of social knowledge. He thought the inability to repeat sequences a factor specially worthy of note. Societies simply cannot afford to repeat phenomena such as famines, depressions, or deaths, etc. Social norms and taboos would bar the repetition of other sequences, for example, those invading privacy or the integrity of the person. Other phenomena that serve as variables are often in their nature not repeatable, for instance unique historical episodes.

Although these and other difficulties plague social science research, they should not be taken as a counsel of despair. As already noted, much fact-finding for purposes of lawmaking does not require the formulation of laws of social causation of any kind. Moreover, even when controlled experimentation and inquiry are not possible, simulations, field experiments, and statistical information and other analyses of data can provide important information and insight.¹⁰⁵

¹⁰⁴ Consider, for example, the range of relatively unmeasurable variables listed below, all of which might be antecedent to a given event or state, the "cause" of which is to be determined: (1) varied motives, desires, ends of individual or groups; (2) varied motives, desires, ends of individuals or groups combined with any of a vast variety of possible means at their disposal; (3) varied traits of individuals or groups; (4) varied social structures; (5) varied legal structures; (6) varied social history; (7) varied natural events.

Indeed, today some philosophers of social scientific inquiry are not so pessimistic as Cohen.¹⁰⁶

V

CRITERIA OF LEGAL VALIDITY I—LAW AS OFFICIAL ACTION

One of the basic notions required to understand the nature of a system of law is that of legal validity. At any given time a society will have a very wide variety of social standards and norms, and people must be able to tell which are legal and which are non-legal. Where there are purported modifications of previously existing law, people will need to know whether past or present law controls. The validity of any additions to existing law will have to be determined. Then too, there will be proposed changes in the law and it will be important to be able to tell whether a proposal would be legal. When conflicts arise between what would otherwise be independently valid legal rules, for instance between a duly enacted statute and a court decision, there must also be some method of determining which law governs.

In all the foregoing and still other important types of instances the issue is one of legal validity: What is the *valid* rule or precept? Note that issues of validity do not necessarily address whether the precepts involved are good or bad. Indeed, as we will see, the controlling standards of validity accepted within a given society *may* be ones that determine validity without regard to the goodness of particular precepts.

Issues of validity are often distinguished too sharply from issues of interpretation and application of admittedly valid law. Questions of validity are themselves to be resolved by reference to law—standards and techniques for determining what is and what is not valid law. This law governing issues of validity may take a variety of forms, and itself calls for interpretation.

The literature of pragmatic instrumentalism includes two basic and not wholly compatible accounts of the nature of the law governing issues of validity in our legal order: (1) any rule or other precept acted upon or laid down by an authorized official is valid, and (2) valid law consists of predictions of what courts will do.

A. *The Validity of Law as Determined by Prior Official Action*

One basic task of the legal theorist is to provide a general descriptive account of the practices followed in our system for the identifica-

¹⁰⁵ See E. NAGEL, *THE STRUCTURE OF SCIENCE* 456-59 (1961).

¹⁰⁶ For a more optimistic assessment, and for the view that Cohen's model of scientific method is unduly restrictive, see generally R. RUDNER, *PHILOSOPHY OF SOCIAL SCIENCE* (1966).

tion of valid law. This account would set forth the standards operative within our system for differentiating what is valid from what is not valid law.

Most pragmatic instrumentalists implicitly or explicitly took the view that a given precept is valid in our system if and only if the relevant highest court or other appropriate official has acted upon it or laid it down.¹⁰⁷ On this view, then, "the law" is not a "brooding omnipresence in the sky";¹⁰⁸ rather, it is whatever judges act upon or lay down as law. Of course, prior judicial action might diverge from prior official text or statements laying down standards for determining what precepts are legally valid; in that event, instrumentalists held that the later judicial action controlled.¹⁰⁹ Indeed, it seems to have been widely thought that provisions of the Constitution limiting the kinds of law Congress or state legislatures can validly create are merely whatever the courts make of them.¹¹⁰ Similarly, if a statute required two witnesses for a valid will but the courts later required only one, the court actions would control as to validity.¹¹¹

This simple doctrine is infelicitous in the following important way. To the extent that these thinkers held that judicial deeds always control prior official words laying down tests of validity, we are left with no independent standards by which to determine whether what judges consider to be valid law is itself in accord with legal tests of validity. Yet our very concept of a standard of validity generally requires that the standard be independent in this way. We subscribe to a system in which the rule of law prevails to some considerable degree. This means, among other things, that citizens are not meant to wait until a court speaks before they can know their legal rights. Generally, they are to have the means of ascertaining these rights in advance. Tests of validity operative in advance of final court action provide these means.

It misdescribes our system to say that judges have general authority to "bootstrap" their actions into legally valid status. As H. L. A.

¹⁰⁷ See, e.g., J. FRANK, *supra* note 41, at 124-26; J. GRAY, *supra* note 47, at 84-112; K. LLEWELYN, *THE BRAMBLE BUSH* 3, 5 (1930); Bingham, *supra* note 95, at 11; Cook, *The Logical and Legal Basis of Conflict of Laws*, 33 *YALE L.J.* 457, 460 (1924).

¹⁰⁸ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917).

¹⁰⁹ See, e.g., J. FRANK, *supra* note 41, at 124-28; J. GRAY, *supra* note 47, at 84-112, 309; Llewellyn, *A Realistic Jurisprudence—The Next Step*, *supra* note 2, at 455-56.

¹¹⁰ Thus, even a Chief Justice of the Supreme Court, Charles Evans Hughes, said "We are under a Constitution, but the Constitution is whatever the judges say it is." Speech by Charles Evans Hughes (May 3, 1907), *reprinted in THE JUDICIAL PROCESS* 501 (R. Aldisert ed. 1976). For extended and perceptive analysis of this viewpoint, see H. L. A. HART, *THE CONCEPT OF LAW* 138-43 (1961).

¹¹¹ One may easily think the foregoing a surprising view of the priority between constitutional text or statute on the one hand, and subsequent judicial action on the other.

Hart has noted, this is true even though their decisions may be legally final.¹¹² If in resolving issues of validity judges are "bound" by something, then that something must be external to whatever it is that they are doing. They cannot at the time of acting be "bound" by their own immediate acts. It must remain possible that even judges could resolve issues of validity mistakenly. Yet if whatever judges do is *ipso facto* valid, then they can never be mistaken. And in our system, informed citizens, lawyers, and officials recognize that judges can be mistaken, for they not uncommonly criticize judicial acts when contrary to independent standards for identifying valid law. Moreover, through our processes of appellate review for error (and other corrective devices) we officially recognize that judges can be mistaken. Indeed, sometimes courts themselves invalidate long-established courses of judicial decision as never having been the true law.

In no modern legal system is it true that the standards and techniques for determining valid law are reducible merely to whatever it is that judges do. The reality is that these systems preserve a fundamental distinction between judicial action in accord with standards and techniques for determining valid law, on the one hand, and judicial action not in accord with such standards on the other. Certainly our own system has always embodied tests for determining valid law that are independent of what judges ultimately do.¹¹³ A theory of legal validity that provides no place for such independent standards is *conceptually* inadequate. It simply lacks the categories required to take account of the reality of the relevant social practices.

I now turn to a second issue. Judicial actions and past official texts specifying tests of validity commonly do not diverge. At least in these circumstances, instrumentalists often wrote as if they were content with the notion that standards of valid law must consist of prior official pronouncements: valid law is whatever an authorized official has duly laid down or acted upon. This test, however, looks solely to the *source* of the law in question. Nothing inherent in the nature of law requires that tests of legal validity take exclusively the form of source-based criteria. Such criteria make no place at all for the fact that a legal system may resolve issues of validity partly upon the basis of the substantive *content* of the precept in question—upon the substantive reasons that figure in its content. In our own legal system many issues of validity are resolved not only by reference to the authority of the source of law in question, but also by reference to such substantive

¹¹² See H. L. A. HART, *supra* note 110, at 138-44.

¹¹³ Of course, this is not to say that for every issue of validity that arises, there must be or is a determinate independent test of validity.

considerations. Hence, in this regard the instrumentalists' "source-based" theory of validity is simply descriptively awry. Whether a statute is valid may depend on its substantive content and not just whether it emanated from an authoritative source, namely the elected legislature. For example, a legitimately promulgated statute may be constitutionally invalid because it discriminates against an ethnic group.¹¹⁴

Analogously, a court precedent within a common law field can be invalid. If judged solely by a source-based test, however, it would seem to follow that such a precedent must necessarily be valid law. But it is familiar to lawyers in our system that we not uncommonly regard a precedent as no longer "good law"—meaning thereby that if the precedent were cited to a court, that court would not follow it. Our courts have power to overrule bad case law, and stand ready to do so. But an actual overruling is not required before lawyers and others may appropriately regard a precedent as bad law—as no longer valid. Difficult borderline cases of validity may arise, of course, but not all cases are near the borderline. Now, just what kind of test of validity is at work when we proceed to identify case law as bad and thus not valid? The test must be partly one of substantive content. Bad case law that is perceived to be no longer valid is simply law without sufficient reasoned justification.

Judges recognize various forms of custom as valid law in our system, too. Yet in so doing, judges consider whether the customs are unreasonable or unconscionable and this must surely count as a "test of content" rather than as merely a test of authoritative origin. There is a further difficulty of a different kind with regard to custom in the theory of those who would claim that its status as valid law depends on its authoritative origin. Usually there are no determinate authoritative originators of custom. Whether such custom be a course of past dealing, a usage of trade, or a general social practice, typically no determinable person in authority lays it down. It just grows up.

It might be thought that source-based tests of the validity of custom still apply, for a custom does not become valid law until a court later recognizes it as such. But this is not consistent with our actual law-identifying practices. Lawyers and others regularly identify customs as law, on their own footing, in advance of official stamps of validity.

In deciding cases of first impression, in fashioning new law to replace overruled law, in choosing between conflicting precedents,

¹¹⁴ Of course, the courts might choose to ignore even explicit substantive criteria of validity in our Constitution, even for long periods; the past is not without amazing instances of this.

and in rounding out a statute or otherwise engaging in legitimate creative interpretation, judges make what is considered valid law. But it would misdescribe the facts to say that in our system this law is valid *merely* because authorized judges have made it. It is valid, too, because it has justified substantive content—because it has a sufficient ingredient of reason. Mere source-based criteria of legal validity do not take account of the actual play of such considerations of substantive content within our system. Instead, they divorce validity from content.

It follows that the general descriptive account of legal validity to which many instrumentalists subscribed was, in an important sense, formalistic. It looked to the exercise of formal authority and entirely neglected substantive content. This is a paradox, for as we have seen, the instrumentalists were virulently anti-formalist in their views. The paradox can be explained, if not resolved, however. Some of these thinkers were reacting, in an indiscriminating way, to certain unenlightened and highly conservative decisions of judges on the Supreme Court and on the highest courts of the various states. Holmes, Pound, and others viewed such judges as overly enamored with Abstract Reason.¹¹⁵ These theorists, wishing to disassociate themselves, may have repudiated tests of validity that are content oriented in favor of source-based tests in which authoritative origins rather than substantive content control what counts as the law. Of course, in seeking to curb excesses of the day these thinkers were abandoning (perhaps unconsciously) the task of *describing* the criteria of validity at work in the system. Moreover, these thinkers were highly science-minded. It was natural for them to want to conceive of the legal validity of a rule or other precept as a matter of ascertainable brute fact—as something determinable solely by empirical evidence of concrete historical events like pronouncement or decision. A mere source-based test of valid law also allowed them (or so they thought) to draw a sharp distinction between valid law and general moral principles, a distinction several of them were keen to insist on, again partly as a way of combatting excesses. Finally, a source-based criterion of legal validity, though itself formalist, does not necessarily entail that *bête noire* of instrumentalism, formalist interpretation and application of the law after it is once identified as valid.

Still, in its time, the instrumentalist effort to describe tests of valid law in terms of whatever has been laid down or acted upon by an

¹¹⁵ See, for example, Professor Howe's discussion of Holmes's reaction to views such as those of Chief Justice Rufus Choate. Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 538 (1951). See also Gray's critique of Blackstone and Carter. J. GRAY, *supra* note 47, at 219-40.

official may not have been wholly devoid of virtue, even though inaccurate. When Holmes, for example, stressed that valid law is something man-made rather than a brooding omnipresence in the sky, he was, among other things, reminding judges and others that the quality of the law is something for which they have responsibility.¹¹⁶ These thinkers also unmasked judicial conservatism partly by stressing that under very general constitutional provisions the law is necessarily to some extent whatever the judges say it is.¹¹⁷

B. *Prescribing Criteria of Validity—A Task for Legal Theorists?*

Another basic task that legal theorists may undertake is normative rather than descriptive. For example, theorists may recommend that a society, where that choice is a real one for existing officials, generally opt for source-based criteria for identifying law as valid in a system of law, for content-oriented criteria, or for some other kind of criteria.

Some of the critics of pragmatic instrumentalism actually interpreted the instrumentalists to be recommending source-based criteria (“valid law is whatever officials have acted on or laid down”) and not simply to be describing the criteria at work in the system. Fuller condemned exclusively source-based criteria. He found them formal and fiat-oriented and likely to breed a “law is law formalism” in which lawyers, judges, and others feel compelled to confine their arguments on the law’s evolving content merely to points that have already been endorsed by some official. He thought that the worth of arguments in court should depend mainly on their intrinsic merits, and not just on whatever “authoritativeness” they might have.¹¹⁸

C. *What the Law Truly Identified as Valid Encompasses*

Even if a legal theorist has provided a satisfactory description of the standards of validity that officials and others use to identify rules and other precepts as valid law, it does not follow that he has also provided an account of what the law so identified encompasses. For example, according to the tests of valid law in our own system, certain judge-made precepts—common law concepts—are valid. But what does this law consist of? Is it merely the words in opinions—the law in books—or does it also encompass “the law in action”? Assume that the law in books is that a plaintiff who has been contributorily negligent may not recover. If factfinders regularly return verdicts in plain-

¹¹⁶ See, e.g., Holmes, *The Path of the Law*, *supra* note 29, at 467.

¹¹⁷ See Pound, *supra* note 8, *passim*.

¹¹⁸ See, e.g., Holmes, *The Path of the Law*, *supra* note 29, at 467.

tiffs' favor in the face of evidence of their negligence, even though instructed that such negligence is a complete bar, is not the law in action really a principle of comparative negligence, and thus different from the law in books?

Certain formalists, at the turn of the century and later, held that valid law is to be found solely in books.¹¹⁹ The instrumentalists, on the other hand, held that the law identified as valid must be construed in light of the law in action. Pound's essay, *The Law in Books and the Law in Action*,¹²⁰ was pathbreaking. He claimed that the law in books is frequently not the same as the law in action, and that a truly realistic and scientific approach must take account of any differences. Llewellyn, among others, insisted that these differences must be studied by means of "an observational science, of objective character."¹²¹

On this view, then, truly scientific "descriptions" of the law are not confined merely to general recitals of the law in books. For law is far more than words on paper. It at least includes what courts are *currently doing in the name of law*. Felix Cohen, for example, asserted that "legal rules are simply formulae *describing* uniformities of judicial decision."¹²²

In their zeal thus *to be realistic* and scientific, many instrumentalists assumed that any form of law is always ultimately reducible to empirical fact—to generalizations about the actual behavior of officials. As Kelsen stressed, however, the law cannot consist just of descriptive generalizations about behavioral regularities. Law is inherently normative; it specifies that something *ought* to be done in given circumstances, and thus generates authoritative reasons (although not necessarily conclusive ones) for deciding legal issues one way rather than another. To portray law only as empirical fact is to distort its normative nature.¹²³

If we seek to reduce law merely to official behavior patterns we not only lose sight of law's normative character, we render utterly irrelevant any inquiry into whether these behavior patterns are consistent with the law in books. Just because the "law in action" and the "law in books" may differ, it hardly follows that the law in action is necessarily the valid law. What a court or other official does that departs from the law in books may indicate that the law in books is sub

¹¹⁹ See, e.g., Langdell, *supra* note 68.

¹²⁰ Pound, *Law in Books and Law in Action*, *supra* note 98, at 12.

¹²¹ Llewellyn, *The Theory of Legal "Science"*, 20 N.C.L. REV. 1, 6 (1941).

¹²² Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 847 (1935) (emphasis added).

¹²³ H. KELSEN, *supra* note 37, at 162.

silencio undergoing change, as in the comparative negligence example. But it may simply reflect a mistaken conception of the law. Whether what the court does is a mistake or a change in the law, of course, makes all the difference. The possibility that the law in action is a mistake must not be foreclosed by recasting our conception of what the law identified as valid encompasses to include only whatever the courts are doing, as some instrumentalists assumed. Valid law consists of the law in action only insofar as it is not a mistaken departure from the law in books.

Moreover, if we seek to reduce the law to what officials actually do we render irrelevant any inquiry into their *reasons* for doing what they do. It is at least possible to state in some way what officials do without going into their reasons. In failing to go into reasons, we make it more difficult to determine whether what they are doing really is consistent with any applicable law because we deprive ourselves of officials' own efforts to link their behavior up with the law through the mediating phenomena of reasons. But of far greater importance, we simply deprive reasoned argument of its true role in the judicial process. Valid law becomes just what judges do, not what they ought to do in light of reason, including any light in the form of applicable precedent or other law. It is true that what a judge does might be a response to reasons urged upon him. But then again, it might not be, and if not, this circumstance would be utterly irrelevant because, in the end, "the law" would consist of whatever it was that the judge actually *did* in that particular case. In adopting any such overall behavioristic position, as Henry M. Hart aptly put it, "we have not only negated the capacity of our officials to take thought, and by thinking change their action; we have nullified our own title to try to persuade them to do so."¹²⁴

In the final analysis, a radically behaviorist reduction of law is significantly self-defeating anyway. It frequently is impossible to characterize the nature of what a person (including a judge) is doing without any reference to that person's reasons for so acting. Moreover, even when the person's behavior alone is generally intelligible in some way without reference to his reasons, a knowledge of those reasons will commonly cast further important light on the nature of that behavior. In sum, without reference to reasons, we frequently could not provide a reliable account of just what a judge *is doing*.

Thus, there are risks for those who would dwell indiscriminately on a distinction between the law in books and the law in action. They may wind up in the deadly bog of behavioralism. A number of

¹²⁴ Hart, *Holmes's Positivism—An Addendum*, 64 HARV. L. REV. 929, 934 (1951).

instrumentalists did just this. But if I am right, my critique of this behavioralist turn in instrumentalist thought also applies more generally to legal behavioralism whatever its source. Thus it applies as well to the behavioralist strains in contemporary economics and socio-biology as applied to law.¹²⁵

VI

CRITERIA OF LEGAL VALIDITY II—LAW AS PREDICTION

There is a deep, though not unresolvable, ambivalence in pragmatic instrumentalist criteria of legal validity. As indicated in the last section, many of these thinkers held that the primary standard of validity actually operative in our system is that a rule or other precept is valid law if laid down or acted upon by authorized officials. Yet many of these same theorists also believed that in our system law consists of *predictions* "of the incidence of the public force through the instrumentality of the courts."¹²⁶ These two formulations are not identical. A rule might be valid under the former, but not under the latter, and vice versa. Instrumentalists generally were not mindful of this ambivalence.

In this section, I will treat the predictive theory merely as a theory of legal validity, although it ramifies into various other important views which cannot be considered here.

A. *The Predictive Theory*

Oliver Wendell Holmes wrote in 1897:

People want to know under what circumstances and how far they will run the risk of coming up against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.¹²⁷

The above passage is probably the most influential in the history of American legal thought.¹²⁸

¹²⁵ Some modern economic analysis of law is behavioralist, at least in the sense that it ignores the reasons judges give for what they do. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1979). The same is true of some sociobiological analysis. See, e.g., Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategy*, to be published in 4 *RESEARCH IN L. & ECON.* (1982).

¹²⁶ Holmes, *The Path of the Law*, *supra* note 29, at 457.

¹²⁷ *Id.*

¹²⁸ Actually, Holmes had adumbrated his theory as early as 1872. See Holmes, *Book Review*, *supra* note 29.

At least two forms of predictivism must be distinguished, a mild form and a robust one. According to the former, valid law consists of a rule or other precept that in the generality of cases is *likely* to prevail, given the applicable constitutional, statutory, customary, or judge-made law. Holmes himself sometimes put the matter in these terms.¹²⁹ This version of predictivism may be considered mild in two respects. The lawyer is predicting not some particular outcome, but a precept that is likely to prevail in the generality of cases. Further, the lawyer uses only pre-existing law as the basis for his predictions. It may be doubted that this should even be called a predictivist theory, for the lawyer appears to be doing no more than identifying and applying the law.

Many apparent followers of Holmes, however, frequently wrote as if they subscribed to a more robust form of predictivism. According to this version, valid law consists of a predicted judicial or other official action in a particular case.¹³⁰ Moreover, the lawyer who is predicting the outcome is to base his prediction not only on pre-existing rules but also on such factors as past instances of judicial behavior, the stimuli of the raw facts of the case at hand, ideologies and personal values of the judges, their social backgrounds, and the like.¹³¹ It was not always clear whether the robust predictivists viewed themselves as describing actual tests of validity in our system, or prescribing the use of such tests.

B. *Deficiencies of Robust Predictivism*

Robust predictivism poses several problems. First, there are methodological issues which these predictivists did not resolve satisfactorily. Apparently under the influence of analogies from science,

¹²⁹ Thus, Holmes once wrote, "The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law" Holmes, Book Review, *supra* note 29, at 724.

¹³⁰ See, e.g., Bingham, *Joseph Walter Bingham*, in *MY PHILOSOPHY OF LAW*, *supra* note 48, at 5, 12:

[W]hen a lawyer tells his client that if he wishes to devise his land, "the law is" that witnesses must sign his will, does he not thereby mean to indicate that if the will is not thus executed, the courts will hold it invalid? The lawyer is not stating any rule as the law; he is predicting the governmental consequences of a particular case—the case of his client's will, executed so or otherwise.

See also J. FRANK, *supra* note 41, at 118-47; Cohen, *supra* note 122, at 845-46; Cook, *supra* note 95, at 308; Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 *YALE L.J.* 703, 703-04 (1929).

¹³¹ See, e.g., Bingham, *Legal Philosophy and the Law*, 9 *ILL. L. REV.* 98, 109 (1913); Cohen, *supra* note 122; Cook, *supra* note 95, at 308-09; Llewellyn, *A Realistic Jurisprudence—The Next Step*, *supra* note 2, at 447-57; Moore & Hope, *supra* note 130; Oliphant, *supra* note 61, at 159-61.

many of these thinkers assumed that past instances of judicial behavior alone could serve lawyers as bases of prediction, in the same way that past instances of muscular reaction in response to electrical impulses serve scientists as bases of prediction. John Dickinson attacked this analogy, and pointed out that judicial reaction to past judicial behavior is unlike the "automatic repetition of like reactions in the behavior of physical bodies."¹³² Rather, the judicial response to past behavior "operates indirectly through the mental understanding which the later judge has of what the earlier judge has done."¹³³ This can occur only through the medium of words characterizing the past judge's actions, not simply through past behavior. Moreover, it will not occur unless the later judge believes in following precedent—the described behavior of past judges—and believes the past behavior to be "close enough" to bring a precedent into play. But how is the predicting lawyer to know who the judges of his case will be, let alone reliably determine their views on the doctrine of precedent in general and in relation to the particular case at hand? As Kelsen noted, it would be "impossible to submit the judge to such an investigation before he has announced his decision. No sociological jurist has ever thought of such a foolish enterprise."¹³⁴

Second, many of these thinkers assumed that a robust predictivism provides, or substitutes for, standards by which lawyers and judges can identify "the law": Valid law takes the form of a particular predicted decision, and the criterion for determining the validity of such a decision as law (as far as we can know the law in advance) is simply that it is the decision that the court is predicted to render. But what if the prediction turns out in fact to be in error and the judge decides differently? Some of these thinkers seem to have assumed that the law ultimately is whatever the court actually does.¹³⁵ If so, however, the prediction can only be an approximation of valid law—a stab at what the law will be—the best that we can do if we are to know the law at all in advance. Again, we are left with no ultimate criterion of law's validity that is independent of what the court actually does. Thus there is little or no point in asking whether a court action *accords with* the law. In a sense, predictivism of this sort simply cannot supply a criterion of legal validity.¹³⁶

¹³² Dickinson, *Legal Rules—Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 838-43 (1931).

¹³³ *Id.*

¹³⁴ H. KELSEN, *supra* note 37, at 173.

¹³⁵ See, e.g., J. FRANK, *supra* note 41, at 46; Bingham, *supra* note 130, at 13-14.

¹³⁶ Alternatively, one might hold that if the court ultimately acts in a way contrary to predicted law, the latter remains valid. This would provide an independent criterion of sorts for determining validity of court action. Still, no pragmatic instrumentalist expressed this view.

Robust predictivism even fails as a general descriptive theory of what a good lawyer does when he identifies, interprets, and applies law, and advises his clients accordingly. Commonly, a lawyer will not proceed in the fashion of a weather forecaster, identifying the prospective decision makers, gathering data about those decision makers and about how they have acted in the past, and then, in light of the facts at hand, predicting which way these decision makers will jump on those facts. Rather, a lawyer will commonly "practice by the book." That is, he will identify applicable law (by reference to independent criteria of valid law) and then interpret and apply this to the facts of the client's case, all in accord with generally accepted interpretational and applicational technique. It would be a distortion to characterize this as a process of prediction. Lawyers are not weather forecasters. Indeed, it is possible for a lawyer to practice law for very long periods of time without predicting in any robust way that a judge will do anything.

The view that lawyers are essentially robust predictors of how individuals with power over the use of state force will act can subtly and unhappily influence lawyers' perceptions of their roles. Indeed, under this view, the lawyer's essential role is to forecast, to manage, and even to seek to control the exercise of state power. A lawyer is merely someone knowledgeable about state power—one who has "power skills." This is an impoverished perception of the lawyer's role, even granting that it is an advance over the formalist view that a lawyer is someone specially adept at the logical elaboration of concepts. As Lon Fuller stressed,¹³⁷ an additional and far more important part of the lawyer's role is that of designing, structuring, and choosing between frameworks for human interaction—frameworks within which private parties and also government functionaries can realize goals. Lawyers are experts in structure, and are knowledgeable about principles for ordering human relations. They regularly play important roles in the design and creation of interactional structures, many of which, like voluntary arbitration or arrangements in which each party has a power of cancellation, do not even contemplate that state power will be exercised in the event of a breakdown.

Moreover, the conception of the lawyer implicit in robust predictivism does not specifically provide for the work of lawyers in deciding how state power *ought* to be exercised, what the law ought to be, and whether existing law is good or bad. The lawyer engaged in these efforts is not stepping out of his role; he is performing it.

Of course, the effort that lawyers often make to predict what a particular judge will decide may have real utility. Sometimes the law

¹³⁷ See Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161-62 (1958).

confers broad discretion, is unclear, or is even conflicting. Here there is diminished scope for genuine divergence between the law (identifiable as valid by criteria independent of judicial action) and that action itself. In these instances the lawyer may be especially concerned with trying to predict which way the judge will jump. But in my view, far more often the law is relatively determinate and determinable in light of relevant standards of validity and accepted interpretational technique, although this is not to say the law is easy to determine, or that particular determinations will always be uncontroversial. Robust predictivists who failed to see this lacked perspective, and consequently overstated the function of predicting decisions.

Where there is room for genuine divergence between determinate law independently identified as valid and judicial action, predictivism could not be credible unless divergence were commonplace and the divergent course of the courts were itself taken to be the law. But my impression is that divergence is not commonplace, and that judges try hard to follow determinate law that has been identified independently as valid by reference to general criteria accepted by judges and others. As argued earlier,¹³⁸ the American system simply does not accept the general view that whatever judges say is valid, regardless of how the law reads.

This is not to say there are no genuine divergences. To determine just how narrow the foothold might be for a robust predictivism derived from such divergence it would be necessary to consider first the explanations that might account for the relatively small proportion of instances of genuine divergence. Such a project is beyond the scope of this Article.

VII

METHODS FOR INTERPRETING AND APPLYING VALID LAW

Modern legal theorists have traditionally made more of the problems of specifying criteria for determining legal validity¹³⁹ than of the problems of interpreting and applying law actually identified as valid. But issues of validity that arise in the daily workings of a legal system sometimes merge into issues of interpretation or application. Moreover, the number of issues of interpretation and application arising over admittedly valid law vastly exceeds the issues about the validity of law itself.

¹³⁸ See text accompanying notes 107-10 *supra*.

¹³⁹ See §§ V and VI *supra*.

By the turn of the century, formalism and related vices were common in the interpretation and application of valid law. Methodological formalism itself took a variety of forms. The instrumentalists attacked these vigorously. Holmes, for example, reminded judges that "the life of the law has not been logic but experience."¹⁴⁰ Pound railed at the "mechanical jurisprudence" of the judiciary.¹⁴¹ Llewellyn criticized the "formal style" and proclaimed the essential indeterminacy of all forms of law.¹⁴² Frank joined in, ridiculing "Euclidean legal thinking."¹⁴³ These theorists agreed more on their negations than on their affirmations; few devoted much effort to constructing an alternative methodology. Still, their critique of formalist legal method may be their most important single achievement. It does not logically follow, however, that an improved legal method is necessarily a good thing. The legal personnel within a system may, for example, eschew formalistic techniques and interpret and apply law in a sophisticated instrumentalist fashion; yet the goals of the law and their implementive content could even be evil.

The instrumentalists were so successful in their attacks on formalist legal method that much of what I will now present as theirs is sure to seem not just familiar but banal to the well-trained lawyer of today. Although I will only treat their views on common law method, these views also apply, *mutatis mutandis*, to constitutional, statutory, and other forms of written law. Many of these theorists, of course, were reacting as vigorously to formalism in constitutional law and in statutory interpretation as they were to formalism in common law method.

A. *Legal Method*

Numerous issues of legal method have been the subject of discussion in jurisprudential literature: how far can judges appropriately reason from the "logic" of legal concepts to resolve issues? How authoritative are mere verbal formulations in precedent? In legal thinking, which has primacy: specific facts, things, and effects, or unitary general conceptions? May judges make law? How comprehen-

¹⁴⁰ O. W. HOLMES, *supra* note 1, at 1.

¹⁴¹ See, e.g., Pound, *supra* note 90.

¹⁴² K. LLEWELLYN, *supra* note 107, at 67-72; Llewellyn, *Legal Tradition and Social Science Method—A Realist's Critique*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* 89, 106 n.8 (1931). It appears that it was not until his later period that Llewellyn regularly referred to this in his writing as a "formal style." See, e.g., K. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 38 (1960).

¹⁴³ Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 *CORNELL L.Q.* 568, 572-79 (1932). See also J. FRANK, *supra* note 41, chs. 3-7; Cook, *supra* note 107, at 457-60; Oliphant, *supra* note 61, at 160.

sive is the pre-existing law? All of these issues occupied the instrumentalists.

The corpus of the common law, as distinguished from specific precedents, may be viewed as a source of authority for a judicial decision. Formalist judges sought to reason from the "logic" of basic legal concepts pervading the common law. I have devised an example of such reasoning and have exaggerated its formalistic feature in order to make it as communicative as possible. (Yet the example is based on actual court opinions dealing with the type of problem involved.)¹⁴⁴ Consider the following judicial opinion:

The issue before us is whether a child born with permanent injury attributable to the defendant's negligence during pregnancy may recover compensation for the injury. We hold that the child cannot recover such damages. The legal right to be awarded damages presupposes that the person against whom redress is sought violated a legal right of the injured. But a legal right can be violated only if that right is possessed by the injured party at the time of its alleged violation. By definition, the only entity that can possess legal rights is a legal person. Thus, one can violate a legal right of a party only if that party was a legal person at the time of the alleged violation of the right. But it is plain that only an entity that can have legal duties can possess legal rights, for in the law the concepts of right and duty are universally reciprocal and symmetrical; the one necessarily attends the other. An unborn child cannot have legal duties. Therefore, one cannot violate a legal right of one who was an unborn child at the time of the alleged violation. The plaintiff, therefore, has no legal right to be awarded damages because there were no legal rights possessed by him that defendant violated.

Note that most of this "argumentation" takes the form of a miniature essay on certain very abstract legal concepts such as "legal person," "right," and "duty." The crucial steps are buried within all the deduction. "Inherent" meanings and conceptual harmony and symmetry are at the fore, not substantive considerations of community policy.

One can well imagine a rather angry dissenting judge responding:

What does it really matter that the unborn child had no legal duties? He can still have legal rights, for we as judges can alter these concepts as we desire to serve useful goals. If the majority insists on maintaining the right-duty symmetry, then call what the

¹⁴⁴ See, e.g., *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 56 N.E. 638 (1900).

child had something else, say an "imperfect right." The majority assumes that logic somehow tells us how to decide this case. But this is an abuse of logic. Indeed, it is arid conceptualism and mechanical jurisprudence at their very worst. The true issue has to do with a new type of tort claim. Here we have a negligently caused injury. I fail to see why this in itself should not be controlling.

Instrumentalist legal theorists applauded dissents of this kind. Law, they said, is not a formal system. Some instrumentalists went further, believing that more than a misguided notion about the logic of system-wide concepts was at work in such cases. Thus Holmes remarked, "Behind the logical form [of such decisions] lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."¹⁴⁵

More common were opinions in which "formalistic" judges invoked over-generalized statements of case law as "authority" on which to decide cases.¹⁴⁶ Instrumentalists condemned this loose view because it made too much of the formulated words in the prior opinion or too much of the general form of a rule or precept articulated in the opinion. These critics asserted that general statements in prior opinions must be read against the facts of the cases involved and in light of what the judges actually decided, rather than what they *say* they are deciding; that narrow generalizations are the only reliable authority; and that such generalities must not, in any event, extend beyond the type of fact pattern implicated in the dispute before the court.¹⁴⁷

Llewellyn, in particular, argued that it is not possible to determine what a common law case stands for in a vacuum or in the abstract. One must first relate it to other cases because they "color the language, the technical terms, used in the opinion."¹⁴⁸ But more important, other related cases, actual and hypothetical, "give you the wherewithal to find which of the facts are significant."¹⁴⁹ Only after comparing, contrasting, and distinguishing related cases can the lawyer determine what the opinion at hand stands for.

As a corollary, the instrumentalists insisted that when a later court chose not to follow a prior decision of which it appeared to

¹⁴⁵ Holmes, *supra* note 29, at 466.

¹⁴⁶ For important early examples of American over-generalizations, see Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 116, 197 (1944).

¹⁴⁷ See K. LLEWELLYN, *supra* note 107, at 34-68; Llewellyn, *A Realistic Jurisprudence—The Next Step*, *supra* note 2, at 431; Oliphant, *supra* note 61, at 71, 159 *passim*.

¹⁴⁸ K. LLEWELLYN, *supra* note 107, at 43.

¹⁴⁹ *Id.*

approve, the court should distinguish the prior case on substantive rather than formal grounds. That is, the court should single out factual differences that make it justifiable for the court not to follow the prior case. Mere formal distinctions are insufficient for distinguishing precedent, because they are simply distinctions without differences.

Above all, Holmes and his followers stressed in legal analysis the primacy of facts rather than words and of ends rather than "logic":

We must think things not words, or at least we must constantly translate our words into facts for which they stand, if we are to keep to the real and true. I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results. It is a necessary method for the purpose of teaching dogma. But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds.¹⁵⁰

The pragmatic instrumentalists also criticized the tendency of judges, when they *were* inclined to change the common law, to resort to what lawyers call legal fiction. For example, some courts were influenced to enforce a promise solely on the ground that the plaintiff justifiably relied on it. But because the law had not yet fully accepted reliance as an independent basis of promissory obligation, these courts simply refused to recognize this ground and instead proclaimed that in these cases there was "consideration"—an already accepted ground of obligation. Instrumentalists repudiated decisions in which judges paid homage through fiction to the form of case law doctrine while changing its substance. Judges should not appear to leave the law entirely intact when they are in fact significantly extending it. Moreover, fictions tend to come home to roost; a later court might fail to see what had been going on and, in our example, take the requirement of consideration seriously and deny recovery, even when the plaintiff had justifiably relied.¹⁵¹

The instrumentalists similarly argued that judges should explicitly address whether a precedent should be overruled. Instead of invoking remote analogies, judges should also openly confront the problem of what law should be made when there is no applicable

¹⁵⁰ Holmes, *Law in Science and Science in Law*, *supra* note 44, at 460.

¹⁵¹ For an actual sequence of cases of this nature, see *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923); *Comfort v. McCorkle*, 149 Misc. 826, 268 N.Y.S. 192 (Sup. Ct. 1933).

precedent. In a realistic light rather than in terms of a formal separation of powers, it is evident that judges can and do make law.¹⁵² Moreover, in normative terms, there are varieties of law that judges are as well suited to make as are legislatures—indeed, better suited.

One further methodological issue may be noted. With the rapid growth of case law, judges in the twentieth century increasingly found themselves confronted with conflicting lines of precedent converging upon the case at hand.¹⁵³ How were they to decide? Some of the responses to this dilemma took on a formalistic aura: decide in accord with the oldest precedents, decide in accord with whichever precedent commanded unanimity at the time, or the like. The instrumentalists objected. In their view, when judges confront a plethora of conflicting precedents, they should simply make choices in light of community policy.

B. *Two Criticisms*

There were two major deficiencies in the common law methodology of most instrumentalists. The first is understandable, the second a puzzle.

A number of instrumentalists (though not Holmes, Gray, or Pound) were what are sometimes called rule skeptics.¹⁵⁴ In reacting against formal deductive methods of reasoning from abstract conceptions, these thinkers advanced several skeptical theses: in every litigated common law case the judges always have a choice, no matter how “clear” the applicable precedent is; there is never a single right answer to a litigated question; there is no such thing as a genuine legal objectivity in the common law; and precedent is necessarily indeterminate because the materials themselves are, among other things, simply too fluid or too remote and indirect in their bearing.

As John Dickinson¹⁵⁵ and others were quick to point out, however, the rule skeptics had over-reacted. They left little place for our

¹⁵² These points were fully made in an influential book widely read during the rise of instrumentalism. See A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908). See also JOHN DEWEY & A. BENTLEY: *A PHILOSOPHICAL CORRESPONDENCE, 1932-1951* (S. Ratner & J. Altman eds. 1964); J. PAUL, *THE LEGAL REALISM OF JEROME N. FRANK* 18 (1959).

¹⁵³ See generally Gilmore, *Legal Realism—Its Cause and Cure*, 70 *YALE L.J.* 1037 (1961).

¹⁵⁴ See W. RUMBLE, *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS* 58-106 (1968). Most rule skeptics did not deny the existence of legal rules. They only denied that they were “the heavily operative factor in producing court decisions.” Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, *supra* note 2, at 1237 (emphasis in original).

¹⁵⁵ See generally Dickinson, *supra* note 132, at 833; Dickinson, *Legal Rules—Their Application and Elaboration*, 79 *U. PA. L. REV.* 1052 (1931).

widely used notions of "a correct application of the law" and its conceptually parasitic counterpart, "a mistaken application of the law." Many rules have a core of content that is quite settled and determinate. Both trial judges and appellate judges sometimes err in formulating and applying valid law. If there were never any right answers these occurrences would not be possible. Of course, to say that often there are single right answers is not to say that there always are, that judges always come up with them, that they are never controversial, or that law school casebooks include many cases in which there are such answers!

The other fundamental flaw in instrumentalist writings on common law method was that they simply did not make a sufficient place for the play of substantive reasons in working with and creating or modifying precedents. Substantive reasons cannot be dismissed as something necessarily metaphysical. There are three main types of substantive reasons at work in the law. Countless examples of such reasons can be found throughout case reports, reports on the legislative history of statutes and the legal literature generally. These are (1) "goal reasons"—reasons of substance that derive their justificatory force from the fact that, at the time they are given, the decisions they purport to justify can be predicted (sufficiently), to have effects that serve a good social goal; (2) "rightness reasons"—reasons of substance that derive their force not from predicted goal-serving effects, but from the way in which the decision that is justified accords with a norm of rightness applied to a party's actions or to a state of affairs resulting from those actions; and (3) "institutional reasons"—reasons of either of the two foregoing kinds that are tied to a specific institutional role or process and derive their force from the way in which the decision would serve goals or accord with norms of rightness peculiarly applicable to actions or participants in institutional settings. In what follows I will mean by "reason" one or more of the above three types.¹⁵⁶

The instrumentalists failed to accord a proper place to substantive reason in the common law in a number of ways. To begin with, some of these thinkers did not, as we have seen, give the doctrine of precedent its due. Their rule skepticism left insufficient room for the notion of binding precedent. This may have been partly because they tended to view following precedent merely as a form of following authority for its own sake. Yet to cite a precedent is itself to give a

¹⁵⁶ See Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707, 716-24 (1978).

reason, and when the reason has justificatory force the reason may derive from (1) the force of the reasons of substance behind the precedent itself and (2) the force of the general rationales, themselves reasons of substance, behind the practice of following precedent.

Further, in their zeal to expose formalistic jurisprudence in all its forms, instrumentalists tended to abandon the common law wholesale as a source of countless reasons of substance already recognized to some degree in some or all branches of the common law. Common law opinions include many passages employing reasons of substance that transcend the cases at hand and apply not merely by analogy but directly to issues to be decided. Only recently, and largely as a result of the perceptive and imaginative work of Professor Ronald Dworkin, have we become fully conscious of the extent to which this is so.¹⁵⁷

In addition, most instrumentalists considered direct judicial resort to ordinary justificatory raw material—reasons of substance—to be an activity extrinsic to law and thus something extra-legal.¹⁵⁸ These thinkers were all too preoccupied with distinctions between “law” and “policy,” as if the latter, which substantive reason encompasses, were somehow essentially extrinsic to law.¹⁵⁹ “Policy,” however, is not something extra-legal. The regular resort to substantive reason is necessarily a part of the common law itself; it can even be said to have *primacy* in the common law.¹⁶⁰

There are some apparent paradoxes here. I will close this section with a modest effort to resolve them. Many pragmatic instrumentalists talked and wrote about “policy” and even “justice,” and it would seem natural that they would find a place for substantive reason within the law itself, or at least that they would not view appeals to substantive reason as necessarily extra-legal. As I have demonstrated, however, the general value theory of leading instrumentalists was relatively anemic; it made little place for qualitative considerations of policy or justice. As an unusually general theory, it lacked determinativeness in particular cases. Indeed, a few of these thinkers were highly skeptical of the validity of more particular notions of value for the resolution of specific issues.

It is also true that most of the instrumentalists were reformers. Some were even zealous reformers. Could these reformers deny a

¹⁵⁷ See generally R. DWORKIN, *supra* note 55, at 14-130.

¹⁵⁸ Indeed, many of them assumed that the law could be described without reference to the reasons of substance that figure in the law. See text accompanying notes 121-22 *supra*.

¹⁵⁹ This was even true of Pound. See Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 947 (1923).

¹⁶⁰ This primacy argument has been developed at length elsewhere. See Summers, *supra* note 156, at 730-33.

major role for the play of reasoned justification within the common law? Yes. Zeal for reform and faith in reasoned justification are not at all the same or even closely related. Reformers may even think it is enough that people generally *want* reforms for their own quite personal ends, and that public, reasoned justification is therefore superfluous or unnecessary. Belief in democracy can foster and reinforce this view, for in a democracy majority vote is the ultimate fall back; it controls regardless of how much rationality informs and enlightens the vote.

Although instrumentalists criticized formalists for not being sufficiently mindful of means and goals, it does not follow that these critics were committed to a large role for reason. Goals might be taken as more or less *given* and reason confined solely to means. Indeed, they may have thought that only the "factual" means-end relation can be a true subject of science.¹⁶¹

In the four preceding sections I have addressed instrumentalist views on lawmaking, the identification of valid law, and its interpretation and application. These topics concern the content and structure of the law, and have traditionally been at the core of legal theory. I now turn to topics relating to the function of law in daily life: the law's implementive machinery (Section VIII); the nature and role of officials (Section IX); the importance of coercion, force, and direct action in law (Section X); and the criteria for judging the success of a use of law (Section XI). Although not fully developed, these ideas were unmistakably important in instrumentalist theory.

VIII

LAW'S IMPLEMENTIVE MACHINERY

According to the instrumentalists, law, in essence, consists of *means*—primarily means that direct and forbid behavior. But these primary means are not self implementing. Their implementation requires machinery and calls for "social engineering."

A. *An Inventory of Law's Resources*

Pragmatic instrumentalists almost uniformly assumed that the law is a kind of machine technology to be used by social engineers to serve goals. Pound led the way:

[I] am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or

¹⁶¹ Or so many of these thinkers assumed. See, e.g., Cook, *The Possibilities of Social Study as a Science*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES*, 27, 47-48 (1931).

desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering.¹⁶²

Llewellyn wrote that “the trend of the most fruitful thinking about law has run steadily toward regarding law as an engine (a heterogeneous multitude of engines).”¹⁶³ He also asserted:

[L]aw operates under the principle of scarcity. The energy available for social regulation at any time and place is limited. . . . Because of this fact, control by law takes on the aspect of engineering. We require . . . to invent such machinery as, with least waste, least cost and least unwanted by-products, will give most nearly the desired result.¹⁶⁴

To the leading instrumentalists, judges were prominent social engineers. Adjudicative processes and administrative agencies were important forms of implementive machinery. The workings of the criminal law provided a preferred model of law’s general *modus operandi*. But Pound stressed that “[s]ocial engineering may not expect to meet all its problems with the same machinery. Its tasks are as varied as life and the complex problems of a complex social order call for a complicated mechanism and a variety of legal implements.”¹⁶⁵

We do not have an adequate general account of the varieties of legal resources to this day. It is important to provide at least a sketch here, by way of filling a basic gap in instrumentalist theory. The sketch to follow will of necessity be largely my own, but it is faithful to instrumentalist thinking. It will indicate the varied and complex nature of law’s vast machinery, and thus will reveal in broad outlines how much more there is to law’s resources than courts and adjudicative procedures. It will also help explain why it was so tempting, at least for those instrumentalists who had some sense of the totality of law’s resources, to think of law as an elaborate machine technology. It will help clear up some misconceptions, including ones that plagued the instrumentalists. For example, it will reveal the inadequacy of any

¹⁶² R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (rev. ed. 1955). See also Dewey, *supra* note 22, at 318-19.

¹⁶³ Llewellyn, *A Realist Jurisprudence—The Next Step*, *supra* note 2, at 464. “Machine” metaphors are common in the literature. See, e.g., Cohen, *supra* note 32, at 6 (“mechanisms”); Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 358 (1933) (“tools”).

¹⁶⁴ Llewellyn, *The Effects of Legal Institutions on Economics*, 15 AM. ECON. REV. 665, 666 (1925).

¹⁶⁵ See Pound, *supra* note 159, at 956.

conception of law's resources that is modeled mainly on the criminal law. Indeed, law does not function in any single standard way.

We may begin by introducing the idea of a *primary* legal precept. Such a precept directs its addressee to behave in a given way or otherwise specifies a legal relation. It may originate in an explicit formulation or it may be constructed from the past behavior patterns of officials or private individuals. It may take the form of a rule, a general order, a principle, or a maxim. It may be constitutional, statutory, judicial, administrative, or private in origin. It may impose a duty, grant a liberty, confer a power, specify a feature of a process, structure an institution, and more. It may reflect such diverse concerns as the prevention of crime, the regulation of health or highway safety, or reinforcement of the family. The nature of primary precepts is a complex topic; whole essays have been devoted to the subject.

When primary precepts fulfill their goals to any degree, the law's implementive machinery is almost always somehow at work. Of fundamental importance in that machinery are *auxiliary* legal precepts.¹⁶⁶ These are designed to implement primary precepts, and are in this sense auxiliary to them. For example, a law imposing a new duty to respect privacy would be a primary precept, but new authorization to enjoin the invasion of privacy would be auxiliary, and so on.

Still another basic type of implementive legal resource consists of institutions, agencies, and other recognized *entities*. Courts, juries, legislatures, and administrative bodies of many kinds are familiar examples. These complex legal entities are built up out of other resources, including legal precepts. A frequent problem for the social engineer is that of deciding whether to create a new entity or to confer further powers and responsibilities on existing ones.

Institutions, agencies, and other legal entities typically operate via regularized *processes*. It is within and by means of such processes, both formal and informal, that such bodies make, administer, and enforce legal precepts.

Beyond precepts, institutions, and processes, the law's implementive technology includes a vast inventory of remedies, sanctions, and other specific implementive devices of varying degrees of complexity.¹⁶⁷

¹⁶⁶ Bentham himself introduced this concept. See J. BENTHAM, BENTHAM'S POLITICAL THOUGHT 165-66 (B. Pareck ed. 1973).

¹⁶⁷ It will be sufficient here merely to list some of these devices: (1) threats and actuality of punishment; (2) incentives, rewards, and other inducements; (3) symbolic denunciations in laws and official pronouncements; (4) state propaganda; (5) continuous official or semi-official supervision; (6) threats and actuality of adverse publicity; (7) grants, denials, revocations, etc.,

All the main types of *implementive resources* identified so far may be relatively legal in nature. But many resources that are deployable for legal purposes are not in this way relatively legal. Manpower and scientific technology are examples. Law without personnel would be impossible. Indeed, a complex division of labor involving many varieties of specialized personnel is one of the salient features of a modern legal system.¹⁶⁸ Similarly, many legal programs would be impossible without scientific technology. A legally prescribed flood control program, for example, is not possible without flood control devices. Deployable but not otherwise legal resources also include general knowledge of human motivation (and much else), materials including equipment and the like, the media, and even language itself.

Some resources, then, may be characterized as relatively legal, while others are not relatively legal in nature but still deployable by social engineers. Beyond these two classes of resources is a third class on which social engineers may merely capitalize. For example, the draftsman of a penal code can capitalize on the strong moral aversions of a people to enhance the efficacy of a penal code. Similarly, the draftsman of a divorce law may capitalize on the influences of religious organizations within the society. Public opinion is also illustrative; a program to regulate the quality of manufactured foods may empower an official to threaten manufacturers with public disclosure of failures—disclosure that will turn people away from their products. The existence of private associations in certain lines of business and trade can be capitalized on in various ways, such as providing a means of communicating new laws.

When law is used, personnel combine the foregoing resources to devise and bring into operation a *functional legal unit*. A functional legal unit typically includes at least one primary precept and one or more auxiliary ones. As already stated, a primary precept directs its addressee to behave in a given way, or otherwise specifies a legal relation. An auxiliary rule is one designed to implement a primary one. To these are added other resources, such as manpower and technology, to organize a program for implementive action. The result is a functional legal unit.

of licenses and licensing; (8) official periodic inspections; (9) regular conferences and other means; (10) taxes, tax exemptions, deductions etc.; (11) grants subject to conditions; (12) rationing devices; (13) conditions facilitating exchange, *e.g.*, legal tender, weights and measures, gap-filler laws; (14) recognized incidents of ownership, and of specialty instruments like stocks and bonds; (15) validation and invalidation, and other forms of nullity; (16) status dissolution or modification, *e.g.*, divorce, bankruptcy discharges; (17) publicity provided facilities, *e.g.*, communications and transportation; (18) state distribution of welfare, in money or in kind; (19) court and agency remedies and orders, and threats of resort thereto.

¹⁶⁸ See section IX *infra*.

But law's implementive machinery is even more complex. A functional legal unit also typically serves as part of an *implementive technique*—a legal *modus operandi*. Even an isolated stop sign on a lonely prairie is part of a complex overall *modus operandi* for the deployment of law to serve goals—in this instance, a general regulatory scheme to facilitate road safety and traffic flow.

According to one traditional model the only basic type of implementive technique is penal in nature. The emphasis on state coercion and direct official action in instrumentalist thought indicates that these thinkers did not really free themselves from this model.¹⁶⁹ But there is more than one basic *modus operandi*. Social engineers design, organize, and combine legal resources into a wider variety of implementive techniques. Most technique designs in modern use may be classified as one of five main types:

(1) A *private arranging type*—one that, as implemented, encourages the formation of private arrangements and facilitates their aims. Private contracts comprise one type of private arrangement. The law authorizes these, sets forth how they are to be made, facilitates their consummation and their administration, permits certain forms of self-help, and provides for other remedies in event of breakdown. In this technique, the fundamental duties of the parties to the arrangement are largely voluntarily incurred rather than imposed by officials.

(2) A *grievance remedial type*—one that, as implemented, confers private rights and provides remedies for their infringement in civil courts. Unlike private arrangements, the basic duties are imposed by officials. But the choice of whether to do anything about breaches of duty is generally left to private parties.

(3) A *distributive type*—one that, as implemented, distributes public goods and services to specified classes of people. Legal ordering providing for public health, education, welfare, and highways is illustrative. This technique calls for the imposition of taxes or other burdens in order that the benefits may be conferred.

(4) A *regulatory type*—one that, as implemented, sets standards for specific classes of people and regulates their behavior through licensing or some other device. Radio and television broadcasting, food and drug manufacture, hazardous employment, etc., may be subject to such regulation, as may activities such as education, which are conducted by publicly owned bodies.

¹⁶⁹ See section X *infra*.

(5) A *penal type*—one that, as implemented, prohibits behavior as criminal, and punishes its occurrence.¹⁷⁰

Primary rules and other precepts that direct their addressees to behave in specified ways also may be classified as private arranging, grievance remedial, distributive, regulatory, or penal in origin. Such forms of law are ultimately implemented by appropriate techniques of the foregoing five basic types which incorporate various auxiliary resources. Considerable variety of design within each basic type is possible.

There are various forms of overlap between types of implementive techniques. There is overlap as to goals potentially served. Dispute settlement, for example, is a general goal that all five types serve. In addition, "distributive" techniques may be used in part for regulatory purposes. Thus, grants of money may be conditioned on acting in accord with regulations, and so forth. There is usually overlap in the resources deployed and sometimes even in the manner of deployment. For example, courts play roles in all the basic types. Notwithstanding this overlap, each basic type retains independent significance, for such significance does not require mutual exclusivity.

This completes the inventory of all the basic elements of law's technology. A use of law of any significant degree of complexity, then, may be analyzed in terms of its: (1) goals; (2) means-goal hypotheses; (3) primary precepts; (4) auxiliary precepts; (5) institutions, agencies or other entities; (6) processes; (7) implementive devices; (8) functional legal units; (9) overall implementive techniques and technique designs.

As Leon Green and others have stressed, the general implementive technology of the law is not static.¹⁷¹ Social engineers regularly discover and devise new legal inventions and refine old ones. During the first four decades of this century, which saw the rise of pragmatic instrumentalism, there was a vast growth in American legal technology. This growth encompassed both the rise of the regulatory state beginning with the Progressive Era, and the elaborate welfare state constructions of the New Deal.

B. *The Fallacy of Unlimited Malleability*

It is not possible within limitations of space to offer a systematic assessment of all the technological themes in pragmatic instrumentalism. Accordingly, I will now single out only one, albeit a leading one.

¹⁷⁰ See Summers, *The Technique Element in Law*, 59 CALIF. L. REV. 733, 736-45 (1971).

¹⁷¹ Green, *Leon Green*, in *MY PHILOSOPHY OF LAW*, *supra* note 48, at 129, 137-40.

This one might be called the "malleability" thesis. Perhaps because machine technologies are often highly adaptable, many instrumentalists tended to assume that the law's varied and complex resources must be similarly malleable.¹⁷² Indeed, some appeared to go quite overboard.¹⁷³ One neo-instrumentalist generalized that "[n]ature doesn't present us with anything. . . . We have to slice nature as we do cheese, in the ways that suit our convenience and our specific practical purposes."¹⁷⁴

An alternative view is that there is an "inner order" of things to be ascertained and taken into account. This view dates back to the ancient Greeks.¹⁷⁵ Fuller is the modern American legal theorist who has sought to develop this rival view most fully. He believed that neither the "materials" from which law is made nor the law's implementive machinery is infinitely pliable. He claimed that lawmakers must work with "basic forms of social order," including legislation,

¹⁷² This was one of the most distinctive legacies of pragmatist philosophy. See generally H. THAYER, *supra* note 24, at 426-27.

¹⁷³ Oliphant, *supra* note 74, at 494.

¹⁷⁴ McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 832 (1941).

¹⁷⁵ Thus, in the pseudo-Platonic dialogue *Minos*, we encounter this exchange:

Socrates: And do doctors on their part, in their treatises on health, write what they accept as real?

Com: Yes.

Soc. Then these treatises of the doctors are medical, and medical laws.

Com. Medical, to be sure.

Soc. And are agricultural treatises likewise agricultural laws?

Com. Yes.

Soc. And whose are the treatises and accepted rules about garden work?

Com. Gardeners.

Soc. So these are our gardening laws.

Com. Yes.

Soc. Of people who know how to control gardens?

Com. Certainly . . .

Soc. And whose are the treatises and accepted rules about the confection of tasty dishes?

Com. Cooks.

Soc. Then there are laws of cookery?

Com. Of cookery.

Soc. Of people who know, it would seem, how to control the confection of tasty dishes?

Com. Yes . . .

Soc. Very well; and now, whose are the treatises and accepted rules about the government of a state? Of the people who know how to control states are they not?

Com. I agree. . . .

Soc. Then we rightly admitted that law is discovery of reality?

Com. So it appears. . . .

Plato, *Minos*, 8 LOEB CLASSICAL LIBRARY 403 (W. Lamb trans. 1927).

adjudication, mediation, markets, contracts, elections, and managerial direction. He held that these forms are relatively few in number and have an inner integrity of their own that is to some extent "there" to be discovered. These forms are not, in his view, all-purpose tools of unlimited pliability. They have distinctive uses and limits, and their successful use requires careful choice.¹⁷⁶ Fuller warned pragmatic instrumentalists against neglecting the distinctive integrity of particular forms of social order. For example, social engineers may pay a heavy price for unduly "mixing" two different forms such as mediation and adjudication. A judge who tries first to mediate a dispute, thereby learning the facts of the case, and then later seeks to determine the facts as a judge not only may fail as a factfinder, but might also forfeit some degree of impartiality and taint the process. Similarly, assigning adjudicators "polycentric" tasks calling for managerial control of diverse yet interdependent factors not only puts the achievement of those tasks at risk, but compromises the integrity of adjudication as well. In Fuller's view, those concerned with the law must discover and master distinct "segments" of reality if they are to take advantage of relevant regularities in the effort to further group life.

IX

THE NATURE AND ROLE OF PERSONNEL

Plainly, people must make the law and staff its implementive machinery. As will be seen, a surprising range of important types of tasks must usually be performed in order to create a legal precept and translate it into practice. The social engineers assigned to these tasks include a wide variety of public officials, private parties (non-corporate and corporate), and various bodies of citizens participating in group actions such as voting, jury service, and the like.

The pragmatic instrumentalists generally stressed the importance of what might be called the "personnel element" in a legal system. Unlike many of their jurisprudential predecessors in America and in Europe, they did not conceive of a legal system solely in terms of structures, processes, and precepts. Most of these thinkers assumed that officials, rather than private parties, have the primary roles

¹⁷⁶ In one of his most famous essays, widely circulated privately in the 1950s and 1960s and published in its entirety only posthumously, Fuller explored the compulsions necessarily contained in adjudicative ordering. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). In a well known book, he dealt similarly with legislation and managerial direction. See L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

within the division of legal labor in our own system. As the young Llewellyn put it, "what these officials do about disputes is, to my mind, the law itself."¹⁷⁷ And by "officials," instrumentalists usually meant only judges.

In my view, on the other hand, private parties actually have more significance within the division of legal labor in our system than do officials. Of course, whether this is so is largely an empirical question, and it is not possible to marshal the evidence here. It should be possible, however, to instill skepticism about the primacy of officials, and thus place their roles in more satisfactory perspective. This inquiry is critical to our understanding of how law works, a concern of central importance to the pragmatic instrumentalists.

First, it is necessary to explore in broad outlines the nature of our division of legal labor. To provide even a very general account of this division, it is necessary to identify at the outset the types of legal tasks that must be performed to translate rules into practice to serve goals. Earlier, five basic legal techniques were introduced: private arranging, grievance remedial, distributive, regulatory, and penal.¹⁷⁸ In order to create and translate a rule into practice via any one of these five modes, a number of creative and implementive tasks must be performed by officials or private parties, or both. That is, law must be brought into being and put to use through a dynamic sequence of events. I will now outline my own tentative theory of "legal tasks." The tasks that must be performed to create and implement law are numerous, and they vary to some extent between the basic technique types referred to above. It is not necessary to explore all this variety here; it will be enough to provide an abstract listing of the essential tasks common to all five techniques. These are, in their usual chronological sequence:

- (1) Setting goals and creating primary and auxiliary rules and other legal precepts;
- (2) Selecting the basic implementive technique;
- (3) Setting up new organizations, entities, or structures, or modifying existing ones as needed;
- (4) Providing any personnel, material goods, scientific technology, or other wherewithal required to implement law;

¹⁷⁷ K. LLEWELLYN, *supra* note 107, at 3. See also J. FRANK, *supra* note 41, at 46 *passim*; J. GRAY, *supra* note 47, at 84-125 *passim*; Bingham, *supra* note 130, at 17-18 *passim*; Cohen, *supra* note 32, at 9-18 *passim*; Holmes, *supra* note 29, at 457 *passim*. Llewellyn, much later, recanted. See K. LLEWELLYN, *THE BRAMBLE BUSH* 8-9 (rev. ed. 1950).

¹⁷⁸ See text accompanying note 170 *supra*.

- (5) Communicating or rendering accessible the content of relevant law to the persons it addresses, and specifying what difference, if any, it is to make if these persons fail to adhere to the law;
- (6) Assuring that persons who wish voluntarily to fulfill duties or exercise rights under applicable precepts will have the capabilities to do so;
- (7) Providing encouragement, persuasion, incentives, or coercion in advance to induce persons not otherwise so disposed to fulfill duties or exercise rights;
- (8) Allocating power both to officials and private parties to take initiatives to see that obligatory law is carried out;
- (9) Monitoring how well persons fulfill duties or exercise rights;
- (10) Providing for the resolution of, and resolving disputes about, *facts* when necessary to determine the existence and scope of rights and duties;
- (11) Providing for the resolution of, and resolving disputes about, applicable *law* when necessary to determine the existence and scope of rights and duties;
- (12) Taking any action ultimately required to fulfill duties, including the imposition of sanctions, official acts themselves in fulfillment of the duties, or the like.

Of course, the specific tasks needed to create and translate a primary precept into practice will vary depending on the goals of the primary precept and the implementive technique involved. Moreover, some tasks may overlap, or occur "out of sequence." For example, the creation of law may merge with authoritative resolution of disputed issues of law, as happens in novel common law cases. Sophisticated social engineers are aware that some tasks themselves call for complex social ordering. The distribution of a new benefit such as public health care, for instance, may require an entirely new distributional agency with both supervisory and operational personnel.

Who performs these various implementive tasks? The participants include judges, legislators, administrative officials and agencies, private individuals, private entities, and sometimes, as in elections, very large segments of the society acting as a group. Pragmatic instrumentalists viewed only judges as the primary functionaries in this division, but their preoccupation with courts was unjustified. It is not possible to discuss here all the tasks that private parties perform either exclusively or with officials. But it is possible to inject considerable skepticism about the "primacy" of the judges and other officials.

Let us begin with the initial tasks that personnel must confront in any sequence for the creation and implementation of law. Who sets goals for uses of law, and who creates the law?

In a libertarian, individualistic democracy with a relatively free market economy, most goals for the various legal precepts in force are not set by officials. Most of "the law" takes the form of private arrangements among private individuals and entities; thus most goals for contracts, property transfers, wills, corporate arrangements, and employment relations, to name a few fields, are set by the private parties and entities involved—not by officials acting for the public. Yet these goals are *legal*, because the corresponding precepts have the force of law between the parties. Even in a large democracy with its vast bureaucracies, these "private" legal goals are far more numerous than those the officialdom sets for statutes, regulations, case law rulings, and the like.

Actually, even the goals formally set by officials are often more faithfully represented as goals "writ large" of individuals or specific classes of individuals than as general goals espoused by all or even a majority of the society. For example, even such a seemingly "official" goal of a collective bargaining statute as "equality of employer-employee bargaining power" translates into something like "we employees want more say over our wages and working conditions, *qua* employees." As the instrumentalists themselves held, the needs and wants of private individuals and groups are the primary sources of goals for law.¹⁷⁹

Who makes the law? Again, private parties, both corporate and noncorporate, loom large. Commonly they are either the exclusive lawmakers, or major partners in the lawmaking enterprise. In a private arranging technique, for instance, these parties are by far the dominant lawmakers. Every month they enter into hundreds of thousands of contracts, employment relations, property transfers, wills, partnerships, trusts, and leases, all of which have the force of law. In a grievance remedial technique, it is often assumed that the lawmakers consist solely of officials, but much of this law is judge-made common law and therefore is culled largely from perceptions of common sense and morality, both of which derive primarily from the citizenry. It must not be forgotten that private parties—the litigants—participate directly in the lawmaking activities of courts. Furthermore, the overwhelming majority of disputed grievances are settled out of court pursuant to private arrangements that, again, have the force of law. In the distributive technique it is true that much of the law concerned with public benefits is officially made, but private parties in the form of interest groups exert powerful influence on the content of this law in

¹⁷⁹ See, e.g., Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915).

a democracy like ours. In the regulatory technique much law is also profoundly shaped and influenced by private parties participating in rulemaking and in adjudicative proceedings before administrative agencies and courts. In the penal technique state and federal legislatures pass laws, but not without hearings in which private parties often participate extensively, and the statutes themselves usually undergo many a gloss in court proceedings in which private parties participate as defendants.

Beyond goalsetting and lawmaking, the first basic tasks in our overall implementive sequence, it would be possible to demonstrate the large role of private parties in performing the second basic task in the typical implementive sequence, choice of the technique itself, in the third, setting up any needed new entities, and so on through all the remaining tasks in the sequence. But such a demonstration should be unnecessary.

For those who are not yet sufficiently skeptical of the pragmatic instrumentalists' view of the primacy of officials over private parties in our overall division of legal labor, two further general points may be made. First, when goals are finally realized, this is far more commonly attributable to voluntary self-administration than to official administration. The vast bulk of the law addresses private parties and private entities. Daily, private parties apply law to themselves: traffic laws, safety laws, laws entitling them to public benefits, property-boundary laws, penal laws, and on and on. In addition, virtually all of the vast domain of privately created law such as contracts, property arrangements, wills, corporate and other organizational norms is largely administered and applied by its private addressees.

Second, of the five basic technique types, the role of the officialdom is largest in the penal technique. One might even think that there, officials do everything. In truth, private parties probably play larger roles than do officials. Indeed, when the penal technique does not work, this is more often attributable to the inaction of private parties. For example, parties may fail to report violations; refuse to give evidence, or render themselves anonymous or unavailable; decline to "press charges"; refuse to convict when serving as jurors; decline to vote for reelection of vigorous prosecutors; refuse as employers or peers to help rehabilitate offenders, and so on.

An implicit corollary of the instrumentalist doctrine of the primacy of officials is that a legal system functions more or less in a simple top-to-bottom fashion; officials on top are assumed to exercise social control over citizens on the bottom. This simple model fits very little in our law fully. As already indicated, most law is self-imposed,

not imposed from above. This is most clearly true of customary, contractual, and other forms of consensual law.

The fallacy of officialism is also partly responsible for the distorted relationship in much instrumentalist thinking between law made by officials and law made by private parties. As already indicated, law made by officials is quantitatively smaller, not larger, than privately created law. Moreover, much officially created law is auxiliary to private law. It exists to *facilitate* the creation and implementation of private law and private choice generally. Even that exemplar of official law, the criminal code, exists mainly to help keep harmful persons out of the way of those who are going about their business—to prevent prospective wrongdoers from interfering with the ordinary conduct of daily life.

The officialism fallacy may also help account for instrumentalist neglect of the informal side of law's techniques. The formal sequences within any of law's techniques rarely proceed through all projected stages, and even when they do officials do not serve at every step as the prime movers.

Even when disputes arise over the application or administration of law, it is unusual that they are resolved through official decision by formal processes. Thus, relatively few claimed torts and breaches of contract become the subject of court judgments; only a small proportion of alleged regulatory infractions become the subject of formal orders of regulatory bodies or courts. The same is true of disputed claims to public benefits such as welfare payments and accident compensation, and of disputes over tax liability. Criminal cases are seldom tried. Instead, most matters are settled informally. Moreover, in settlement processes, private parties will often be the prime movers, with or without lawyer help. Indeed, in many fields of law, the power to take initiative to put an official process for applying law in motion is left largely in the hands of private parties.

X

COERCION, FORCE, AND DIRECT OFFICIAL ACTION

When officials and others use law to serve goals, they may resort to coercion, force, direct action, or a combination of these. What is the place of these elements in a legal system? Most pragmatic instrumentalists held or assumed that the law's efficacy is attributable to the use of coercion and force. They also assumed that law's typical ways of serving goals are direct rather than indirect.

A. *Coercion and Force*

Holmes,¹⁸⁰ Gray,¹⁸¹ Dewey,¹⁸² and Felix Cohen,¹⁸³ in particular, stressed the role of coercion and force. In their view, when an ordinary daily use of law is effective, this will be due largely to the state's capacity and willingness to use, or its actual use of, coercion and force. Pound reinforced this view, remarking frequently that "the life of the law is in its enforcement."¹⁸⁴ Some differences between coercion and force should be noted at the outset. Coercion may be roughly defined as a *threat* of significant adverse action. These thinkers sometimes used "force" as a synonym for "coercion." But they also used "force" in another sense that differentiates it from "coercion." In this other sense, an official may use force without *threatening* adverse consequences, as when he forcibly takes a reluctant drunk off the street. Force need not involve physical action against the person, however. An official may also use coercion without resorting to force, as when he merely threatens a potential trespasser who then moves on. And coercion need not involve threats of force. It may, for example, involve threatened withdrawal of financial support.¹⁸⁵

In my view, the instrumentalists' emphasis on coercion and force probably had no salutary effect whatsoever. Coercion and force have always been prominent in the history of thought about law. Although some theorists of the nineteenth century may have erroneously identified law with "reason" or "morals" and the like, they did not, as a practical matter, disregard likely actions of officials in power. Without evidence of such disregard, it is hard to justify the instrumentalists' emphasis on coercion and force as a corrective to possible extremism of the day.

The actual place of coercion and force in the workings of law within a particular system is, of course, an empirical question. A legal system may rely more heavily on coercion and force at one time than at another, or more heavily in some areas than in others. Still, I will try to offer some useful tentative generalities.

In the law, coercion and force are most commonly encountered in the working clothes of sanctions (although some sanctions involve neither coercion nor force). There are many forms of law, however,

¹⁸⁰ See Holmes, *The Path of the Law*, *supra* note 29, at 457-62.

¹⁸¹ See J. GRAY, *supra* note 47, at 12, 101, 116.

¹⁸² See Dewey, *Force and Coercion*, 26 INT'L J. ETHICS 359 (1916); Dewey, *Force, Violence and Law*, 5 NEW REPUBLIC 295 (1916).

¹⁸³ See Cohen, *supra* note 32, at 21.

¹⁸⁴ Pound, *supra* note 82, at 514.

¹⁸⁵ See generally Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 AM. J. JURIS. 71 (1976).

that citizens or officials may depart from without incurring liability to a sanction and which do not otherwise bring coercion or force into play. For example, the legal effect of failure to follow rules that merely confer legal power on a private party is generally some form of *nullity* such as an invalid contract, not a sanction. In such a case no one is deprived of possible contract benefits as a sanction for untoward behavior. Or consider an example from the distributive type of technique, a statute providing social security benefits for persons over age sixty-five. Such a law merely defines eligibility. If a person fails to qualify because not yet sixty-five, he is simply ineligible rather than subject to authorized punishment or other sanction.

The efficacy of a particular precept may depend mainly upon educational effort, a reward or other incentive, symbolic deployment of a legal form, publicity, continuous supervision, a public signal, recognition of a status or an entity, and so on. It is not obvious that these implementive devices and mechanisms are necessarily coercive or involve the use of force. Yet many rules that depend upon such devices and mechanisms are nonetheless reasonably effective.

It is at least possible that not just particular rules but a whole system of law may function without organized sanctions. In fact, this is true of our system of international law. Similarly, we may imagine a municipal legal system without sanctions. The efficacy of such a system might depend upon social criticism, inducements, rewards, or the like. Coercion and force in the form of legal sanctions are at least not conceptually necessary features of law. Yet some instrumentalists disagreed. Felix Cohen, for example, thought that law could be "functionally meaningful" only as an act of state force: "[Functionalism] leads to a definition of legal concepts, rules, and institutions in terms of judicial decisions or other acts of state-force. Whatever cannot be so translated is functionally meaningless."¹⁸⁶

But, it may be asked, is not the everyday efficacy of law generally attributable to the state's standing willingness to use, and its actual use (when necessary), of coercion and force to back up legal duties and directives? In my view an affirmative answer to this is not obviously compelled. It is possible to build an impressive case showing that, in our legal system citizens comply with most duties and directives mainly because of their perception that they *ought* so to behave, and not because of legal coercion or force.¹⁸⁷ The obligations of custom and contract, as we have seen, are by and large self-imposed and self-applied. Although the issue is empirical, the evidence would most

¹⁸⁶ Cohen, *supra* note 32, at 8 (footnote omitted).

¹⁸⁷ Again, Lon Fuller took this view. See Summers, *supra* note 51, at 445-47.

likely reveal that the average adult citizen seldom thinks of committing a crime of any seriousness; he takes the leading norms of penal law for granted and behaves consistently with them. Thus not even the fulfillment of the duties imposed by the criminal law—that seemingly most coercive form of law—can be attributed mainly to coercion and force. The same is true of most common-law duties. There are no deep discrepancies between most such duties and general community notions of what is fitting and just. This is true, too, of duties imposed by many statutes and regulations.

Another way to achieve perspective on the true role of coercion and force in accounting for law's efficacy is to return to the sequence of implementive legal tasks introduced earlier.¹⁸⁸ In many uses of law in the American legal order, most if not all implementive work is accomplished when all tasks are fulfilled up through task six—securing citizen capacity to carry out duties or follow directives. At this point the citizens will, assuming performance of the relevant tasks, know what the law expects of them, and will be in a position to fulfill the law's goals. For many citizens this will be enough; the law will mobilize various influences that channel their activity effectively. Few disputes will arise, and when they do it will be at a later stage after the activity has occurred. Many instrumentalists neglected law's channeling tasks, for they were preoccupied with its dispute-settling tasks and the role of courts.¹⁸⁹

Much channeling of great importance to the social order occurs daily, and without coercion or force figuring prominently in it. Frequently those responsible for the law's implementation must confront task seven—provision of effective incentives. Yet it is probable that citizens are moved most often not by threats or actual uses of coercion or force, but by a sense of obligation, generalized respect for law, fear of criticism, habit and tradition, perception of self interest, recognition of common interest, or by encouragement, persuasion, and other incentives. Of course, it must be admitted that coercion is the only incentive that will work for some addressees of the law at this stage.

In assessing the true place of coercion and force, it is also important to bear in mind that normally these sanctions cannot come into play unless behavioral obligations and directives are involved. As already suggested, however, much law does not impose behavioral obligations or consist of behavioral directives. Distributive law is illustrative. A large part, though not all, of such law provides: "Here

¹⁸⁸ See section IX.

¹⁸⁹ See, e.g., J. GRAY, *supra* note 47, at 84-125; Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 23-24 (1892). See also K. LLEWELLYN, *supra* note 107 *passim*.

is a benefit. Come and get it, if you qualify." Furthermore, much law simply confers liberties and powers to be exercised by the individual at will. To coerce the exercise of most liberties and powers would be to destroy their essential character. Rather, the major implementive problems for law of this kind are those of fostering regard for such liberties and powers, and of eliciting the positive responses—creative performances—that they are designed to facilitate. Coercion and force would often nullify rather than nurture such responses.

Once the law's overall implementive sequence has run up to task twelve—taking ultimate implementive action—it will usually be necessary to coerce or to use force, for by that stage a citizen's duty will be clear and by hypothesis he will be refusing to fulfill it. At this stage our legal order could not dispense with powers to use coercion and force. Certainly, the tax system is dependent to some degree on these powers. Prisons, police, and the like appear to be a pragmatic necessity for some small proportion of the population. Although countless daily interactions and exchanges occur without state coercion or force playing a role, some resort to these powers is required to reallocate certain losses that occur such as tort and contract claims. And of course, some citizens would not go along with regulatory programs if the regulators had no ultimate power to coerce or use force. But although such cases are significant, they are far from the whole story. Of the totality of public and private goals realized to some extent through law on any given day, only a small proportion probably owe anything to official coercion or force.

It is important to distinguish the inherent credibility of the state's monopoly on lawful coercion and force from the incidence of actual resort to official power. Ours is a tolerably well-ordered society.¹⁹⁰ It would appear that the credibility of the state's monopoly does not regularly enter into the daily calculations of ordinary adult citizens. When a society is not tolerably well ordered, however, the contrary is more likely.

So far, I have concentrated on the role of coercion and force in accounting for the general efficacy of laws addressed primarily to ordinary citizens. Yet many laws are addressed primarily to officials: rules of jurisdiction and procedure applicable to legislators, courts, administrative agencies; rules defining the duties of officials; rules limiting official power to affect private citizens, and so on. These laws may be constitutional, statutory, or unwritten in form. In our system, many of these laws are rather closely observed. Is this because, as

¹⁹⁰ By "tolerably well ordered," I do not mean an order attributable to the omnipresence of state power but a set of relations the citizens themselves internalize and consider themselves responsible for.

many instrumentalists would have us believe, our officials fear sanctions, or are coerced in some way?

This too, is an empirical question, but the answer seems fairly clear. Frequently no legal sanction or official coercion will be in the offing, because the rules do not provide for such. A judge who exceeds his jurisdiction, for example, will not be subject to official sanction. Furthermore, as H. L. A. Hart has stressed, most officials generally accept and abide by laws applicable to them in their official capacities, as common public standards of official behavior.¹⁹¹ They also stand ready to condemn those of their colleagues who do not abide by the rules. The prospect of such criticism no doubt induces some to follow the rules when they might not otherwise. Presumably there are still other explanations for compliance not attributable to coercion or force.

It is important to offer these correctives to the instrumentalist view that our law functions mainly through coercion and force. If law is identified only with state coercion and force it may prove more difficult to secure citizen cooperation in voluntarily upholding it (those parts that deserve to be upheld). Cooperation is dependent mainly upon a widely disseminated understanding that there are affirmative reasons of substance for following most forms of law. To dwell on coercion and force is to neglect these reasons.

B. *Directness of Official Action*

The pragmatic instrumentalist theory that the efficacy of law is essentially dependent on the power of officials to coerce and to use force has a natural corollary: when officials do act they typically take some form of direct action. For example, a police officer's direct efforts to stop a person from committing a crime, the direct action of a regulatory official to confiscate bad food and thus stop it from reaching the market, direct action of a traffic officer to coordinate traffic flow, and so on. Such direct action frequently involves official resort to coercion or the use of force. The "direct action" thesis in instrumentalist writings is more implicit than explicit, but is evident nonetheless.¹⁹² Of course, nothing in instrumentalist theory necessarily requires that legal means be predominantly or even typically direct.

Instrumentalists would have done well to heed Jeremy Bentham's essay *Of Indirect Means of Preventing Crimes*.¹⁹³ Addressing himself

¹⁹¹ See, e.g., H. L. A. HART, *supra* note 110, at 109-14.

¹⁹² See, e.g., J. GRAY, *supra* note 47, at 12, 101, 116; Dewey, *Force, Violence and Law*, *supra* note 182, at 295; Holmes, *supra* note 29 *passim*.

¹⁹³ J. BENTHAM, *Of Indirect Means of Preventing Crimes*, in 1 WORKS OF JEREMY BENTHAM, *supra* note 10, at 533-80.

almost solely to the penal technique, Bentham postulated that the law's various modes of implementation are not predominantly direct. At least on the surface, the criminal law appears to provide the richest source of illustrations in our law of goals that are served by direct rather than indirect means. If it turns out that the means of implementing the ultimate goals of even the criminal law are largely indirect, this finding will go far to refute those instrumentalists who assume that legal action typically is direct.¹⁹⁴

According to Bentham, "direct" legal means include both coercive threats of punishment operating at the moment of choice and actual uses of force. Bentham assumed that all other relevant legal means are indirect. A partial list of those other, indirect means, most of which Bentham cited, includes: (1) removal of "bad examples," *e.g.* eliminating violence from public entertainment; (2) deprivation of tools of misbehavior, *e.g.* firearm controls; (3) withholding knowledge required for misbehavior, *e.g.*, keeping secret the movement of valuables through the mails; (4) diversion of dangerous desires, *e.g.*, providing potential delinquents with public amusements to occupy them and to serve as outlets for aggression; (5) removal of open temptations, *e.g.*, counseling people to lock vehicles; (6) improvement of the capacity of potential victims to protect themselves, *e.g.*, encouraging technology for thief-proof locks and alarm systems; (7) reduction of access to judgment-impairing drink and drugs, *e.g.*, regulating liquor consumption; (8) provision of peaceful alternatives to violent self help, *e.g.*, making courts available for redress of grievances; (9) encouragement of public criticism of wrongdoing, *e.g.*, publicizing convictions and naming the parties involved; (10) reinforcement of specific values behind prohibitions, and strengthening dispositions not to engage in wrongful conduct, *e.g.*, providing moral education as part of general education; and (11) cultivation of general benevolence, *e.g.*, through education.

On a lower level of generality—a level of greater goal variety and particularity—I have found that it is possible to identify other more substantive contrasts between direct and indirect legal means. Most of these contrasts can be drawn not only within the criminal law, but in other fields as well.

One important contrast is between coercing a person to act or refrain (direct) and inducing him to do so voluntarily through incen-

¹⁹⁴ Of course, law may be used directly and indirectly at the same time. Moreover, a use of law may involve use of direct means to serve one goal, and indirect means to serve another related goal. Thus, while a use of law to provide education is a direct means to the goal of securing basic literacy, it is also an indirect means, when compared with threats of punishment, to crime control.

tives, rewards, etc. (indirect). Thus, instead of coercing private lenders to observe set ceilings on interest rates chargeable for loans, the state might, through publicity given to interest rates charged by competitors, encourage more competition between lenders, with the incentive consisting of larger shares of the total loan business for those with the lowest competitive interest rate.

A second contrast is between "treating the symptom" (direct) and "removing the cause" (indirect). For example, instead of forcibly jailing a public drunk each time he becomes a nuisance (direct), the state might induce him when he is sober to enter a hospital for a "cure" (indirect).¹⁹⁵ Of course, "causes" can be approached directly, too, but note that in this contrast the "direct" action is addressed to the objectionable behavior itself with a view to its immediate termination, whereas the "indirect" action focuses on underlying causes of the overall behavior pattern.

A third contrast is between providing a benefit, facility, or the like (direct) and maximizing the conditions under which people are able to provide such resources for themselves (indirect). For instance, instead of guaranteeing minimum material well being through welfare payments, the state might provide tax incentives for people to save for hard times, make job information available, prohibit job discrimination, and so on.

A fourth contrast is between direct and indirect imposition of burdens. For example, a tax or fine may be imposed directly on A, but A may eventually (indirectly) be able to pass it on to B.

A fifth contrast is that between burdens fixed in specie and generalized obligations. If the state wants to increase its resources for state use, for instance, it may adopt a rule to take specific property away from individuals (direct), but it might achieve the same result by imposing a general tax that forces owners to sell the property to pay the tax (indirect).

A final contrast is between using a means that allows officials to take action without going through legal processes (direct) and requiring officials to go through duly constituted processes before they act (indirect). For example, instead of invoking emergency powers and acting directly to stop people en masse from traveling during a time of peril, officials might take an individualized approach and stop movement only after they have secured specific detention orders.

¹⁹⁵ This might serve still other goals directly, as well.

Thus, in my view it is well, and perhaps a prerequisite to optimal use of law, to be aware of possibilities for indirect goal subservience. Many goals may be more effectively served by indirect means. Some are not readily achievable or not achievable at all through direct means. For example, a legal system cannot guarantee self-realization or happiness of citizens directly—it can only seek to secure conditions in which goals are realized. Even when law can contribute directly to the achievement of certain goals, an indirect contribution might be more effective, as in the foregoing array of indirect means of crime control.

Furthermore, direct means actually may be too effective, and thus do more harm than good. If so, indirect means may be preferable. Direct prohibition of liquor consumption is perhaps the best illustration of such “overkill.” Similarly, the state may choose to use indirect rather than direct means because the latter are too paternalistic. Followers of John Stuart Mill might oppose direct uses of law to forbid smoking or direct uses of law to require drivers to wear seat belts, yet still favor laws against making cigarettes or laws requiring that cars have seat belts. Or the state might lack the substantive standards or bureaucratic means to set wages in private employment and therefore confine its efforts to setting up and policing systems of collective bargaining.

Moreover, what is politically acceptable at a given time may depend on whether an indirect rather than a direct use of law is involved. Thus, although a political party might not rally enough support for wage controls on unions (direct), it may be able to secure legislation imposing sanctions against employers who make excessive wage settlements (indirect). It should be plain that in some societies, direct official taking of property would be politically unacceptable, while a confiscatory tax with the same ultimate effect would be more palatable. Similarly, it may be more acceptable for governments to redistribute income through “free” state services (indirect) than through money payments to particular beneficiaries from tax revenues (direct). Indirect means can be more economical, too. Thus a tax deduction (indirect) usually costs less to administer than direct payments.

Finally, as Bentham noted, indirect means may be more gentle. Certainly educative and persuasive methods of disposing people to behave well are more gentle than is criminal punishment.

The implementive resources of the law, then, should and do include many devices that may be deployed indirectly rather than directly. It cannot be assumed that in our own system we rely more heavily on direct means than on indirect means.

XI

JUDGING THE SUCCESS OF A USE OF LAW

After law is created, used to serve projected goals, and after sufficient time has passed, it is natural for the pragmatic instrumentalist to inquire whether this use of law has been successful. For this, he needs some kind of criterion of success.

Among instrumentalists it became an article of faith that officials and the public must judge a use of law by its substantive "effects"—by the extent to which its effects served goals set at the outset. Thus Roscoe Pound, in his famous essay on the scope and purpose of sociological jurisprudence, wrote that we should "study . . . the actual social effects of legal institutions and legal doctrines . . . , [the end of which] is to make effort more effective in achieving the purposes of law."¹⁹⁶ Walter Wheeler Cook emphasized:

the worth or value of a given rule of law can be determined only by finding out how it works, that is, by ascertaining, so far as that can be done, whether it promotes or retards the attainment of desired ends. If this is to be done, quite clearly we must know what at any given period these ends are and also whether the means selected, the given rules of law, are indeed adapted to securing them.¹⁹⁷

The formalists, to whom the pragmatic instrumentalists were reacting in part, appeared to ignore law's effects. Their orientation was largely retrospective. In using law, their primary concern was to achieve consistency and harmony with the past; "logical" elaboration of pre-existing doctrine was their basic tool. The orientation of instrumentalists to the future and its improvement was therefore a considerable advance. But their "efficacy criterion" of legal success was not free of difficulties, and to this day, it has received little systematic critical attention.

A. *The Complex Evaluative Nature of Efficacy Judgments*

Instrumentalists generally believed that to judge the success of a use of law, it is necessary only to identify its effects and measure them on some kind of scale. In the grip of a rampant empiricism, most of these thinkers assumed that all facts relevant to the application of this criterion of success must be determinable through observation, and

¹⁹⁶ Pound, *supra* note 82, at 513-15 (footnotes omitted).

¹⁹⁷ Cook, *supra* note 95, at 308. For similar views, see Cohen, *supra* note 32, at 18-24; Dewey, *John Dewey*, in *MY PHILOSOPHY OF LAW*, *supra* note 48, at 82-85; Llewellyn, *supra* note 2, at 1237; Moore, *Underhill Moore*, in *MY PHILOSOPHY OF LAW*, *supra* note 48, at 206-07.

that the ultimate judgment about success or failure therefore must be essentially empirical rather than evaluative. In my view, the truth is far more complex. The ultimate question is whether the use of law being judged is *sufficiently* effective, and an answer to this calls for the exercise of evaluative judgment.

For present purposes, it will be useful to think of the effectiveness per se of a use of law in relation to an imaginary scale on which complete effectiveness in the form of total "victory" over the problem is registered at the top of the scale (a state of affairs rarely achievable or rarely desirable as a goal), and complete ineffectiveness is registered at the bottom of the scale. Of course, whether a use of law is *sufficiently* effective to be successful is to some extent a function of the absolute level of effectiveness on such a scale. It would be absurd to judge as successful a totally ineffective use of law, and similarly absurd to judge as unsuccessful a totally effective one. Likewise, the regularity of any level of effectiveness would be relevant to determining whether a use of law is sufficiently effective. But because these factual matters are not the whole story, the actual level of effectiveness on such a scale for a given use of law may be one thing, and the determination of whether that use is sufficiently effective to be successful quite another. Thus, to judge the effectiveness of a given use of law, two separate questions must be addressed: (1) What level of effectiveness did it achieve? (2) What level of effectiveness is sufficient for it to be judged a success?

It is possible that even a low level of effectiveness, judged absolutely, may nonetheless count as sufficiently effective and successful. How is this so? First, in some fields, because of special difficulties of detection, as in the crime of incest, or of proof, as in the crime of rape, relatively little (here in the form of actual convictions) may be achieved. Even so, given such special difficulties, the uses of law involved may be judged sufficiently effective. Similarly, the intrinsic nature of a task might make it exceedingly difficult to achieve by any use of law, and especially by a coercive use. This would be true, for example, of tasks such as those of inspiring attitudes of charity or tolerance. As to these, considerable ineffectiveness might still count as sufficient and therefore successful.

Second, the state of affairs to be achieved may be one that can generally be brought about through law only indirectly, with substantial ineffectiveness more or less inevitable. Happy marriages are an example. Age requirements for valid marriages comprise one indirect means we use to pursue this end. These requirements tend, but only tend, to make for more mature judgments in the choice of spouses; yet even a high divorce rate would not signify that age requirements are

insufficiently effective. Because it would be unwise for the law to prescribe particular marital matches or otherwise proceed directly, the law must proceed indirectly and therefore quite contingently.

Third, those who use law may deliberately choose a limited means for cost reasons. A society, for example, might decline to set up an independent review bureaucracy in order to combat problems of official abuse of power because it would be too costly. Instead, the society might choose to rely solely on private tort actions to protect against official abuse of power, yet this limited means might fail significantly to reduce abuses such as police brutality. Still, this use of law might be adjudged sufficiently effective and thus successful, given the costs society is willing to incur.

Fourth, legislators or judges may deliberately choose to adopt limited means because more effective ones would involve unacceptable sacrifices of other important goals. Considerations of liberty and humaneness, for example, might lead a society to choose to fight crime with one arm behind its back. The resulting shortfall in crime control should not necessarily be judged insufficiently effective.

Fifth, even considerable ineffectiveness in the short run does not necessarily imply long run ineffectiveness. For example, it might turn out that affirmative action programs designed to remedy racial imbalances fail badly in the short run but take hold in the long run. Or a country might only gradually embrace a set of norms like those in the International Convention on Human Rights. Some uses of law simply require time to take effect. When this is so, a relatively low level of effectiveness may still be viewed as sufficient, given the required time interval.

Thus, in all these cases more is involved in judging legal success than simply determining actual effects and plotting them on some kind of scale. Rather, the issue becomes one of sufficiency of effects in relation to such factors as the difficulties of realizing the goals, the amenability of the goals to direct means, the extent to which resources are allocated to the problem, the conflicting goals that are affected, and the time interval required for the use of law to "take hold." Whether a given use of law is sufficiently effective, as judged in relation to such considerations, is therefore a complex evaluative question. And it must not be thought that these considerations come into play only rarely. On the contrary, most are normally at work to some degree any time law is used.

It might be objected that the foregoing analysis illegitimately preserves an evaluative issue about the sufficiency of effectiveness beyond the initial stage of goal formulation; if goals are formulated in the first place not in absolute terms (*i.e.*, the top end of an effectiveness scale) but are adjusted downward in light of the bearing of such

factors as difficulty of fulfillment, amenability to direct means and the like, then, once the facts about effectiveness level are known at the stage when success is to be judged, the remaining judgment as to efficacy will be wholly factual and non-evaluative.

But whatever the virtues of trying to set goals initially not in terms of total or absolute "victory" over a problem, but rather, in relation to the difficulty of the task, its amenability to direct means, and so on, we can rarely foreclose all evaluative questions at the final stage when facts are in and success or failure is to be judged. For it is not until then that we will have the fullest possible factual picture of the importance of such factors, and thus it is not until success or failure is to be judged that *sufficiency* of efficacy can itself be most realistically measured. It is this very judgment that is inescapably evaluative. Even if all evaluative issues as to what is sufficiently effective could appropriately be resolved at the initial goal formulation stage, this early determination would inevitably lend any final judgment of efficacy an *overall* evaluative character, no matter how exclusively factual the final judgment actually is. That is, to judge a use of law as effective in this way would also be to say that it is sufficiently effective, given the earlier resolution of "sufficiency" issues.

B. *Further Difficulties in Applying an Efficacy Criterion*

Instrumentalist thinkers varied greatly in the degree of their sophistication about the practical and other difficulties of applying an efficacy criterion. Most of them were unaware of these difficulties or did not take them very seriously,¹⁹⁸ yet the problems can be considerable, for even the simplest uses of law.

The very idea of an "object" of an efficacy judgment is at least problematic. What is to count as a "use of law" for purposes of judging efficacy? The meaning of this phrase may range from a single official action applying a rule in a particular case to the entire workings of, say, the penal technique. It would be inappropriate to confine the object of an efficacy judgment to some arbitrarily specified use of legal resources within this range. In practice, legal actors must make efficacy judgments about uses of law that fall across the whole range of uses, small and large, brief and lengthy. Thus, any functional unit of legal resources can be the object of an efficacy judgment, although care must be taken to see that such an object is not artificially separated from related resources.¹⁹⁹

¹⁹⁸ See, e.g., Bingham, *supra* note 95; Cook, *supra* note 95.

¹⁹⁹ It would be artificial, for example, to try to judge the effectiveness of a duty-imposing precept apart from the implementive resources devoted to it. The relevant goals are goals of the

Another problem is that the relevant goals may not be readily ascertainable for judging whether a use of law is sufficiently effective. It is one thing to attribute goals to a single precept, although this too, can be problematic. It is quite another to attribute goals to a use of law for judging efficacy. A use of law combines precepts with other legal resources into a functional unit, and it is to this complex unit that goals usually must be attributed.

The goals considered depend on the nature of the use of law to be judged. If the judgment is about a functional unit consisting only of a judicial decision within a given legal framework, for example, the goals will usually be less numerous and varied, and their identification easier, than if the judgment is about some larger use of law such as regulatory control of air pollution from stationary and mobile sources.

The goals relevant to judging efficacy also depend on how the intentions of legal actors limit what is relevant. As has been shown, it is important to separate three levels of "end result" goals, at least for uses of law that impose behavioral duties.²⁰⁰ These levels can be distinguished along an ascending means-end continuum in which the realization of lower level goals, often explicitly formulated in the law, serves higher level goals, often not so formulated. Thus, for most uses of law we may identify one or more immediate goals, intermediate goals, and ultimate goals. Returning to an earlier example, consider a law requiring private handgun owners to register their ownership with the police. We might distinguish at least the following different goals for this law: registration of all privately owned handguns (immediate), deterrence and control of firearm violence (intermediate), general community peace (ultimate).

Note that just because a use of law serves an immediate goal well, it does not follow that its ultimate goal will be well served. Thus, even if all handguns were registered, firearm violence might nonetheless increase. It should be evident, therefore, that efficacy judgments must be framed with goal multiplicity in mind. A given efficacy judgment might read: "The law is effective as to immediate goals, but ineffective, or of limited efficacy, as to one or more intermediate or ultimate level goals."

Often, however, we will not know just what goal possibilities the lawmakers had in mind, or which goals of several a majority espoused. Standard legislative or other sources may be of little help. It may be necessary to review a variety of sources to have a sufficient

whole entity, not just the part, and effects cannot meaningfully be attributed to parts in isolation.

²⁰⁰ See text accompanying notes 79-81 *supra*.

basis for determining intermediate or ultimate goals for a use of law. Where relevant law is a mix of statute, regulation, and court action, as is often the case, the whole mix must be considered. Moreover, goals can change over time even though the relevant law remains the same. A goal statement may prove over-general or vacuous. Or it may be that no single goal can be considered authoritative. In such a case, efficacy must be judged in relation to a posited goal.

Goal statements are often formulable in different ways: as general or specific, as more or less concrete, as time bound or not, etc. By manipulating goal formulations it is possible to convert inefficacy into efficacy or vice versa. For example, a goal statement for a use of law imposing a charitable tax contribution may purport to make people more charitable, or it might be interpreted only to call for coercive collection of a sum of money to be used for charitable purposes. If the latter, this use of law could be judged effective. If the former, only little might be achieved because the extent to which law can coerce charitableness is inherently limited. Thus, much depends on what goal formulations are fairly attributable to a particular use of law.

Sometimes what appears on the surface to be a goal will turn out not to be upon analysis. In tort law, for example, deterrence of unduly risky activities is always a natural candidate for goal status. But some torts do not involve this goal. The tort of "ultrahazardous" activity, for example, might be viewed more accurately as a kind of tax on a course of conduct. Similarly, many uses of law confer liberties or benefits. If individuals do not avail themselves of these advantages, it does not necessarily follow that a goal has not been met. It is not a goal that a given percentage of liberty or right exercises take place.

Once various goals are identified it often will be evident they conflict, and that the lawmaker does not desire substantial fulfillment of a particular goal but only the relative maximization of a number of goals. The interrelations of conflicting goals can thus inject considerable complexity into the process. Beyond problems of defining proper objects of efficacy judgments and problems of defining goals, a third basic difficulty in judging efficacy remains: determining the actual effects of uses of law.

The conditions that must be satisfied in order to make efficacy judgments are most often met with respect to the *immediate* effects that correspond to the immediate goals of a use of law. For example, an immediate goal of one important branch of law is to provide a compensatory judicial remedy for breach of contract if the aggrieved party seeks it. When a breach occurs and a remedy is sought, it will often be easily determinable whether the court granted a remedy and what remedy it gave. If a remedy was granted, then we may say that in

light of this immediate effect of the use of relevant law, the immediate goal of providing a compensatory remedy was effectively realized.²⁰¹

Other examples of more or less ascertainable immediate effects of a use of law may be cited from any of law's five basic techniques. For example, one immediate goal of a regulatory use of law might be that all car drivers possess a minimum knowledge of traffic laws. By prescribing examinations as a prerequisite for licensing, the immediate effects of a law requiring knowledge could be ascertained. Similarly, a distributive use of law might have as its immediate goal providing basic subsistence payments to qualified persons who apply. By comparing payments with applicants' qualifications, it would be possible to determine whether the immediate effect of this use of law was to provide the desired payments.

Immediate effects that correspond to immediate goals, however, differ in kind from the effects corresponding to intermediate and ultimate goals. As already indicated, immediate effects can occur without triggering intermediate and ultimate effects. The ready determinability of immediate effects may be relatively insignificant to an understanding of the efficacy of the law with regard to higher goals. Immediate effects may turn out to be merely mechanical; they merely may be necessary steps in a sequence of projected effects in which intermediate and ultimate effects must occur before the law can be judged sufficiently effective. These further effects may be difficult or impossible to ascertain. For example, one intermediate or ultimate goal of liability for breach of contract is to facilitate efficient reallocation of resources when the transaction breaks down. The degree to which granting a remedy (immediate effect) serves this further goal may be difficult to determine. Similarly, whether a law is effective in requiring drivers to possess knowledge of traffic rules may be ascertainable, but whether this law in turn significantly enhances safety (intermediate or ultimate goal), may be quite indeterminable. Although it may be easy to determine whether eligible welfare recipients get paid (immediate goal), it may be less easy to ascertain whether these payments actually nurture the minimum health and well being of recipients (intermediate or ultimate goal).

Determining intermediate and ultimate effects, and the degree of regularity thereof, may be difficult for a variety of reasons familiar to social scientists. The "effects" might have occurred in any event, caused by non-legal factors simultaneously at work. It may be impos-

²⁰¹ Notice, though, that this might be a rather hollow form of goal realization, for the defendant might be judgment-proof. Notice, too, that we have said nothing about whether the remedy is adequate.

sible to make comparative studies or whatever is required to sort out what is genuinely causal. Such studies might be impossible or exceedingly difficult to do because society will not permit costly or otherwise objectionable social experiments, because comparable social conditions may not exist, because the factors involved are too intangible or too difficult to measure, and so on.

In sum, the pragmatic instrumentalist social engineers who thought it relatively easy to determine the effects of a use of law were naively optimistic. The object of an efficacy judgment—a use of law—is rarely self defining. Goals for a use of law may not be readily specifiable. The actual isolation and description of effects genuinely attributable to this use may be speculative. Such difficulties are often compounded when the goals and effects under study are intermediate or ultimate in character.

C. *Efficacy as a Criterion of Success*

Even if an efficacy criterion could be readily and easily applied, it would not necessarily follow that it would be a satisfactory general criterion for judging the success of a use of law. Those who invoke an efficacy test might construe it narrowly to require inquiry only into whether the use of law being judged actually fulfills goals set at the outset. Among the technologically minded instrumentalists there may even have been some disposition to construe the criterion narrowly in this way.²⁰²

So construed, the criterion is deficient in several ways. First, it neglects the goodness or badness of the means used. Legal means may themselves be bad, and this badness may also infect the quality of the goals realized. Second, a merely technological focus fails to subject to scrutiny the goals originally set. A genuine criterion of *success* cannot take the desirability of these for granted. Even if means are effective and not objectionable, and even if original goals are good, we still may not have genuine legal success. Unanticipated bad effects may occur with the result that the use of law brings more harm than good. Third, a technological criterion ignores the effects that a use of law may have in influencing the general patterns of wants and desires within the society. Of course, these effects, too, may be good or bad. For example, the uses of law to structure and order an economic system may foster commercialism and materialism.

Thus, at its worst, a technological criterion of legal success allows legal actors and citizens to judge a use of law successful even though

²⁰² See, e.g., Pound, *supra* note 82; Llewellyn, *supra* note 2. See also K. LLEWELLYN, *supra* note 107, at 79-80.

the means selected and the original goals are bad, the outcome is one that does more harm than good in the circumstances, and the ultimate effects on general patterns of wants and desires is unwholesome.

Although no pragmatic instrumentalist appears to have unqualifiedly subscribed to a merely technological criterion of legal success, many stated their criterion without addressing any of the foregoing issues. Moreover, the emphasis on means in instrumentalism, and its conventionalist value theory ("whatever the crowd wants," as Holmes put it),²⁰³ was congenial to such a narrow criterion. A use of law could prove to be a highly effective means for satisfying antecedent wants and interests, yet be subject to objections on all of the various grounds just considered.

Furthermore, an efficacy criterion is myopic in two quite special ways. First, as a consequentialist criterion, it presupposes that values can be realized only through uses of law that are *causal*—uses that serve goals through cause-effect sequences. Only if these occur can there be legal success. But values can also be realized when law is used in ways that simply *accord with* norms of right behavior. Law is regularly used to resolve disputes, for example, but actual dispute settlements are not all that is of concern here. We also want settlements to accord with what is right. Such a relationship is not just some additional kind of effect. To illustrate: much law is concerned with "doing justice and equity" between the parties after the fact in light of rightness norms such as "act in good faith," "take care for others," "keep your word," "give others their just due," and "deal honestly." The accordance of judicial or other legal decisions with such norms in light of the facts of the case is not causal, for it does not depend on the occurrence of decisional effects. Rather, it depends on the relation between the decision and the way that rightness norms apply to the past interaction of the parties. Hence, the pragmatic instrumentalist slogan "judge legal success in terms of effects," takes no account of the accordance of a decision with rightness norms in a particular case as a distinctive form of legal success.²⁰⁴

An efficacy criterion is myopic in another way; it makes no special place for effects that may occur *in the course of law's workings* prior to or apart from any end result. These effects may implicate rule-of-law values such as certainty, predictability, reliability, and even-handedness; division of legal labor values such as democratic control, efficiency of specialization, and distinctive competency; process values such as notice and opportunity for fair participation in

²⁰³ 1 HOLMES-POLLOCK LETTERS, *supra* note 44, at 163.

²⁰⁴ See generally Summers, *supra* note 156, at 718-22, 764-82.

a legal process.²⁰⁵ All these are important values, and in the course of law's workings they may not be realized even though antecedent substantive goals are. Sometimes such substantive goals can be realized only at the price of sacrificing these other types of values.

CONCLUSION

Some might deny that pragmatic instrumentalism constitutes a theory of law.²⁰⁶ By all standards, however, this body of tenets qualifies as a general theory about law and its use. It incorporated a sufficiently wide range of tenets, and although many of its tenets were not the subject of extensive development, at least the general directions of thought were reasonably clear. Some of its tenets were evaluative, some analytical, and some empirical. But such diversity is rooted in the nature of the subject. Did the tenets lack sufficient thematic unity? Pragmatic instrumentalism is not without its general unifying themes—ones that range over or inter-relate many, if not most, of its tenets. The notion of law as an instrument to serve social goals was one of these. The scientific and technological ethos was another, as was the primacy of personnel, particularly the judiciary. Some facet of pragmatist philosophy underlay nearly every tenet. It must be admitted that there was no one root idea from which all else developed, but this is true of other legal theories as well.

Many Europeans have tended to dismiss American legal theory as merely derivative. They have worked within the continental natural law tradition or within the analytical positivist tradition, mainly Viennese or British. But pragmatic instrumentalism cannot be dismissed as merely derivative. Rather, it is a distinctive tradition in its own right. With its utilitarian and therefore consequentialist value theory, its orientation to the social sciences, and its technological emphasis, for example, no one could reasonably characterize it as in the natural law tradition. At the same time, it can hardly be considered merely another version of analytical positivism. Pragmatic instrumentalism incorporated a general theory of value. It viewed law as a human artifact, not as a mere inert datum on which analysts might ply their trade. It viewed law as a means to goals—as a social instrument—and it conceived legal theory to be concerned with the general uses of law as well as with its nature. It was antiformal, and was occupied—even preoccupied—with issues of legal method, particularly with regard to judging.

²⁰⁵ See generally Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

²⁰⁶ See, e.g., W. TWING, *supra* note 3, at 375.

Not only is pragmatic instrumentalism a distinctive tradition within Western legal theory, it is also largely indigenous to the United States.²⁰⁷ Further, many American lawyers who assumed themselves to be uninfluenced by jurisprudence simply were wrong. Many tenets of pragmatic instrumentalism dominated the American legal scene at least during the middle decades of this century. Some tenets were profoundly influential, and continue to be so now. This is true in particular of instrumentalist legal method. I cannot go into the evidence of instrumentalist influence here, but if I am wrong about the extent of it, I am in good company, including that of Gilmore,²⁰⁸ and Llewellyn himself.²⁰⁹

It is too soon to attempt a definitive account of this influence. It is also premature to offer an overall assessment of the theory. Nonetheless, I have indicated some ways in which this body of thought was, in my opinion, errant. It neglected and distorted law's normative nature. It was utilitarian and therefore failed to subject goals and means to independent qualitative scrutiny (including the scrutiny of "rightness" concepts and principles). It was excessively means-minded. It incorporated exclusively source-based criteria of legal validity. It overestimated the freedom judges have, under the law, to decide cases as they wish. It oversimplified complex matters, including the nature and relations of means and goals, the techniques of the law, and the determination of law's effects. Yet many of these deficiencies can be remedied.

At the same time, there is much to welcome in pragmatic instrumentalist thought. Its spirit was humanistic and democratic—law was viewed as organized society's chief means of altering the future in the interest of social improvement. It opened up whole new branches of legal theory, including law's complex goal structures, the interactions of means and goals, and law's implementive technology. It brought technological rationalism and empiricism into the law. It introduced a concern for law's social effects. It provided a telling critique of formalistic legal method. It stressed the significance of legal personnel. And more.

In addition to these substantive contributions, there are methodological lessons, too. Perhaps the most important one to be learned from a study of pragmatic instrumentalism is that legal theory is something more than a branch of philosophy, more than applied

²⁰⁷ This is not to say that there have been no instrumentalists or functionalists elsewhere. See, e.g., R. VON IHERING, *supra* note 9.

²⁰⁸ See G. GILMORE, *supra* note 8 *passim*.

²⁰⁹ See K. LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 142, at 3-178.

social science, and more than just an exercise in the history of ideas. Legal theory cannot safely draw its models from any one discipline. If it was wrong for Llewellyn (and his like) to rail as he did at the philosophers, it was also wrong for him to embrace the scientists in the way he did. Legal theory has a kind of autonomy of its own. Law will not, without distortion, yield in some wholesale fashion to the analytical perspectives and methods of any one discipline.²¹⁰

In 1957, H. L. A. Hart wrote that he had formed the belief that within analytical jurisprudence, inquiry had come to a "premature standstill."²¹¹ In his view, much more could be done. Subsequent events have proven him right.²¹²

At mid-century in the United States, pragmatic instrumentalist thought had come to a premature standstill. I have sought in this Article to indicate several of the more fertile yet relatively untilled domains. It is likely that some, perhaps much, further instrumentalist work will be done. Ultimately, however, I suspect that the perfect theory of law will not take the form of a duly revised and elaborated pragmatic instrumentalism. Rather, it will be a more inclusive theory that partakes of the best in each of the three great traditions. And even at that, this perfect theory will not be equally applicable to all societies.

²¹⁰ But for a somewhat different view, see Summers, *The New Analytical Jurists*, 49 N.Y.U. L. REV. 861 (1966); R. DWORKIN, *THE PHILOSOPHY OF LAW* (1977).

²¹¹ Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 957 (1957).

²¹² In large measure it was Hart himself who not only showed the way but undertook the primary labors. See, for example, H. L. A. HART, *supra* note 110, and the bibliography of his many other illuminating articles and books in *LAW, MORALITY, AND SOCIETY—ESSAYS IN HONOUR OF H. L. A. HART* (P. Hacker & J. Raz eds. 1977).