

THE PERILS OF PERVASIVE LEGAL INSTRUMENTALISM¹

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I. INTRODUCTION

An instrumental view of law—the idea that law is an instrument to achieve ends—is taken for granted in the United States, almost a part of the air we breathe. Legal instrumentalism operates in various ways: as a theoretical characterization of law, as an attitude toward law that professors teach students, as an orientation of lawyers in their daily practice, as a strategic approach of organized groups pursuing their agendas, as a view toward judges and judging, as a perception of legislators and administrators when enacting laws and regulations. In all of these contexts, people see law as an instrument to advance their interests or the interests of the individuals or groups they support or represent.

Few people recognize that legal instrumentalism has a relatively recent provenance, originating about two centuries ago. In no other society, or at least in none that I am aware of, has instrumentalism ever become a pervasive view of law. For reasons that will be indicated, the US has gone the furthest in this direction. In a real sense, we have embarked upon a vast social experiment with no previous examples to provide guidance or warn of pitfalls. Worrisome signs are everywhere that this experiment may be ill-fated.

To state the problem concretely, in situations of sharp disagreement over the social good, if law is perceived as an instrument, individuals and groups within society will endeavor to seize the law, and fill in, interpret, and apply the law, to serve their own ends. What results is a contest over law itself, a contest in which all sides seek to enlist the power of law on their behalf, spawning a Hobbsean conflict of all against all carried on within and through the legal order. It is not my contention that instrumental views of law are unique to the modern period.

Instrumental strains of thinking about law can be found in earlier periods of the Western legal tradition. At most, however, this was seen as aspect of law, one of its capacities, not the essence of law. Nor is it my contention that *only* instrumental views of law circulate in the US today. Non-instrumental understandings of law are still present and influential. But they have been shunted to the margins as instrumental views have spread. The shift I identify herein is one of emphasis and proportion: instrumental and non-instrumental views of law have circulated together, and continue to do so, but a sea change has occurred away from predominantly non-instrumental views of law toward predominantly instrumental views. Finally, I do not assert that the Hobbsean war within law articulated above is inevitable. Rather my contention is that the logic of the situation portends such a scenario and that plentiful indications of it are already evident.

A deceptively complex question exists about the underlying nature of the shift to pervasive legal instrumentalism, which ought to be kept in mind in the course of this essay. Consider two distinct possibilities. One possibility is that law has always been instrumental in nature, as a Marxist or critical theorist might assert, that law has always served elite or particular interests, although this partiality was concealed beneath a non-instrumental guise. According to this view, the core change entailed in modern legal instrumentalism is making explicit and known to everyone what covertly was happening all along. This is a very real change with real consequences, but it is not a change from a fundamentally non-instrumental law to an instrumental law.

¹ This essay is an extract from a more detailed forthcoming book, tentatively entitled *Law as an Instrument: The Trap of Our Age*.

A second possibility is that law was truly non-instrumental in a core sense, so the shift to legal instrumentalism is a change in the underlying character of law. The law used to consist of content that was given or predetermined in a manner that was not entirely subject to or determined by the desires of any particular individuals or groups. The law was, in some sense, autonomous or semi-autonomous, with its own integrity. Under this latter view, the change represents an emptying out of law that renders it a ready coercive power amenable to the will and desires of whoever effectively seizes it.

Both positions contain an element of truth: law has been used instrumentally in the past even when it was characterized in non-instrumental terms, and there is a real sense in which law is understood and constituted differently now than in the past. Both positions, moreover, agree on the essential point: in no Western society has law been characterized as an instrument so explicitly and pervasively. Profound consequences have followed from this change, which this essay will outline.

The essay will proceed chronologically and thematically. The next Section will begin with a description of former non-instrumental views of the common law, and then will elaborate on the circumstances surrounding the emergence of legal instrumentalism. The Section thereafter will canvass instrumental views of law in the contemporary US legal culture. It is impossible in an essay of this length to cover every possible area, so the focus will be on legal instrumentalism in legal education, legal theory, the practice of law, cause litigation, and the appointment of judges. The final Section will draw out the implications of this exploration, identifying the reasons for concern.

Before commencing it is appropriate to comment on the namesake of this Series, Baron de Montesquieu. Although his work will not be explicitly referred to, this essay is in homage to Montesquieu. The methodology, perspective, and framework of analysis that informs this work can be traced back in a direct line of descent that began in his *Spirit of the Laws*. Following his lead, I will consider historical, sociological, economic, cultural and political factors, and will engage in a great deal of rational reconstruction. I take for granted that law cannot be understood without attention to the entire surrounding milieu within which it exists. This modest diagnosis of our age is indebted to and in the spirit of Montesquieu.

II. THE TRANSITION FROM NON-INSTRUMENTAL VIEWS OF LAW NON-INSTRUMENTAL UNDERSTANDINGS OF LAW

It is characteristic of non-instrumental views that the content of law is in some sense given; that law is immanent; that the process of law-making is not a matter of creation but one of discovery; that law is not the product of human will; that law has a kind of autonomy and internal integrity; that law is in some sense objectively determined.

In the Medieval period in Europe two distinct (yet commingled) types of law possessed these characteristics. The first type was natural law and divine law in the Catholic tradition—the 10 Commandments, for example. Divine and natural Law were thought to be binding upon and infused the positive law that governed society. They were pre-given by God and were the product of God's will, unalterable by man. They were objective in that they constituted absolute moral and legal truths that were binding on all. They set limits on the positive law. The content of these laws and principles were discerned through revelation (including scripture) and through the application of reason implanted in man by God.

The second type was customary law. Everyday life during the Medieval period was governed by customary law, or, more accurately, by overlapping and sometimes conflicting regimes of customary law: feudal law, the law of the manor, Germanic customary law, residues of

roman law, trade customs, local customs. Customary law was said to have existed from time immemorial. It was derived from and constituted the very way of life of the community, the byways and folkways of the people. As such, the content of customary law was not the product of any particular individual or any group's will, but was a collective emanation from below. Accordingly, the process of explicitly articulating and applying the law was a matter of discovering and declaring the unwritten law that was already manifested or immanent in the community life.

These intertwined understandings of law, which dominated for at least a millennium, were non-instrumental in the core respect that they represented a pre-given order that encompassed everyone. It was a law for all that was the product of no one. The law was not subject to the will of anyone and not in the specific interest of anyone. It was the law of the community. Certain groups were in more favorable positions than others, to be sure, as nobles were to serfs, but everyone had a place within an organic society governed by law. Legislation in the modern sense of the enactment of positive legal norms did exist, but it was sparse and generally understood to involve making explicit the already existing immanent law. Emperors, kings and princes had the power to declare law. This power, however, was bounded by the natural, divine, and customary law.

TWO NON-INSTRUMENTAL VIEWS OF U.S. COMMON LAW

Historical understandings of the common law in the United States provide two distinct examples of non-instrumental law. The first one, which held sway until the second half of the 19th Century, is continuous with the above two Medieval understandings of law; the second one, which grew in the course of the 19th Century and dominated for a short time into the 20th Century, characterized law as a science.

The common law in the US was heavily influenced by English common law, although it came to follow a separate path. Blackstone's *Commentaries on the Laws of England* had an inestimable impact, providing the basic training material for apprentices who wished to become lawyers in the late 18th and 19th Centuries, as well the leading text in early law schools.² The US legal tradition was also influenced by a strong belief in the natural rights of life, liberty, and property, as stated and reflected in the Declaration of Independence and the Bill of Rights.

Traditional English understandings of the common law, carried over to the US, pointed to two underpinnings.³ First, as with the Medieval views described above, the common law was thought to be a product of the customs of the people from time immemorial. It was said that the law represented the lived ways of the community, their collective wisdom recognized and refined into law. This origin in the customs and usages of the people was thought to render the law consensual in nature. At the same time, the common law was also the very embodiment of natural rights and principle. This was so because universal custom and usage was thought to reflect and be evidence of natural principle, and also because judges refined the common law and its principles through reasoned analysis. When engaging in this activity judges were declaring law, not creating law.

Jesse Root, a leading US lawyer, articulated (in 1798) this characteristic understanding:

[Our] common law was derived from the law of nature and of revelation; those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things,

² See Dennis R. Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," 51 N.Y.U. L. Rev. 731 (1976).

³ A superb discussion of Blackstone's *Commentaries* can be found in Daniel J. Boorstin, *The Mysterious Science of Law: An Essay on Blackstone's Commentaries* (Chicago: Univ. of Chicago Press 1996).

which need only to be understood, to be submitted to; as they are themselves the highest authority; together with certain customs and usages, which had been universally assented to and adopted in practice, as reasonable and beneficial.⁴

According to Root, the common law: “is the perfection of reason”; “universal”; “embraces all cases and questions that can possibly arise”; “is in itself perfect, clear and certain”; “is superior to all other laws and regulations”; “all positive laws are to be construed by it, and wherein they are opposed to it they are void”; “It is immemorial.”⁵

By the early 19th Century these longstanding ideas about law had begun to lose their power, owing in part to Enlightenment ideas and owing in part to new social and economic realities that rendered the old common law rules obsolete. Borrowing from the newfound prestige of the natural sciences, science was the ascendant form of legitimation for law. Blackstone, whose *Commentaries* were based on a series of lectures he delivered at Oxford commencing in 1753, claimed that “law is to be considered not only as a matter of practice, but also as a rational science;”⁶ as such, it was “an object of academical knowledge” that ought to be studied in the University.⁷ The extraordinary success of the *Commentaries* owed in large part to its organized categorization and systematic presentation of the common law, a feat not previously accomplished.

As the prestige of science grew in the course of the 19th Century, so did the identification of the common law as a science. Richard Rush, a leading US lawyer, published an essay in 1815 on “American Jurisprudence,” which declared: “The law itself in this country, is, moreover, a science of great extent. We have an entire substratum of common law as the broad foundation upon which every thing else is built.”⁸ Nationally renowned law reformer, David Dudley Field, claimed in 1859 that there is no science “greater in magnitude or importance” than “the science of law.”⁹ Edward Ryan, a Justice of the Wisconsin Supreme Court, stated in a law school graduation address (1873): “The law is a science.”¹⁰ An 1851 essay on legal studies described why:

Like other sciences, [law] is supposed to be pervaded by general rules, shaping its structure, solving its intricacies, explaining its apparent contradictions. Like other sciences, it is supposed to have first or fundamental principles, never modified, and the immovable basis on which the whole structure reposes; and also a series of dependent principles and rules, modified and subordinated by reason and circumstances, extending outward in unbroken connection to the remotest applications of law.”¹¹

Christopher Columbus Langdell, appointed in 1870 to be the first Dean of the Harvard Law School, offered the most influential articulation:

⁴ Jesse Root, “The Origin of Government and Laws in Connecticut,” Preface to Volume 1, *Root’s Reports* (1798), excerpted in Mark De Wolfe, *Readings in American Legal History* (Cambridge, Ma.: Harvard 1949) p. 17, 16-24.

⁵ *Id.* 19.

⁶ II *Commentaries* 2, quoted in Boorstin, *The Mysterious Science of Law*, supra 20.

⁷ I *Commentaries* 26-7, Quoted in David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century England* (Cambridge: Cambridge Univ. Press 1989) p.32.

⁸ Richard Rush, *American Jurisprudence* (1815), reprinted in *Readings in American Legal History*, p. 217, 268-280.

⁹ David Dudley Field, “Magnitude and Importance of Legal Science” (1859), reprinted in *Law and Jurisprudence in American History*, Stephen B. Presser and Jamil S. Zainaldin, 5th ed. (St. Paul, Minn.: West Pub. 2000) p. 740, 740-45.

¹⁰ Edward G. Ryan, Address to the Graduating Law Students of the University of Wisconsin (1873), reprinted in Dennis R. Nolan, *Readings in the History of the American Legal Profession* (Charlottesville, Va.: Michie 1980) p. 153, 153-159.

¹¹ “Nature and Method of Legal Studies,” 3 U.S. Monthly Law Mag. 381-82 (1851)

Law, considered as a science, consists of certain principles or doctrines....Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases....It seems to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines..."¹²

Law, according to this account, was a science with inductive, analytical and deductive aspects. Decided cases were the raw material of law (its empirical component). Decisions fell into patterns, from which the governing rules, concepts and principles could be derived through induction. These rules, concepts and principles could be logically organized and their necessary content and implications made evident, then applied deductively to determine the outcomes in future cases. Lawyers, judges, and law professors engaged in this process in an ongoing basis. The common law and rights together formed a coherent and gapless whole which objectively determined the decision in any given case. These ideas formed the basis of a school of thought known as formalists, to be discussed later.¹³

An illustrative description of the common law, which combines all of the 19th Century non-instrumental views of law, can be found in the Annual Address to the American Bar Association, delivered in 1890 by James C. Carter. His address is especially telling for the purposes of this essay, for his specific target of criticism was the growing instrumental view that legislatures had the power to declare law at their will. After centuries in which the common law had been the dominant source of law-making, this was the time of the rise of legislation. Legislation was being promoted, by theorists like Jeremy Bentham, as more democratic, more systematic, clearer and more certain, than the "unwritten" common law, which opponents complained was the uncertain preserve of manipulative lawyers and elite judges.¹⁴ Carter responded (emphasizing what he saw as the key words):

That the judge can not *make* law is accepted from the start. That there is already a rule by which the case must be determined is not doubted....It is agreed that the true rule must somehow be *found*. Judges and advocates—all together—engage in the *search*. Cases more or less nearly approaching the one in controversy are adduced. Analogies are referred to. The customs and habits of men of men are appealed to. Principles already settled as fundamental are invoked and run out to their consequences; and finally a rule is deduced which is declared to be the one which the existing law requires to be applied to the case....[O]ur unwritten law—which is the main body of our law—is not a command, or a body of commands, but consists of rules springing from the social standard of justice, or from the habits and customs from which that standard has itself been derived.¹⁵

¹² Christopher Columbus Langdell, Preface, *Selection of Cases on the Law of Contracts*, reprinted in *Law and Jurisprudence in American Legal History*, p. 747, 746-748. A similar characterization of law as a science was written by the Dean of Columbia Law School, William A. Keener, "Methods of Legal Education," 1 Yale L.J. 143 (1892).

¹³ A superb study of Langdell's ideas is Thomas C. Grey, "Langdell's Orthodoxy," 45 U. Pitt. L. Rev. 1 (1983).

¹⁴ A general discussion of the time can be found in Robert W. Gordon, "'The Ideal and Actual in the Law': Fantasies and Practices of New York City Lawyers, 1870-1910" in *The New High Priests: Lawyers in Post-Civil War America*, edited by Gerard W. Gawalt (Westport, Conn.: Greenwood Press 1986) 51-74.

¹⁵ James C. Carter, "The Ideal and the Actual in the Law," Annual Address, American Bar Assoc. Reports (1890) 224-5.

Time and again Carter insisted that the common law reflected the ways of the people. The job of the judge and jurist was to observe and formulate, organize and rationalize, these customs and habits. As such, “the law reveals itself in its true character as an Inductive Science.”¹⁶ “The law is a department of sociology. It is the unconscious resolve of society that all its members shall act as the great majority act.”¹⁷

Carter systematically attacked the legal positivist views (to be explained shortly) of Bentham, the most vociferous critic of the common law and champion of legislation. Carter thought (as Savigny did before him) it obvious that “no legislature can make what laws it will.”¹⁸ Legislatively mandated reforms are partial, not representative of the ways of the people or their sense of justice, and therefore doomed to failure. With a rhetorical flourish, he dismissed Bentham as someone who “may be accurately described by the vulgar designation of *crank*...”¹⁹

ENLIGHTENMENT AND ITS AFTERMATH

The 18th Century Enlightenment was characterized by the rise in the prestige of science and reason as the most reliable sources of truth and knowledge. After the miraculous discoveries of Newton, who announced a handful of natural laws that governed everything in the heavens and on earth, it was thought that all of the secrets of the natural order would be revealed by science. It was also thought by the Enlightenment *Philosophes* that, just as the natural order could be discovered and beneficially exploited, so too could the social order be mastered. A science of man (focusing on human nature) and society would yield knowledge about the natural principles of law and morality, enabling mankind to use reason to shape society to achieve material and political progress. In the pursuit of knowledge, science and reason were applied to critically examine myths, superstitions, religious dogma, unthinking traditions and customs.

The critical thrust of Enlightenment views undermined the two aforementioned Medieval pillars of non-instrumental views of law—natural and divine law, and longstanding custom. Many Enlightenment thinkers were hostile to Catholicism, specifically, and institutionalized religion generally. Divine revelation and Catholic natural law thus became less acceptable as sources of law. Similarly, the Enlightenment emphasis on critical scrutiny of received tradition undermined the prestige that had always attached to custom. What was once seen as the wisdom of the ages came to be seen as blind fetters of the dead past holding back progress. A new emphasis on historical studies, another product of the Enlightenment, produced demonstrations that historical times and longstanding custom and usage were, often as not, tyrannical and barbarous, not worthy of emulation or continuing deference.²⁰

Many contemporaries of the period, including Blackstone, simultaneously held onto pre-Enlightenment views and Enlightenment views, notwithstanding their tension. Historian Bernard Bailyn found this in the ideas that surrounded the American Revolution:

The common lawyers the colonists cited, for example, sought to establish right to appeal by precedent and to an unbroken tradition evolving from time immemorial, and they assumed, if they did not argue, that the accumulation of the ages, the burden of inherited custom, contained within it a greater wisdom than any man or group of men could devise

¹⁶ Id. 231.

¹⁷ Id. 236.

¹⁸ Id. 241.

¹⁹ Id. 244.

²⁰ See, for example, John Milton Goodenow, *Historical Sketches of the Principles and Maxims of American Jurisprudence* (NY: Arno Press 1972). Originally published in 1819, this book has a remarkably modern critical sensibility.

by the power of reason. Nothing could have been more alien to the Enlightenment rationalists whom the colonists also quoted—and with equal enthusiasm. These theorists felt that it was precisely the heavy crust of custom that was weighing down the spirit of man; they sought to throw it off and to create by unfettered power a framework of institutions superior to the accidental inheritance of the past.²¹

Ultimately, the implications of Enlightenment arguments under cut not just the foundations of law but also those of morality, which shared the same foundations. The *Philosophes* were not moral relativists or anarchists. To the contrary, their goals were to establish sounder more rational and scientific footings for law and morality, to bring about a more just society. At the outset they had no doubts that they would be successful in the search for rational moral and legal principles.

Today we know today that they failed. The reasons for this are many, only two of which will be recited here. First, exploration of the world made it increasingly evident that there were a multitude of diverse moral systems with apparently little in common, suggesting that morality and law were largely conventional. Human nature was base and could at most be used to come up with a minimum set of rules necessary to survive in society. Second, the power and scope of reason became restricted. Reason was once thought capable of producing substantive principles of the right and good. But in the course of the Enlightenment reason came to be seen as instrumental. Reason enabled people to efficiently achieve their ends, but it could not identify the proper ends to be desired. Notions about the good and right appeared at bottom to be a product of surrounding cultural views and individual tastes or passions.

Utilitarianism formalized the implications of this complex of ideas into a moral system, holding that the individual good is what gives one pleasure; achieving the social good entails maximizing the total aggregate of pleasure over pain among the individuals in a society. Although utilitarianism spread within liberal societies in the course of the 19th Century,²² it has never been a satisfactory account of the good, for, among other problems, utilitarianism is hedonistic in bent, and cannot distinguish among pleasures—the pleasure of a sadist inflicting pain counts the same as the pleasure an altruist derives from rendering aid to another.

An enduring, bedeviling legacy of the Enlightenment is that it undercut former beliefs in divine and natural law and in the wisdom of custom and tradition, once thought to provide correct principles for morality, law and life, but offered no persuasive replacements. It spelled the demise of non-instrumental views of law, while leaving a void that would come to haunt legal instrumentalism.

LEGAL INSTRUMENTALISM AND THE RISE OF LEGISLATION

The emergence of legal instrumentalism was one of the main themes of Lawrence Friedman's magnificent *History of American Law* (1973), which recounted in meticulous and panoramic detail the development of American law from pre-colonial times until the beginning of the 20th Century. Friedman began his account: "The modern idea of law as essentially man made, as essentially a tool or instrument, was foreign to the classic common law."²³ By the final quarter of the 19th Century, according to Friedman, instrumentalist views of law were in place. It

²¹ Bernad Bailyn, *The Ideological Origins of the American Revolution*, enlarged edition (Cambridge, Ma.: Harvard Univ. Press 1992), 33-34.

²² According to Peter Gay, natural law theory dominated the first half of the Enlightenment, whereas Utilitarian dominated the second half. Peter Gay, *The Enlightenment: The Science of Freedom* (NY: W.W. Norton 1996) 459.

²³ Lawrence M. Friedman, *A History of American Law*, 2nd ed. (NY: Touchstone 1985) 23. The first volume was published in 1973.

was the time of the reformist Populist and (later) Progressive Movements.²⁴ “American law was an essential instrument or weapon in economic struggle....This meant...that law could serve as a social instrument of great power.”²⁵

The rise of legislation as a mode of law making was a key contributing factor in the spread of instrumental views of law. Prior to this period the vast bulk of law was judge made common law. The threat posed to the common law by the increasing frequency, scope and ambition of legislation was a dominant theme of the writing of jurists at the time. Toward the end of the 19th Century legislation made its presence felt in field after field once controlled by the common law, and in areas in which the common law was previously silent, especially public law and administrative law matters. Judges did not conceal their hostility to this increase in the frequency and scope of legislation, which they opposed at every turn.

Classical views of the common law allowed little place for the active creation of new law by legislation. Jurists claimed that the common law was coherent, ordered, and comprehensive. Legislation posed a threat to the systematic and rational nature of the common law.²⁶ Supremacy in the hierarchy of law making was accorded to the common law, for only common law judges were trained in rational science of law, not legislators. To set limits on legislation, in addition to exercising the power of judicial review, judges utilized a long-standing rule of construction that legislation in derogation of the common law was to be strictly construed.²⁷

The battle between the common law and legislation for supremacy as a source of law making carried on for more than two centuries. Locke’s argument for parliamentary sovereignty as representatives of the people gave a boost to legislation. After the Revolution, the waves of Jeffersonian popular democracy and Jacksonian egalitarianism that swept through the American political culture put judge made common law further on the defensive.

In a temporarily effective maneuver, judges emphasized that the common law, as custom and usage, embodied the consent of the people, which gave it a claim to democratic legitimacy. Legislation that was inconsistent with prevailing social usages, it was said, was likely to remain a dead letter, resisted by the people. Moreover, defenders of the common law argued that legislation suffered from unavoidable blindness, since legal rules were framed by legislators in general terms in advance, when it was impossible to anticipate all the circumstances that might arise, in contrast to the more cautious and particularized case-by-case creation of the common law. Legislation, furthermore, was denigrated as the product of special interests and unreliable passion and will, to be distrusted and constrained, in contrast to reason, principle, and the will of the people embodied in the common law.

Advocates of legislation as a source of law, most famously Bentham, in return pointed out the evident failings of the common law. Bentham made his reputation by launching a polemical attack on Blackstone’s celebrated *Commentaries*, which he characterized as an exercise in rationalization that concealed the egregious state of the common law.²⁸ Bentham averred that the common law was purposely kept in an obscure state by lawyers and judges as a way to artificially prop up their prestige and income. He pressed the shocking argument that the common law did not exist. “In these word [common law] you have a name, pretended to be the

²⁴ See D. Hofstadter, *The Age of Reform* (NY: Vintage Books 1955).

²⁵ Id. 340.

²⁶ See Grey, “Langdell’s Orthodoxy, supra 10,12.

²⁷ See 50 Am. Jur. Statutes, Sections 402,346; see also Karl N. Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed,” 3 Vanderbilt L. Rev. 395 (1949-50).

²⁸ See Jeremy Bentham, *A Fragment on Government* (Cambridge: Cambridge Univ. Press 1988).

name of a really existing object: look for any such existing object—look for it till doomsday—no such object you will find.”²⁹

Law was not an emanation of the ancient customs of the people or a body of objective natural principles. In essence it involved the coercive enforcement of rules by legal officials.³⁰ Law, according to Bentham, was an instrument to serve the social good. Laws should be designed and implemented to maximize the greatest happiness of the greatest number. He promoted a utilitarian science of legislation that would produce a clear, comprehensive and coherent code of laws that would enable each person to be his own lawyer. Although his ideas were known in the US, it is incorrect to place too much emphasis on Bentham in direct causal terms, as he was too theoretical for the practical sensibilities of 19th Century lawyers and jurists.³¹

Bentham’s work nevertheless offers an important conceptual insight for this exploration, for its linkage of three ideas: legislation, legal instrumentalism, and legal positivism. Legal positivism is a theory of law which holds that law is what the recognized authority sets out as law, known as the “will” or “command” theory of law; legal instrumentalism is the idea that law is an instrument or tool to achieve ends; legislation is the most adaptable form that law takes. They combine in a mutually reinforcing fashion. An instrument exists to serve ends; if the law is to do this efficiently, it must be open with respect to content, which must vary according to the end identified and the surrounding circumstances; if the law is open with respect to content, and the ends must be chosen, then its content must be determinable at will; legislation is the most adaptable available mechanism for shaping law instrumentally.

By the end of the 19th Century, the momentum had shifted markedly away from the common law in favor of legislation as a source of law making, both in terms legitimating ideals and in actual practice. In 1908, Roscoe Pound, one of the leading jurists of the age, observed (in a legal positivist vein) that “much of American legislation...is founded on an assumption that it is enough for the State to command...”³²

The shift in momentum to legislation was not only a matter of the greater claim to democratic legitimacy. Traditional common law concepts, frozen in a mode of abstract analysis, were becoming obsolete, no longer functional, no longer able to adequately meet problems presented by rapidly changing circumstances. If not modified, the common law would “obstruct the way of social progress.”³³ Legislation was the solution:

A period of legislative activity supervenes to supply, first new rule, then new premises, and finally a systematic body of principles as a fresh start for juristic development....The further step, which is beginning to be taken in our present era of legal development through legislation, is in reality an awakening of juristic activity, as jurists perceive that they may effect results through the legislator as well as through the judge or the doctrinal writer.³⁴

²⁹ Jeremy Bentham, “Bentham’s Letter, Letter IV, in *Codification of the Common Law* (NY: John Polbemus Printer 1882) 3.

³⁰ See Jeremy Bentham, *Of Laws in General: Principles of Legislation*, edited by H.L.A. Hart (London: Athlone Press 1970).

³¹ C.W. Everett, “Bentham in the United States,” in *Jeremy Bentham and the Law*, edited by George W. Keeton and Georg Schwarzenberger (Westport, Conn.: Greenwood Press 1970) 188, 185-232.

³² Roscoe Pound, “Mechanical Jurisprudence,” 8 *Columbia L. Rev.* 605,613 (1908).

³³ *Id.* 616.

³⁴ *Id.* 612.

Marking the beginning of a new era, Pound gave a clear nod to legislation as the preferred mode of law making for the present and future. Legislation would multiply exponentially in the US in the course of the 20th Century, far outstripping the law making activities of courts.

CONFLICT FOUGHT THROUGH LAW AT THE CLOSE OF THE CENTURY

The rise of legislation as a source of law was at the epicenter of intense social conflict. At the outset of the 19th Century, society and the economy revolved around agriculture. Urban areas bustling with activity were dominant at the close of the Century. The economy became industrialized, launched on its way especially by the development of railroads. People spread across the great plains toward the West, settling the entire country; land speculation was commonplace; commerce exploded, with textile factories, coal mines, oil production, steel production, generating internal and external trade; financing mechanisms to support large commercial enterprises became more sophisticated; giant corporations and trusts expanded their powers; economic boom and bust was a constant reality; modern society was fitfully being born. All the while, technology was changing the conditions of daily life. Electricity illuminated the cities; telephones allowed immediate communication across distances; mass production and payment plans made automobiles affordable, allowing cities to spread out further; the airplane was on the horizon.

A society was coming into being that was radically different from the economy upon which the common law was constructed. Prior to this period, for example, tort law was a small part of the common law and legal business. But in this period the railroads killed and maimed thousands of people a year, while industrial accidents added massively to the toll. Huge corporations developed which, separately and combined, ran the lives of employees, shaped consumers' tastes and purchases, and controlled the economic fates of towns and cities, rivaling the power of government. All of this came to be dealt with by law. The very notions of customary law and customs of the people were hopelessly antiquated in this context. Longstanding common law notions were becoming irrelevant or inadequate.³⁵

During this period conflict between organized groups with divergent economic interests became more focused, organized and intense. This combat took place in the legal arena.³⁶ Contests were fought out in legislatures and courts arena between debtors and creditors, between mortgagors and mortgagees, between employers and employees, between capital and labor, between the major trusts or business combinations and the government. A sense of this divided time is vividly conveyed in this passage by historian Richard Hofstadter:

The very sharpness of the struggle, as the Populists experienced it, the alleged absence of compromise solutions and of intermediate groups in the body politic, the brutality and desperation that were imputed to the plutocracy—all these suggested that failure of the people to win the final contest peacefully could result only in a total victory for the plutocrats and total extinction of democratic institutions, possibly after a period of bloodshed and anarchy. "We are nearing a serious crisis," declared Weaver. "If the present strained relations between wealth owners and wealth producers continue much longer they will ripen into frightful disaster. This universal discontent must be quickly interpreted and its causes removed." "We meet," said the Populist platform of 1892, "in the midst of a nation brought to the verge of moral, political, and material ruin. Corruption

³⁵ See William Wiecek, *The Lost World of Classical Legal Thought* (NY: Oxford 1998) 246-50.

³⁶ See Friedman, *The History of American Law*, supra 237-370.

dominates the ballot-box, the Legislatures, the Congress, and touches even the ermine of the bench....”³⁷

A battle lost by one side in the legislative arena was re-fought in the courts.

The US practice of judicial review placed judges in the unique position of possessing the power to invalidate legislation. Although in theory this power could be exercised only for violations of constitutional limits, state and federal courts acted far more expansively.³⁸ Citing the liberty of contract and the right to property, citing the Due Process clause, the Commerce clause, the Equal Protection Clause, or using common law principles and underpinnings, and sometimes offering nothing more than vague references to reason and natural justice, state and federal courts began, in the 1880’s and continuing for decades, a practice of invalidating legislation, particularly legislation friendly to labor. According to one study of 19th Century challenges in court to the validity of pro-labor statutes, twenty-six were upheld while sixty-seven were invalidated.³⁹ While much of this took place in state courts, the US Supreme Court was also active. “According to one count, in the period before 1898, the Supreme Court invalidated a total of twelve federal statutes and 125 state laws, while in the single generation after 1898, it trebled those figures (fifty federal and 400 state).”⁴⁰

The problem was not just that court actions frustrated legislative policy initiatives; it was that they lined up time and again on the side of protecting capital interests. These decisions reeked of obstructionist favoritism for the rich, executed in the name of objective law. Lending credence to this view, consider this outburst by Supreme Court Justice Stephen J. Fields in one of his legal decisions: “The present assault on capital is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich,—a war constantly growing in intensity and bitterness.”⁴¹

In his famous 1897 essay “The Path of the Law,” Justice Oliver Wendell Holmes described the ongoing class battle fought through legal institutions:

When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitution, and that in some courts new principles have been discovered outside the bodies of these instruments...⁴²

THE FORMALISTS

A formalist view of law has been blamed as the culprit behind court decisions striking social welfare legislation. An early articulation of formalism as an approach or style of judicial decision making can be found in Pound’s “Mechanical Jurisprudence” (1908) article. Pound began by attacking the contemporary identification of law as an abstract, logical science. “Law is

³⁷ Hofstadter, *The Age of Reform*, supra 66-67.

³⁸ See e.g. *Hepburn v. Griswold*, 75 US 603 (1870); see also William E. Nelson, “The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America”, 87 Harvard L. Rev. 513,530-31 (1974); Wiecek, *Lost World of Classical Legal Thought*, supra 100.

³⁹ Wiecek, *Id.* 133 (citation omitted).

⁴⁰ *Id.* 135 (citation omitted).

⁴¹ *Pollock V. Farmers’ Loan and Trust Co.*, 157 US 429,607 (Field, J., dissenting).

⁴² Oliver Wendell Holmes, “The Path of the Law,” Harvard L. Rev. 457,467-68 (1897)

not scientific for the sake of science.”⁴³ He accused adherents of this approach, what he called a “jurisprudence of concepts,”⁴⁴ for emphasizing logical deduction from assumed dogmas of law with little attention to social consequences:

...the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists protest, and protest rightly.⁴⁵

...

That our case law at its maturity has acquired the sterility of a fully developed system, may be shown by abundant examples of its failure to respond to vital needs of present-day life.⁴⁶

To serve as the epitome of flawed formalist reasoning, Pound offered *Lochner v. New York*,⁴⁷ an infamous case in the annals of American jurisprudence. To protect workers’ health and safety, the New York legislature imposed limits on the working hours of bakers to no more than ten hours a day and sixty hours a week. The Court invalidated the statute as an: “unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate of necessary for the support of himself and his family.”⁴⁸ Basing the decision on the abstract liberty of contract, the Court ignored the reality that the bakers had no freedom to bargain—they took the conditions of employment imposed upon them by the employers, or didn’t get the job. Justice Holmes issued a still echoing dissent which lacerated the majority for reading their own personal laissez faire views into the Constitution.

Formalist views of the law, introduced earlier in the discussion of legal science, involved two core notions, conceptual formalism and rule formalism. Conceptual formalism was the idea that legal concepts and principles, like liberty of contract, consisted of necessary content and logical interrelations, all of which could be discerned through reason. Rule formalism was the idea that the complete body of rules, principles and concepts was coherent, internally consistent, comprehensive, and gapless, and that judges could reason “mechanistically” from this body of common law to discover the right answer in any particular case.

PRAGMATISM, HOLMES, POUND, THE LEGAL REALISTS

Pound explicitly credited von Rudolph von Ihering’s *Der Zweck im Recht* (published in the US under the title *Law as a Means to an End*) with pioneering the critique of conceptual jurisprudence.⁴⁹ Another key source for Pound, which he quoted from extensively, was William James’ just published *Pragmatism*. Pound cited James for articulating an “instrumental” view of theories and science.⁵⁰

⁴³ Pound, “Mechanical Jurisprudence,” supra 605.

⁴⁴ Id. 611.

⁴⁵ Id. 612.

⁴⁶ Id. 614.

⁴⁷ 198 US 45 (1905).

⁴⁸ 198 US at 56.

⁴⁹ Pound, “Mechanical Jurisprudence,” supra 610-11.

⁵⁰ Id. 608.

Pragmatic philosophy, the only indigenous American school of philosophy, was born in the last quarter of the 19th Century.⁵¹ It is a fascinating detail of US intellectual and legal history that pragmatic philosophy was presented and developed at a small elite gathering of Cambridge intellectuals, called the Metaphysical Club, which included Charles Sanders Peirce, William James, Chauncey Wright, and Oliver Wendell Holmes, the most influential jurist in US history, along with six additional lawyer members, including a disciple of Bentham named Nicholas St. John Green.⁵² Holmes thus imbibed pragmatist views at their inception.

Another label for pragmatic philosophy, the one preferred by Dewey, was “instrumentalism.” Pragmatism was constructed on the notion that truths are established in the course of the pursuit of our projects in the world.⁵³ Truths are what work, are beliefs that satisfy expectations when carried out. Knowledge consists of understandings and ideas that are tested and prove reliable when acted upon within a community of investigators. Truths are created through and in the course of our collective activities. This does not mean that truths are whatever people desire or want to believe; we are up against a world that is not malleable to our thoughts or wishes; this reality imposes constraints on—often refuting or disappointing—beliefs. Pragmatism was thus experimental, empirical, action oriented, and social in bent. Pragmatism denied the possibility of absolute truths outside of human experience, but insisted that many reliably certain truths had already been established in human knowledge, especially by science, and more were constantly being added through our activities.

Pragmatists had less to say about moral values. Like absolute truths, absolute moral values in the sense traditionally sought after by moral philosophers do not exist. Although moral values are often stated in terms of general propositions, their meaning and implications become apparent only in contexts of application, when choices must be made that take into consideration all of the competing values and implications. Moral values can be evaluated in terms of whether good or bad, desirable or undesirable, consequences follow when acted upon.⁵⁴ They can (and should) be evaluated on whether the results that follow meet with our expectations and satisfaction. But they cannot be adjudged true or false in the same sense that is applied to empirical claims; moral values operate in the realm of meaning. James wrote only one essay dedicated exclusively to the subject of moral values. He therein observed that there is no morality in the nature of things.⁵⁵ It is an aspect of human social existence: “beyond the facts of his own subjectivity there is nothing moral in the world”⁵⁶...“there are no absolute evils”...⁵⁷

An objection often lodged against pragmatic philosophy is that pragmatism espouses moral relativism. A pragmatist cannot argue, in other than instrumental terms, that one set of moral values is evil and another is good, only that it has good or bad consequences from the standpoint of the community or the individual. This problem, as will be indicated shortly, came to haunt the Realists as well.

Though Holmes viewed pragmatic philosophy, as everything, with a degree of skepticism, core aspects of pragmatism showed in his judicial decisions and legal theorizing, particular his famous denial that general propositions can unequivocally decide concrete cases, his equally

⁵¹ See Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (NY: Farrar, Straus and Giroux 2001).

⁵² John P. Murphy, *Pragmatism: From Peirce to Davidson* (Boulder, Colo.: Westview 1990) 21.

⁵³ See William James, *Pragmatism and the Meaning of Truth* (Cambridge, Ma.: Harvard Univ. Press 1975).

⁵⁴ See Elizabeth Anderson, “Dewey’s Moral Philosophy,” in *Stanford Encyclopedia of Philosophy* (Spring 2005 Edition) <http://plato.stanford.edu/archives/spr2005/entries/dewey-moral/>.

⁵⁵ William James, “The Moral Philosopher and the Moral Life,” in *Essays in Pragmatism* (NY: Hafner Press 1948) 69.

⁵⁶ Id. 70.

⁵⁷ Id. 83.

famous assertion that experience rather than logic is at the heart of law, his experimentalism, his urging of attention to actual social consequences, and his instrumental view of law.

Holmes called Langdell the “greatest living legal theologian.”⁵⁸ Although Holmes admired Langdell’s achievement, he objected to Langdell’s portrayal of law as a logically constructed self-contained system of rules and principles that could be deductively applied to produce answers in specific cases. Holmes asserted that “You can give any conclusion a logical form.”⁵⁹ He was not against legal principles and logical consistency as such—which he promoted—only against portraying this systematic coherence as the ultimate end of law, and he was skeptical of the claim that judges reasoned objectively in this manner. Holmes dismissed another often cited pillar of the common law: “The time has long gone when law is only an unconscious embodiment of the common will.”⁶⁰

Holmes urged in instrumental terms that “a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.”⁶¹ “The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion, and repose is not the destiny of man.”⁶² Competing social interests must be weighed and choices based upon social policy must be made. Holmes urged that judges engage in this process openly rather than subconsciously or covertly. “[T]he result of the often proclaimed judicial aversion to deal with such [policy] considerations is simply to leave the very ground and foundation of the judgments inarticulate...”⁶³

In the same vein as Holmes, Pound wrote that “as a means to an end, [law] must be judged by the results it achieves, not by the niceties of its internal structure...”⁶⁴ “We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs.”⁶⁵ In support of his critique of formalistic legal science and his proposed instrumental approach, Pound quoted William James’ advocacy of an instrumental approach to philosophy:

In the philosophy of to-day, theories are ‘instruments, not answers to enigmas, in which we can rest.’ The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also....⁶⁶

Pound offered that “The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law.”⁶⁷ Jurisprudence, he urged, is “a science of social engineering.”⁶⁸

Karl Llewellyn, Jerome Frank, and Felix Cohen, and other Legal Realists, assumed a more radical stance than Pound, but on the instrumental view of law they were in complete

⁵⁸ O.W. Holmes, Book Review (Of the Second Edition of Langdell’s Casebook), 14 American L. Rev. 233 (1880).

⁵⁹ Holmes, “The Path of the Law,” supra 466.

⁶⁰ Quoted in Wiecek, *The Lost World of Classical Legal Thought*, supra, 180.

⁶¹ Holmes, “The Path of the Law,” supra 469.

⁶² Id. 466.

⁶³ Id. 467.

⁶⁴ Pound, “Mechanical Jurisprudence,” supra 605; Roscoe Pound, “The Need of a Sociological Jurisprudence,” 19 Green Bag 607 (1907).

⁶⁵ Pound, “Mechanical Jurisprudence,” supra 609.

⁶⁶ Pound, “Mechanical Jurisprudence,” supra 608.

⁶⁷ Roscoe Pound, “The Need of a Sociological Jurisprudence,” 19 Green Bag 607 (1907).

⁶⁸ Roscoe Pound, *The Ideal Element in Law* (Indianapolis: Liberty Fund 2002) 234.

agreement. In Llewellyn's characterization, the Legal Realists "view rules, they view law, as means to end."⁶⁹ This was the "major tenet" of Legal Realism,⁷⁰ supplemented by the insistence that law must be seen as it actually functions, not as an abstract body of rules, concepts and principles. The Realists pointed out that often the rules written in law books, which occupied the attention of law professors, were not enforced by legal officials or observed by the public. That is why Llewellyn asserted "What these officials do about disputes is, to my mind, the law itself."⁷¹

The Realists attacked conceptual formalism and rule formalism. Conceptual formalism, as I have indicated, was the notion that concepts had inherent or predetermined content and implications that had merely to be discovered and applied by judges. Felix Cohen called this "transcendental nonsense"—the "theological jurisprudence of concepts."⁷² Rule formalism was the idea that the legal rules and principles formed a coherent, gapless whole, which judges mechanically applied to arrive at the outcome in every case. All of this was rejected by the Realists. The content of concepts was not somehow indelibly predetermined but was a matter to be filled in. There were conflicts and gaps among the rules, there were exceptions to every rule, and principles could lead to more than one outcome in a given context of application.⁷³ Moreover, a great deal of flexibility was present when determining what particular binding rule of law issued from a given case. Rather than starting from the rules and principles and reasoning toward the decision, the Realists suggested that the judges began instead with a rough sense of the decision and worked backward to find supportive legal rules and principles,⁷⁴ revising the decision if necessary in the course of coming to an acceptable conclusion.⁷⁵

THE PROBLEM WITH PRAGMATISM IN LAW

In a famous intra-family contretemps, Pound later attacked the Realists, with whom he had much in common, for going too far in denying that there were rule-based formalist components within the law and within judicial decision making,⁷⁶ and for emptying the law of its moral resources.⁷⁷ A number of Realists had explicitly accepted that moral relativism was an undeniable implication of modern scientific and philosophical views.⁷⁸

A revealing—for legal instrumentalism—irony is that these same objections were previously lodged against Pound himself, in a 1925 article by Walter Kennedy. In "Pragmatism as a Philosophy of Law," Kennedy noted that Pound rejected the concept of natural rights,⁷⁹ and promoted the satisfaction of social needs as "the final objective of law."⁸⁰ Kennedy quoted a passage from Pound which conveyed these views:

...if in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disproportionate sacrifice of other claims,

⁶⁹ Karl Llewellyn, "Some Realism About Realism—Responding to Dean Pound," 44 *Harvard L. Rev.* 1222,1223 (1931)

⁷⁰ M. McDougal, "Fuller v. The American Legal Realists: An Intervention," 50 *Yale L.J.* 827,834-35 (1941).

⁷¹ Karl Llewellyn, *The Bramble Bush* (NY: Oceana 1930) 3.

⁷² Felix Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Columbia L. Rev.* 809 (1935).

⁷³ Karl Llewellyn, "A Realistic Jurisprudence—The Next Step," 30 *Columbia L. Rev.* 443 (1930).

⁷⁴ See Jerome Frank, *Law and the Modern Mind* (NY 1963) 109, 114-21.

⁷⁵ See Dewey, "Logical Method and Law," 10 *Cornell Law Quarterly* 17,23 (1924); Joseph C. Hutcheson, "The Judgment Intuitive; The Function of the 'Hunch' in Judicial Decision," 14 *Cornell L. Quarterly* 285 (1929).

⁷⁶ Roscoe Pound, "The Call for a Realist Jurisprudence," 44 *Harvard L. Rev.* 697 (1931).

⁷⁷ Roscoe Pound, "The Future of Law," 47 *Yale L. J.* 2 (1937).

⁷⁸ See Walter Wheeler Cook, "Scientific Method and the Law," 13 *American Bar Assoc. J.* 305 (1927); Underhill Moore, "Rational Basis of Legal Institutions," 23 *Columbia L. Rev.* 612 (1923). Purcell discusses this aspect of Realism, in Edward Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, Ky.: Univ. Press Kentucky 1973) 90-94.

⁷⁹ Walter B. Kennedy, "Pragmatism as a Philosophy of Law," 9 *Marquette L. Rev.* 63,68 (1924-25).

⁸⁰ *Id.* 69.

there is no eternal limitation inherent in the nature of things, there are no bounds imposed at creation, to stand in the way of its doing so.⁸¹

In response to Pound, Kennedy observed that there are many “social wants,” some of which are good and some not, and, furthermore, that there are conflicting social wants. Pound’s answer: “I do not believe the jurist has to do more than recognize the problem and perceive that it is presented to him as one of securing all social interest so far as he may, of maintaining a balance or harmony among them that is compatible with the securing of all of them.”⁸²

Kennedy found this inadequate:

Pragmatism has been frequently criticized because it is in a sense anarchistic and devoid of standards or principles...As a practical science, law requires an appreciable degree of uniformity, stability and certainty. It does not suffice to shuffle the mass of wants and claims of the litigants into a confused pile and then give effect to as many of them as we can in so far as harmony will permit.

Kennedy’s point is important. A crucial shortcoming of Pound, and of the Realists in his wake, was a strikingly naïve, or underdeveloped, view of how to identify or formulate social ends law was to serve. Many Realists were utilitarians, others thought social science could help provide answers, others relied upon democratic mechanisms to supply the answers, and others apparently thought (like Pound) that a happy balance among competing social interests could be arrived at.

Kennedy offered additional objections to the pragmatic instrumentalist approach to law:

Pragmatism worships at the altar of social reform. The pages of the sociologist teem with the inequalities of our social, marital, and industrial relations. Ingenious remedies are poured forth which aim to make even the path of mankind. Inevitably these proposals are directed to the state as the effective instrument to give them effect....If we accept the formula that law exists solely to give effect to ‘claims’ and ‘wants,’ it is difficult to question this sudden rush to state and federal Legislatures for relief against all real or imaginary pains and aches of the body politic, but there is grave doubt whether the law is capable of absorbing the tasks of social and religious reformation....If there is weight in this criticism of the present day tendency to legislate society into a state of perfection, to erase the shortcomings of human relations by government intervention, the pragmatic jurist must bear a goodly part of the responsibility; they are the tangible results of the endeavor to infuse into statutes all the demands of the people without the stabilizing influences of Constitutional principles or the dictates of natural rights.⁸³

Kennedy was wrong to blame Pound’s pragmatic instrumentalist approach for causing the rush to legislatures for by every group seeking relief. This practice was already underway in the late 19th Century, as described earlier, well before Pound suggested it.

Kennedy was correct, however, that pragmatic instrumentalist legal theory was consistent with this practice and provided it with theoretical underpinnings and respectability. The effect of

⁸¹ Id. 69, quoting R. Pound, *An Introduction to the Philosophy of Law* (1922). 97-98.

⁸² Id. 71, quoting Pound, *An Introduction to the Philosophy of Law*, 95-96.

⁸³ Id. 72-73.

the Realists was not to give rise legal instrumentalism, which already existed in relation to legislation, but to provide it with legitimacy. Throughout this period the legal elites—judges, legal academics, leaders of the bar—continued to espouse non-instrumental views of law. The truly critical consequence of Legal Realism was that it contributed to the collapse of the still strong non-instrumental view of law among legal elites. Once this was finished off, there was nothing left to hold back rampant legal instrumentalism.

Kennedy's article presaged the firestorm of opposition raised against Realism (and pragmatic philosophy) in the mid-to-late 1930's and 1940's, coinciding with the emergence of the Nazi threat in Germany. These events prompted a collective reaffirmation that US society and values were good and right, morally superior to the evils of Nazism (and Communism).⁸⁴ Many egregious actions of the Nazi regime were carried out by legal organs in the name of law, so it was especially necessary to confirm that US law was not like Nazi law. The Legal Realists were roundly chastised for suggesting that law was a matter of power, with no integrity unto itself, and for their moral relativism. Under this withering storm of criticism, some of the Realists openly repented. Llewellyn wrote: "I for one am ready to do open penance for any part I may have played for giving occasion for the feeling that modern jurisprudes or any of them have ever lost sight of this [ethical component of law]."⁸⁵ Other Realists protested that they had been unfairly mischaracterized.⁸⁶ Legal Realism was effectively silenced.

These are formidable difficulties for legal instrumentalism, but proponents of non-instrumental views of law suffer from their own critical defect. Kennedy demonstrated this, albeit inadvertently, when he (progressively) argued, citing a Papal encyclical, that natural law doctrines support the legislative enactment of a minimum wage to provide for living necessities. Kennedy also recognized, however, that other jurists believed that freedom of contract was violated by a legislated minimum wage, and, furthermore, that Papal encyclicals were not universally (or constitutionally) considered to be authoritative. Jurists committed to a non-instrumentalist approach to law, therefore, are put to the test at precisely the same spot that they skewer the instrumentalists.

This problem is not unique to law, of course. It is the modern condition, the culmination of views first set in motion with the Enlightenment. The pragmatists and the Realists were merely taking note of developments occurring across all fields of knowledge, in which objectivity, universal values, and absolute truths were being challenged everywhere. Non-Euclidean geometry shook assumptions about the exclusivity of Euclidean geometry; Einstein's theory of space-time relativity not only dethroned Newton's mechanistic laws, it also raised questions about scientific theories themselves, which were previously thought to be objectively correct descriptions of nature; anthropological studies revealed for academic and popular consumption the abundance of diverse moral systems. Cultural meaning systems and individual subjectivity appeared to color everything.

Legal Realism as an identifiable group of like minded thinkers was finished, but the ideas they brought into legal discourse would not be permanently squelched because they were part of the broader modern condition.

COLLAPSE OF FORMALISM

Laissez faire formalist court decisions ended at about the same time that Realism was routed from the scene. The collapse of formalism can be dated to the year 1937. This sudden

⁸⁴ See Purcell, *The Crisis of Democratic Theory*, supra Chaps. 7,8,9,10.

⁸⁵ Karl Llewellyn, "On Reading and Using the Newer Jurisprudence," 40 Columbia L. Rev. 593,603 (1940).

⁸⁶ See Purcell, *The Crisis of Democratic Theory*, supra 172-74.

demise cannot be attributed mainly to the Realists' critiques of formalistic views of law, but rather was the consequence of political actions surrounding the Supreme Court, specifically, Franklin Roosevelt's failed 1937 "court packing plan." This event has been characterized as a "great constitutional war,"⁸⁷ the culmination of which was a "constitutional revolution."⁸⁸ It was the closest the country had come to a genuine constitutional crisis since the Civil War and Reconstruction.

President Roosevelt was incensed by Supreme Court decisions that invalidated his social welfare legislation. Following his landslide victory in the 1936 election, Roosevelt proposed that a new position be created for every judge in the entire federal judiciary over the age of 70. Roosevelt justified the plan as a way to solve a backlog in the processing of cases, which he attributed to the slower working pace of aged judges. But his real objective was different: he would be able to immediately appoint six more justices to the Supreme Court, increasing its size to fifteen, thereby ending the Court's opposition to his legislative program.

A great backlash erupted against the plan, which was portrayed as an attack on the independent judiciary and rule of law, and killed in the Senate in 1937. For the purposes of sending a message about judicial instrumentalism, the key is not Roosevelt's plan itself, but rather the universal perception that the Court did an unseemly retreat owing to pressure brought by the plan. Less than two months after the plan was announced, the Supreme Court upheld a Washington minimum wage law which appeared no different from the New York legislation it had invalidated just ten months before.⁸⁹ In subsequent months, the Court upheld the Wagner Act,⁹⁰ which supported labor organization, and the Social Security Act, which created unemployment and old age benefits.⁹¹ These decisions were undeniably contrary to the letter and spirit of the New Deal cases decided just the previous term. A switch in sides by Justice Roberts was the main reason for this blatant turnabout in the Court's jurisprudence. Justice Van Devanter announced his retirement effective in June of that summer. Four new appointments came in the next two years. The Supreme Court would not again strike legislation relating to economic regulation. Economic interpretations of liberty were done. Laissez faire formalism was all but dead.⁹²

The deeper message brought home by this event was that judicial interpretations of the Constitution were, beyond question, a product of the personal views of those people who happen to be appointed as judges, making this point more convincingly than a hundred Realist articles could have. A change of mind by one or two individuals had political and legal consequences of great magnitude, affecting millions of people. A curtain had been pulled away to expose that politics could have a determinative influence on judging at the highest level.

THE "ACTIVIST" SUPREME COURT OF THE 20TH CENTURY

A new, unprecedented level of judicial assertiveness, particularly in the area of individual rights, was ushered in by the 1953 appointment of Chief Justice Earl Warren. The landmark *Brown v. Board of Education* (1954) was the coming out announcement of the Warren Court. Finding that it violated the Equal Protection Clause of the 14th Amendment, the

⁸⁷ Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: the Court Packing Crisis of 1937* (NY: Fordham Univ. Press 2002).

⁸⁸ Constitutional law scholar Edwin Corwin is credited with coining this phrase in the 1941 book with that title. See also William E. Leuchtenburg, *The Supreme Court Reborn: the Constitutional Revolution in the Age of Roosevelt* (NY: OUP 1995).

⁸⁹ *West Coast Hotel v. Parrish*, 300 US 379 (1937).

⁹⁰ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 US 1 (1937).

⁹¹ *Steward Machine Co. v. Davis*, 301 US 538 (1937); *Helvering v. Davis*, 301 US 619 (1937).

⁹² See Wiecek, *Lost World of Classical Legal Thought*, supra 231-41.

Court invalidated legally imposed segregation in education, which was common throughout the South at the time. Few would quarrel today with the proposition that legalized segregation was deeply immoral (although a sizeable majority Southerners at the time vehemently disagreed); it stands with slavery as an indelible stain on the nation's history. But the *Brown* decision has always been dubious from a legal standpoint. The historical record, while not certain, supports the conclusion that the ratifiers of the 14th Amendment did not intend it to prohibit legalized segregation.⁹³ Racial segregation was a way of life at the time, thought by many to reflect the natural order, and during the ratification period a number of the states which approved the amendment also sanctioned segregation in schools and elsewhere.⁹⁴ Also standing in the way of *Brown* was *Plessy v. Ferguson*,⁹⁵ a half century old precedent which held that the Equal Protection Clause was not offended by legalized segregation because separate facilities could still be equal. For the legal establishment, aside from overruling precedent, the main problem with the *Brown* decision was that it was devoid of the normal trappings of constitutional legal analysis. At bottom, the opinion was based upon psychological and sociological assertions that legalized segregation imposed a badge of servitude on blacks, and was therefore constitutionally impermissible.

Brown and the desegregation decisions were just the beginning. The Warren Court went on to impose various newly found constitutional protections. Evidence obtained in improper searches could no longer be used in trials;⁹⁶ confessions obtained by coercive techniques were disallowed;⁹⁷ people in custody had to be advised of their rights and waive them before they could be interrogated;⁹⁸ indigent defendants were entitled to lawyers provided at public expense;⁹⁹ and more. The Court ordered the reapportionment of voting districts to become more proportional to population, which was previously considered to be a political decision in the discretion of the legislature.¹⁰⁰ It increased protection for pornography,¹⁰¹ and disallowed prayers in schools.¹⁰² The Court found that a constitutional right of "privacy" existed, notwithstanding the fact that it was nowhere stated in the Constitution.¹⁰³

The effect of the Warren Court's jurisprudence was to greatly expand the parameters of the political and civil rights of individuals and to enforce these rights against the state and federal governments. Critics on the right bitterly opposed these decisions, which they characterized as coddling criminals, encouraging immorality, and anti-religious. They appended the "activist" label to the Warren Court, spitting out the word as an epithet. Liberal supporters applauded the Warren Court reforms as necessary to wrench the US constitutional system into a more progressive stance, yet they worried about what would happen if a more conservative set of judges once again took control of the Court.

In the 1968 presidential election, Richard Nixon made the Warren Court and its liberal decisions a prominent campaign issue. Just days before the election Nixon promised that his appointees would not be judicial activists:

⁹³ See Alexander M. Bickel, "The Original Understanding and the Segregation Decision," 69 Harvard L. Rev. 1 (1955).

⁹⁴ Charles Hyneman, *The Supreme Court on Trial* (Westport, Ct.: Greenwood Press 1974) 189-94.

⁹⁵ *Plessy v. Ferguson*, 163 US 537 (1896).

⁹⁶ *Mapp v. Ohio*, 367 US 643 (1961).

⁹⁷ *Escobedo v. Illinois*, 378 US 478 (1964).

⁹⁸ *Miranda v. Arizona*, 384 US 436 (1966).

⁹⁹ *Gideon v. Wainwright*, 372 US 335 (1963).

¹⁰⁰ *Baker v. Carr*, 369 US 186 (1962); *Reynolds v. Sims*, 377 US 533 (1964).

¹⁰¹ *Kingsley International Pictures Corp. v. Regents*, 360 US 684 (1959); *Jacobellis v. Ohio*, 378 US 184 (1964).

¹⁰² *Engel v. Vitale*, 370 US 421 (1962); *School District of Abington Township v. Schempp*, 374 US 203 (1963).

¹⁰³ *Griswold v. State of Conn.*, 381 US 479.

[N]ominees to the high Court...would be strict constructionists who saw their duty as interpreting law and not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social forces and political viewpoints on the American people.¹⁰⁴

Nixon won. He appointed Chief Justice Warren E. Burger to fill the vacancy left by Warren's retirement, and in the next few years he appointed Harry A. Blackmun, Lewis F. Powell, and William H. Rehnquist. Most of the Warren Court's new jurisprudence, however, remained intact. Even more telling was that the assertive stance of the Court remained unchanged. "The balance of the decisions suggested the Burger Court's willingness—like its predecessor—to use judicial power in pursuit of particular social objectives, whether in curtailing or extending precedent or in venturing out onto new fields."¹⁰⁵

Using the propensity to strike federal and state legislation as one measure of "judicial activism," the Burger Court was *more* activist than the Warren Court. In nineteen years the Warren Court struck 23 federal statutes, and 186 state statutes, on constitutional grounds; in seventeen years the Burger Court struck 32 and 309, respectively.¹⁰⁶ Burger's reign, moreover, brought *the* watershed event of contemporary Supreme Court history. Three of Nixon's appointees voted with the majority in *Roe v. Wade* to invalidate state statutes that prohibited abortion, finding that they constituted an impermissible infringement upon a woman's constitutional right to control what happens to her body.¹⁰⁷ For opponents, *Roe* reigns as the unmatched example of judicial usurpation of legislative power, of justices imposing their personal views on the populace in the name of interpreting the Constitution.

Perhaps the most astounding aspect of this is the record of the current "conservative" Supreme Court, dominated by appointees of Republican Presidents who opposed "government by judiciary." The *Rehnquist* Court, covering about the same span of time, has struck approximately *twice* the number of federal statutes as *Warren* Court, and a comparable number of state statutes, and it continues to add to the toll.¹⁰⁸ One study, relying upon statistical and doctrinal analysis, concluded that Rehnquist Court has been "the most activist Supreme Court in history."¹⁰⁹

Liberal constitutional law scholar Cass Sunstein asserted that the Rehnquist Court has showed an "illegitimate judicial activism," in which it has been "exceedingly willing to strike down congressional (and also state) enactments, not when the Constitution is clear, but when it is unclear and when reasonable people can disagree about what it means."¹¹⁰ Many of these

¹⁰⁴ E.E. Kenworthy, "Nixon Scores Indulgence," New York Times, November 3, 1968, p 1,79, quoted in Donald Grier Stephenson, *Campaigns and the Court: the U.S. Supreme Court in Presidential Elections* (NY: Columbia Univ. Press 1999) 181.

¹⁰⁵ *Id.* 189.

¹⁰⁶ Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation, and 2000 Supplement* (Washington, D.C. Government Printing Office, 1996,2000) reproduced in Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: Univ. Chicago Press 2004) 40-41. See also Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* (Reading, Ma.: Addison Wesley Pub. 1990) 398-413.

¹⁰⁷ *Roe v. Wade*, 410 US 113 (1973).

¹⁰⁸ Thomas Keck updated the Congressional Research Service to 2003, and found that the Rehnquist Court struck 40 federal statutes and 128 state statutes up through 2003 (in seventeen years). Since that time it has added to both categories, especially the state total with its decisions invalidating the death penalty for people under eighteen and the mentally retarded. Keck, *Most Activist Supreme Court in History*, supra 40-41.

¹⁰⁹ *Id.*

¹¹⁰ Cass Sunstein, "A Hand in the Matter," Legal Affairs, March-April, 27-30, <http://www.legallaaffairs.org/printerfriendly.msp> 2,3.

invalidations, he observed, “fit the agenda of extreme elements of the Republican Party.”¹¹¹ At the other end of the political spectrum, arch conservative Robert H. Bork was scathing in his criticism:

...the Supreme Court brought home to us with fresh clarity what it means to be ruled by an oligarchy. The most important moral, political, and cultural decisions affecting our lives are steadily being removed from democratic control....A majority of the court routinely enacts its own preferences as the command of our basic document.¹¹²

....

After twelve years of Presidents Reagan and Bush, each of whom made a determined effort to appoint Justices who would abide by the Constitution as originally understood, we seem farther than ever from a restrained Court...A majority of the Justices has become more arrogantly authoritarian than ever.¹¹³

Another conservative constitutional law scholar Mary Ann Glendon asked: “How did it come about that ‘conservative,’ ‘moderate’ justices on today’s Supreme Court are often more assertive and arrogant in their exercise of judicial power than the members of the ‘liberal,’ ‘activist’ Warren Court?”¹¹⁴

At the close of the 20th Century the Supreme Court displayed, in its willingness to strike legislation, an unusual lack of regard for the authority of the political branches. Even those judges who insisted upon the need for judicial restraint—this language is regularly inserted in their opinions—showed little apparent restraint when necessary to arrive at outcomes consistent with their predilections. The unprecedented decision of *Bush v. Gore*, in which the Supreme Court seated George W. Bush as President through a blatantly political decision, was the extraordinary climax of this development. It is as if, owing to the cumulative effect of the court packing plan, the Legal Realists, and the Warren Court, with *Roe* piled on for good measure, an essential component of judging on the Court snapped. What broke was an intangible but no less real self-imposed restriction against the unfettered instrumental manipulation of legal analysis by Justices to lead to ends they prefer.

II. CONTEMPORARY LEGAL INSTRUMENTALISM

With this backdrop in place, contemporary legal instrumentalism will now be canvassed in selected areas. The following exploration will, in particular, track the consequences of instrumentalist views of law in a context of sharp disagreement about ends, which is the key dynamic of today.

INSTRUMENTALISM AND MORAL RELATIVISM IN LEGAL EDUCATION

The views of contemporary law professors, judges, and practicing lawyers, took root in a period of social turmoil, the civil rights battles and protests over the Vietnam War of the 1960’s and 1970’s. Accounts written at the time, confirmed by current retrospectives, help convey a sense of the period. In a recent book, Albert W. Alschuler characterized the prevailing attitude:

¹¹¹ Id. 2.

¹¹² Robert H. Bork, “Our Judicial Oligarchy,” in Michael S. Muncie, ed., *The End of Democracy: The Usurpation of Politics* (Dallas: Spence Pub. 1997) 10.

¹¹³ Id. 16.

¹¹⁴ Glendon, *A Nation Under Lawyers*, supra 117.

By the time I attended law school in the 1960s, my teachers had law figured out. They were pragmatists, and they favored 'the functional approach.' Although no one explained what function was served by the functional approach, I sensed what they meant. Law was a matter of balancing interests and of determining which ones 'predominated.' Interests were what people had or wanted to get, and the goal was to satisfy as many of these interests as possible.¹¹⁵

Realism as an active movement was silenced in the 1940's, as indicated earlier, but the resonance of its powerful critiques of conceptual and rule formalism continued like a subterranean river that swept through and carried along those who would become the law professors of the 1960's and 1970's. Legal historian Calvin Woodward wrote in 1968 that "At least in the better law schools, functionalists' and 'realists' are no longer lonely aliens in a hostile world. In truth they probably outweigh in influence, if not in numbers, the Langdellians."¹¹⁶

Woodward pointed out that the dominance of these views of law among the professoriate by this period could not be laid entirely upon the influence of the Realists:

...the society-wide trend toward secularization is the culmination of a centuries-long development that has transformed the Law from a "brooding omnipresence in the sky" into a down-to-earth instrument of social reform and, at the same time of social reform and, at the same time, translated...the lawyer from a quasi-priestly figure into a social engineer. Legal education...has both reflected and contributed to this long-term trend.¹¹⁷

In the course of the 20th Century society at large underwent a general loss of belief in objectively existing principles.¹¹⁸ A revolt against formalism had taken place in many areas of knowledge.¹¹⁹

More ominously, with a seemingly irresistible momentum, "the knowledge of good and evil, as an intellectual subject, was being systematically and effectively destroyed."¹²⁰ The 20th Century brought the "disenchantment" of the world. The spectacular evil and suffering inflicted by all sides on all sides in two World Wars, followed by the rise of Soviet totalitarianism, could not be made to square with the faith in reason and inevitable human progress that informed so much of 19th Century political thought.¹²¹ The collapse of non-instrumental views of law described earlier were merely a part of these larger developments.

A prominent legal historical, G. Edward White, wrote at the time that "A final and possibly the most significant aspect of American culture in the 1970's is the disintegration of common values or goals. In the place of consensual values around which members of American society can cohere stand sets of polar alternatives..."¹²² Beyond the fact of the sharp disagreement over values was the bleak prospect that there was no apparent way to resolve these disputes. Arthur Leff remarked in 1974 that the absence of objective moral foundations "is a fact of modern intellectual life so well and painfully known as to be one of the few which is simultaneously

¹¹⁵ Albert W. Alschuler, *Law Without Values: the Life, Work, and Legacy of Justice Holmes* (Chicago: Univ. Chicago Press 2000).

¹¹⁶ Calvin Woodward, "The Limits of Legal Realism: An Historical Perspective," 54 *Virginia L. Rev.* 689,732 (1968).

¹¹⁷ *Id.* 733.

¹¹⁸ A historical exploration of the ideas that led to this state can be found in Richard Tarnas, *The Passion of the Western Mind: Understanding the Ideas that Have Shaped our World View* (NY: Harmony Books 1991).

¹¹⁹ See Morton G. White, "The Revolt Against Formalism in American Social Thought of the Twentieth Century," 7 *Journal of History of Ideas* 131 (1947).

¹²⁰ Arthur Allen Leff, "Economic Analysis of Law: Some Realism about Nominalism," 60 *Virginia L. Rev.* 451,454 (1974)

¹²¹ See Robert A. Nisbet, *Social Change and History* (NY: Oxford Univ. Press 1969).

¹²² G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," 59 *Virginia L. Rev.* 280,296 (1973)..

horrifying and banal.”¹²³ “*There is no such thing as an unchallengeable evaluative system. There is no way to prove one ethical or legal system superior to any other, unless at some point an evaluator is asserted to have the final, uncontradictable, unexaminable word.*”¹²⁴ His essay memorably left off with these words: “God help us.”¹²⁵

In the air was a palpable awareness that society and law had been cut adrift irretrievably from its old moorings on issues of right and wrong with no new anchorage in sight. The feared and abhorred moral relativism that had been used to bludgeon the Legal Realists into silence in the 1940’s had become a way of life by the 1960’s and 1970’s. It was for many an accepted article of the faith that “in a pluralistic and tolerant society it is impossible to expect that individuals or groups will agree about many basic values.”¹²⁶

The Dean of Cornell Law School, Roger C. Cramton, wrote in 1978 that legal instrumentalism had become “the ordinary religion of the law school classroom.” This “orthodox” wisdom among law professors, conveyed daily to their students, was “an instrumental approach to law and lawyering,” along with “a skeptical attitude toward generalizations, principles, and received wisdom.”¹²⁷ Cramton credited (or blamed) Holmes, the Legal Realists, and pragmatism with being the source of these attitudes about law:

Today law tends to be viewed in solely instrumental terms and as lacking values of its own, other than a limited agreement on certain ‘process values’ thought to be implicit in our democratic way of doing things. We agree on methods of resolving our disagreements in the public arena, but on little else. Substantive goals come from the political process or from private interests in the community. The lawyer’s task, in an instrumental approach to law, is to facilitate and manipulate legal processes to advance the interest of his client.¹²⁸

Cramton captured succinctly the view of law as an empty vessel, matched by a vision of the lawyer whose role was to serve as an instrument of the client and who treated legal rules and processes in the same way.

By the 1970’s, two streams with critical implications were in place. Legal instrumentalist views—owing to their own attractions, but also to the default of non-instrumental views—had won over the legal academy. And this occurred in a context of society-wide, group-based disagreement over moral values and the public good, seemingly made worse owing to a loss of belief in the availability of objective standards by which to resolve such disputes. Woodward, back in 1968, had already raised the critical question: “does the functional approach not teach all manner of men to look to law as an instrument for *their* private or personal disposal?”¹²⁹

INSTRUMENTAL THEORIES OF LAW

The main theories of law circulating today in the US all have their origins in the 1970s. Many of these theories explicitly identify themselves as progeny of the Legal Realists and construe law in consummately instrumental terms. Law and economics, prominently developed by Richard Posner, characterizes law as an instrument for maximizing wealth. Critical Legal

¹²³ Leff, “Economic Analysis of Law,” *supra* 455.

¹²⁴ Arthur Allen Leff, “Unspeakable Ethics, Unnatural Law,” 1979 Duke L. J. 1229,1240 (1979)(emphasis in original).

¹²⁵ *Id.* 1249.

¹²⁶ Roger C. Cramton, “The Ordinary Wisdom of the Law School Classroom,” 29 J. Legal Educ. 247,252 (1978). 252.

¹²⁷ *Id.* 248.

¹²⁸ *Id.* 257.

¹²⁹ Woodward, “The Limits of Legal Realism,” *supra* 735 (emphasis in original).

Studies characterizes law as a (relatively autonomous) instrument of domination by the elite. Critical feminism characterizes law as an instrument of male patriarchy. Critical race theory characterizes law as an instrument of white domination.

In the late 1980's and early 1990's, came a sudden rush of theorists who asserted allegiance to "legal pragmatism."¹³⁰ A striking peculiarity of this the convergence upon pragmatism was that it involved scholars from across the entire range of political views, including law and economics guru Richard Posner, CLS veterans Morton Horwitz and Martha Minow, critical feminist Margaret Radin, critical race theorist Mari Matsuda, and a multitude of scholars from the mainstream identified with no particular school of thought. Theorists who had in the past demonized one another—critical scholars and Posner—found themselves promoting the same program. This convergence on pragmatism—though there were dissenters¹³¹—did not reflect a sudden reconciliation among contesting views. They remained as far apart as ever in their substantive vision. The very fact of this convergence confirmed what had been a source of criticism early in the Century: pragmatism is empty with respect to ends, offering no particular guidance on values.¹³²

The popularity of pragmatism was short-lived, for it was not evident what insight, if any, pragmatism offered to law. Pragmatic philosophy was primarily a negative critique of absolutist theories of truth. When Pound, Dewey, and the Realists invoked pragmatist thought in the legal context in the early 20th Century they were combating prevailing non-instrumental views of law as abstract principles that were applied in a logical fashion with no attention to social consequences. Pragmatism had real bite then. By the 1960's and 1970's, as indicated, a pragmatic approach to law reigned and legal instrumentalism was "the ordinary religion of the classroom." It is routine for judges today to consider the social consequences of their decisions. Philosopher Richard Rorty concluded that pragmatism in law today is "banal," as its insights have already been absorbed.¹³³

Another indication of the hold of instrumental views of law can be seen in the "formal" version of the rule of law.¹³⁴ Friedrich Hayek set out an influential early definition of the formal rule of law: "stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced before-hand, rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."¹³⁵ This formulation says nothing about the content of the law, about what the laws can or cannot prohibit or allow. It says only that the government is bound to follow rules set out in advance (whatever those rules might be).

The most influential essay on the rule of law in legal theory was written by Joseph Raz in the 1970's, which asserts a purely instrumental, morally empty understanding of law:

A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of law, indeed it is their most important inherent value. It is of the

¹³⁰ The literature on this subject is massive. Two excellent early collections are Symposium, *On the Renaissance of Pragmatism in American Legal Thought*, 63 S. Cal. L. Rev. 1569 (1990); Michael Brint and William Weaver, eds., *Pragmatism in Law and Society* (1991).

¹³¹ See Steven D. Smith, "The Pursuit of Pragmatism," 100 Yale L.J. 409 (1990); Ronald Dworkin, *Law's Empire* (Cambridge, Ma.: Harvard Univ. Press 1986) 161.

¹³² See Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press 1997).

¹³³ Richard Rorty, "The Banality of Pragmatism," 63 S. Cal. L. Rev. 1811 (1990).

¹³⁴ See generally Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge Univ. Press 2004).

¹³⁵ Friedrich Hayek, *The Road to Serfdom* (Chicago: Univ. of Chicago Press 1996) 80.

essence of law to guide behavior through rules and courts in charge of their application...Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which it the instrument is put.¹³⁶

Here is one of the most prominent legal theorists of the day declaring unequivocally that law is a morally empty instrument, like a knife that can be used to slice vegetables or to kill a man.

It must be emphasized that important strains of non-instrumentalist thinking about law remain in circulation today. Several varieties of natural law thought, in particular, continue to have lively expositors.¹³⁷ John Finnis has revived the Catholic natural law thought of Aquinas.¹³⁸ Ernest Weinrib has argued in support of a formalist understanding of law backed by classical natural law understandings.¹³⁹ Michael Moore had articulated a theory of moral realism in which there are objectively existing legal and moral entities that provide correct answers to legal questions.¹⁴⁰ Ronald Dworkin, while not a natural law theorist in the traditional sense of the term, has elaborated the view that there are correct answers to legal questions in every case, answers which can be discerned by judges through a consideration of the immanent moral and political principles of the community that are a part of the law.¹⁴¹

The primary difficulty faced by Dworkin's theory, as well as all the rest, is that there is no agreement on the content of the principles behind the law are (his analyses of legal issues are consistently liberal, prompting the suspicion that his own political views have been hoisted to a higher standing), there is no agreement on how these principles are to be identified, and there is no way to confirm that the right principles have been identified even if they had. As moral philosopher Alastair MacIntyre observed, "no fact seems to be plainer in the modern world than the extent and depth of moral disagreement, often enough disagreement on basic issues."¹⁴² It is late in the day for constructing a plausible non-instrumental view of law in these terms.

INSTRUMENTALISM OF LEGAL PRACTICE

The deepening of instrumental views of law also shows up in the practice of law. The US adversarial legal system by design contemplates an instrumental role for lawyers. The very first sentence of the Model Rules governing the legal profession unequivocally declares that the core of lawyering is a means (lawyer)—ends (client) relationship: "a lawyer, as a member of the legal profession, is a representative of clients."¹⁴³ It mandates that "a lawyer shall abide by a client's decisions concerning the objectives of representation."¹⁴⁴ Confirming this avowedly instrumental connection, the Rules remind us that "A lawyer's representation of a client...does not constitute an endorsement of the client's political, economic, social or moral views or activities."¹⁴⁵

There are many signs that the legal profession today is being confronted with uniquely difficult challenges. Highly publicized books announcing *The Lost Lawyer*, *The Betrayed*

¹³⁶ Joseph Raz, "The Rule of Law and its Virtue," in *The Authority of Law* (Oxford: Clarendon Press 1979) 225-26.

¹³⁷ An outstanding overview of natural law theory is Brian Bix, "Natural Law Theory: the Modern Tradition," in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford Univ. Press 2002).

¹³⁸ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980).

¹³⁹ Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Ma.: Harvard Univ. Press 1995); Ernest J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law," 97 Yale L.J. 949 (1988).

¹⁴⁰ Michael S. Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford Univ. Press 2000).

¹⁴¹ Ronald Dworkin, *Law's Empire* (Cambridge, Ma.: Harvard Univ. Press 1986); Ronald Dworkin, *A Matter of Principle* (Cambridge, Ma.: Harvard Univ. Press 1985).

¹⁴² Alastair MacIntyre, "Theories of Natural Law in the Culture of Advanced Modernity," in E.B. McLean, ed., *Common Truths: New Perspectives on Natural Law* (Wilmington, Del.: ISI Books 2000).

¹⁴³ American Bar Association Model Rules of Professional Conduct (2002), Preamble: A Lawyer's Responsibilities [1].

¹⁴⁴ Id. Rule 1.2 (a).

¹⁴⁵ Id. Rule 1.2 (b).

Profession, and the *Crisis in the Legal Profession*, were published in the early to mid-1990's, accompanied by a slew of less visible like-minded books and articles.¹⁴⁶ Their common theme was that lawyers had, perhaps irretrievably, lost their former ideals and positions as pillars of the community, as lawyer-statesmen, as public leaders, as men of rectitude, as preservers of the public good. Lawyers were thick in the middle of Watergate of the 1970's, the Savings and Loan scandal of the 1980's, and more recently Enron. Today, worriers lamented, the legal profession is a business like any other. Lawyers are "amoral technicians" who do whatever their client's require, no matter how morally repugnant or socially harmful, so long as it does not cross the line into illegality (and sometimes even then). Lawyers take a purely instrumental approach to law in the service of their clients.

One indication of a change can be seen in a transformation in the longstanding dualistic ideal of the legal profession. It has long been claimed that lawyers owe a "devotion to serving *both* the client's interest and the public good."¹⁴⁷ As instrumental views toward lawyering deepened, however, the lawyer's independent obligation to the public good began to fall away. Observe the successive changes in the codes of professional ethics. The 1908 Professional Canons set out that the lawyer "advances the honor of the profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law."¹⁴⁸ The lawyer's conscience had final say in decisions. The next version, the 1969 ABA Model Code of Professional Responsibility, noticeably used more hedged language: "In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."¹⁴⁹ This modest advice was immediately followed with "In the final analysis...the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."¹⁵⁰ The current version, the 1983 ABA Model Rules of Professional Conduct, is the least demanding of all: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."¹⁵¹ Informing lawyers that, when advising clients, they *may* raise moral among other considerations (today), is a far cry from the assertion that it is desirable to point out to clients what is morally just (1969), which was already a retreat from impressing upon clients exact compliance with the strictest principles of moral law (1908).¹⁵²

The entrenchment of instrumentalism runs deeper than a chipping away at one of two ideals that lawyers took to define their profession. It extends into the very way in which legal rules and processes are perceived by practicing lawyers. Lawyers can satisfy their duty to clients while remaining within the spirit of the law, seeing the law as binding dictates to be complied with. There are practicing lawyers who view the law this way, perhaps most prevalent among idealistic

¹⁴⁶ See Anthony Kronman, *The Lost Lawyer* (Cambridge, Ma.: Harvard Univ. Press 1993); Sol M. Linowitz and Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (NY: Charles Scribner's Sons 1994); Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (NY: Farrar, Straus and Giroux 1994).

¹⁴⁷ American Bar Association, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (Chicago: American Bar Association 1986) 10.

¹⁴⁸ ABA, *Canons of Professional Ethics*, *supra* Canon 32, 14.

¹⁴⁹ ABA Model Code of Professional Responsibility (1969), Ethical Consideration 7-8.

¹⁵⁰ *Id.*

¹⁵¹ ABA Model Rules of Professional Conduct (1983) Rule 2.1.

¹⁵² A fascinating study of the negotiating processes surrounding the enactment of the latest code shows how the trial lawyers lined up against the bar elite and the academics in a way that led to greater protection for their activities. Theodore Schneyer, "Professionalism as Politics: The Making of a Modern Legal Ethics Code," in Robert Nelson, et. al., *Lawyers' Ideals/Lawyers' Practices: Transformation in the American Legal Profession* (Ithaca, NY: Cornell Univ. Press 1992).

government lawyers who see themselves as enforcing the law and serving the public. Another approach, however, is one in which lawyers manipulate and stretch law and legal processes to their very outer limits, no matter how far away from or contrary to its underlying spirit. Both are recognized approaches toward lawyering.¹⁵³ Perhaps they sound similar, but pushed to the extreme they are as far apart as this: do what the law requires when pursuing the client's end, versus, do whatever it takes when pursuing the client's end (including manipulating or getting around the law). Many lawyers in practice today take an attitude closer to the second than the first.

The second attitude toward law is ingrained in students in law school. Below is a fair characterization of what, since the 1970's, became a widely practiced method of teaching law:

Most important of all, [lawyers] must have the ability to suspend judgment, to see both sides of a case that is presented to them, for they may be called on to argue either case. The task of the law professor is often to change a student's mind, and then change it back again, until the student and the class understand that in many situations that will come before them professionally they can with a whole heart devote their skills to either side. Then they have to block out much of that part of their mind that saw the other side, finding ways to diminish and combat what they once considered the strong points of the opponent's argument.¹⁵⁴

Regularly, professors will ask the same student or different students to articulate the best arguments on both sides. Through this pedagogical technique, students are taught to ignore the binding quality of law. After three years of this, students understandably come to think that legal rules are nothing but tools lawyers utilize on behalf of whichever side they represent.

Consistent with the purely instrumental attitude toward legal rules and processes, lawyers "are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favor their clients."¹⁵⁵ Robert Gordon described this common orientation:

Lawyers should not commit crimes or help clients to plan crimes. They should obey only such ethical instructions as are clearly expressed in rules and ignore vague standards. Finally, they should not tell outright lies to judges or fabricate evidence. Otherwise they may, and if it will serve their clients' interest must, exploit any gap, ambiguity, technicality, or loophole, any non-obviously-and-totally-implausible interpretation of the law or facts.¹⁵⁶

It should be emphasized that the claim here is not that all lawyers take such an unrestrained instrumental attitude toward legal rules all the time, but most lawyers do much of the time.

This characterization is not limited to private lawyers. The US Justice Department Office of Legal Counsel's infamous "torture memo"—which presented a legal exploration of the limits on interrogation of prisoners imposed by legal prohibitions against torture—is a supreme example of lawyers exploiting "any gap, ambiguity, technicality, or loophole, any non-obviously-and-totally-implausible interpretation of the law or facts" in order to allow the greatest possible leeway for the

¹⁵³ Explorations of the different models of lawyering can be found in Rob Atkinson, "A Dissenter's Commentary on the Professionalism Crusade," 74 Texas L. Rev. 259 (1995); Stephen L. Pepper, "Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering," 104 Yale L. J. 1545 (1995).

¹⁵⁴ Linowitz, *The Betrayed Profession*, supra 116.

¹⁵⁵ Gordon, "Independence of Lawyers," supra 10.

¹⁵⁶ *Id.* 20.

US interrogation of prisoners. It was an everyday lawyerly exercise in selective reading of the applicable body of legal rules that led to the desired result of identifying an extraordinarily high threshold for torture: “the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions—in order to constitute torture.”¹⁵⁷ A great deal of pain and suffering can be inflicted before engaging in torture, by that legal interpretation, which is precisely what the Bush Administration wanted.

The lawyers got there in a transparently simple move. The US statute that prohibited torture described it as “severe” pain and suffering, without defining what was “severe.” Office of Legal Counsel lawyers searched for the most stringent definition of “severe pain” they could find, which happened to come in an insurance-related statute that mentioned organ failure and death when identifying emergency medical conditions.¹⁵⁸ Hence they defined torture as involving injury that rose to the level of organ failure and death. The overarching orientation of these lawyers was not to figure out what the law was trying to prohibit—“torture”—but rather was to produce an arguable interpretation of the law that would allow them to accomplish what they desired—to allow the application of as much pain possible in order to make prisoners talk, and to provide legal cover if the torture was discovered.

When this memo came to light, on the heels of disclosure of torture at Abu Ghraib prison, the public outcry was intense. For the purposes of this exploration, what is most revealing was the relatively unruffled response of lawyers, summarized by a legal scholar who noted the contrast with the public shock:

Much of the legal profession...met the news with a dramatically different take. Charles Fried, for example, defended the OLC’s work, asserting that ‘[t]here’s nothing wrong with exploring any topic to find out what the legal requirements are.’...Eric Posner and Adrien Vermeule characterized the analysis as ‘standard lawyerly fare, routine stuff.’ Those lawyers who did criticize the memoranda concerned themselves with the deficiencies of the legal analysis...¹⁵⁹

Although the subject of torture was anything but routine, the memo was indeed routine stuff in the sense that every lawyer who reads it would find the style of argument of instrumentally manipulating the law to reach the end desired intimately familiar. It is what lawyers do.

The complete normalcy of this instrumental orientation toward rules is evident when one considers the players involved. One author of the memo, Jay Bybee, is an accomplished lawyer who now sits on the US Court of Appeals, the second highest federal court. Another author, John Yoo, is a professor of law at Berkeley. The recipient of the memo was Alberto Gonzales, a former judge on the Supreme Court of Texas, who was White House Counsel at the time and later (after the flap over the memo) was promoted to US Attorney General, the highest legal officer of the federal government. Fried is a Harvard professor, a former judge on the Massachusetts Supreme Court, and former Solicitor General of the US. Vermeule and Posner are professors at Chicago. These are distinguished lawyers all. Lawyers at every level in every type of job, from solo general practitioners just getting by, to prosecutors and defenders, to in

¹⁵⁷ Memorandum from Jay S. Bybee, Assistant Attorney General, to White House Counsel Judge Alberto Gonzales, August 1, 2002, 6.

¹⁵⁸ See Robert Vischer, “Legal Advice as Moral Perspective,” forthcoming, *Florida Law Review* (2005).

¹⁵⁹ Vischer, “Legal Advice as Moral Perspective,” *supra*

house lawyers at corporations, to partners in elite firms, to the Attorney General, have been taught to see, and routinely treat, legal rules and processes in purely instrumental terms.

Legal rules at their core have a binding quality. It is not yet clear what the consequences will be to a legal system which is pervasively characterized by lawyers who ignore the binding quality of rules to, without restraint (short of committing a crime), instrumentally manipulate legal rules and processes on behalf of their clients. There are indications that the US legal profession is headed in this direction.

INSTRUMENTALISM OF CAUSE LITIGATION

Public interest litigation, also known as cause litigation, is the contemporary culmination of legal instrumentalism in the court context. Cause litigation typically involves lawyers seeking to instigate legal actions around the country in order to obtain decisions that further the particular agenda they support. Basically these involve small law firms of a dozen or fewer lawyers with substantial financial backing who pursue a “commitment to litigation as a tool for social change.”¹⁶⁰ As one cause lawyer put it, “The law has always been an instrument of change, of course, but in recent decades it has become, through the deliberate, indeed passionate, efforts of a new breed of lawyer-activists, a favored engine of change.”¹⁶¹ “Since the early 1950s,” an observer noted “the courts have been the most accessible and, often, the most effective instrument of government for bringing about the changes in public policy sought by social protest movements.”¹⁶²

The origins of modern public interest litigation, which took off in the 1970’s, can be found in *Brown*. The NAACP, through its offshoot Legal Defense Fund, brought a series of cases that challenged segregation, voting restrictions against blacks, and racially restrictive covenants. Following its success, this pioneering approach was emulated by other groups interested in social change. An influential 1976 article in the Harvard Law Review by Abraham Chayes took stock of the phenomenon. So unprecedented were these suits, he concluded, that “the proceeding is recognizable as a lawsuit only because it takes place in a courtroom before an official called a judge.”¹⁶³ The remedy was less aimed at compensating a past injury, but instead was forward looking and oriented toward changing an existing social or legal state of affairs. Decisions turned less on interpretations of legal rights and more on public policy questions, and remedies were not simple awards for damages or injunctions but were legislative-like detailed decrees. Although these actions were conducted in the name of “public interest litigation,” Chayes recognized that it was driven by organized interest groups using litigation to further their agenda.

Mostly liberal causes—environmental protection, women’s rights, immigrants rights, gay rights, etc.—were involved in the first wave of cause litigation. Conservative interest group litigation—pro-business, anti-affirmative action, religious groups etc.—emerged in full force by the early 1980’s, coinciding with the general rightward shift of the federal judiciary owing to conservative judicial appointments by Presidents Reagan and Bush. Now there are a multitude of groups, left and right, who litigate to further a range of interests, all in the name of the “public good.” The result of this consummately instrumental view of law in a context of sharp group

¹⁶⁰ Michael McCann and Helena Silverstein, “Rethinking Law’s ‘Allurements’: A Relational Analysis of Social Movement Lawyers in the United States,” in *Cause Lawyering*, edited by Austin Sarat and Stuart Scheingold (NY: Oxford Univ. Press 1998) 263.

¹⁶¹ Thomas B. Stoddard, “Bleeding Heart: Reflections on Using the Law to Make Social Change,” 72 NYU L. Rev. 967.973 (1997).

¹⁶² Aryeh Neier, *Only Judgment: The Limits of Litigation in Social Change* (Wesleyan Univ. Press 1982) 9.

¹⁶³ Abraham Chayes, “The Role of the Judge in Public Law Litigation,” 89 Harv.L.Rev. 1281,1303 (1976).

conflict is that “The courts have become the battlefield for the supremacy of ideas in this country.”¹⁶⁴

Groups on the left and right are united in “using whatever tools of law are available to pursue their own visions of the public interest.”¹⁶⁵ They see a “lawsuit as a tool for reform.”¹⁶⁶ Of late, however, the real enthusiasts of public interest litigation are conservative cause lawyers. One leftist cause lawyer observed in 1996 that “In field after field—mental health, death penalty defense, welfare—the paradigms of reform that we thought we had constructed have crumbled.”¹⁶⁷ Liberals have painfully learned that instruments can be used in your favor, or against you, with equal felicity. A court can decide in favor of the right to an abortion, or against affirmative action. The tide had turned against liberals so much that a once favored tool—cause litigation—had come increasingly to look like a fearsome weapon for the other side.

INSTRUMENTALISM IN JUDICIAL APPOINTMENTS

Political scientist Nathan Glazer inquired in 1975, had the US polity permanently shifted “Towards an Imperial Judiciary?” Despite determination by Presidents to appoint judges who would exercise restraint, Glazer observed, the “Court is committed to an activist posture, with great impact on various areas of life...[and the Court] simply legislating its views on difficult problems.”¹⁶⁸ In the intervening quarter century since he posed this question the expansive power grabbing stance of courts identified by Glazer has remained constant, if not worsened, according to many observers. This is not just about the Supreme Court. Prompted by cause litigation, by rights cases, by the interpretation of far reaching legislation and administrative regulations, by pleas from litigants for social justice, judges increasingly make decisions that penetrate all aspects of social life, from prison reform, to school funding, to product sales and design, to pornography on the internet, to gay marriage. At the end of the 20th Century, said Robert Bork, “It is arguable that the American judiciary—the American Supreme Court, abetted by the lower federal court and many state courts—is the single most powerful force shaping our culture.”¹⁶⁹ While there are reasons to doubt that courts are as efficacious in this task as Bork suggests, there is no doubt that his view is widely shared. This is a declaration of the instrumental power of law concentrated in the hands of the judiciary.

The logic of the complex of ideas covered in this essay *must* culminate in an ideological battle over who gets to become a judge. If a judge has substantial scope to inject personal views into legal decisions, and if judges wield inordinate power to shape social life, then it is imperative to populate the judiciary with individuals who share your ideological views. Political coalitions for legislation come and go, but achieving a critical mass of like-minded judges can lock in the dominance of a set of ideological views for a generation. Furthermore, judges have the power to render decisions that trump the political process, whether through judicial review or by eviscerating statutes and regulations with narrow interpretations.

Even if one group were inclined to abstain from seizing control of judgeships as an instrument to further its particular social vision, out of a desire to not diminish the integrity of law,

¹⁶⁴ Daniel J. Popeo, “Public Interest Law in the 80’s” *Barron’s*, March 2, 1981, 28 (Popeo was the General Counsel of Washington Legal Foundation, a conservative public interest firm); see Karen O’Conner and Lee Epstein, “Rebalancing the Scales of Justice: Assessment of Public Interest Law,” 7 *Harv. J.L. & Pub. Policy* 483,484 (1984).

¹⁶⁵ Statement of Michael Horowitz advocating conservative public interest litigation, quoted in *Id.* 503.

¹⁶⁶ David Wagner, “Legal Activism—When Conservatives Lay Down the Law,” *Insight Magazine*, August 10, 1998, 2, available at <http://www.insightmag.com>

¹⁶⁷ Dean Hill Rivkin, “Reflections on Lawyering for Reform: Is the Highway Alive Tonight?” 64 *Tenn. L. Rev.* 1064,1069 (1997).

¹⁶⁸ Nathan Glazer, “Towards and Imperial Judiciary,” *Public Interest*, Fall 1975, 115.

¹⁶⁹ Robert Bork, *Slouching Toward Gomorrah* (1996) 96.

the dynamics of the situation almost inevitably leads to a battle over judicial appointments, if only defensively to keep judgeships out of the clutches of unrestrained ideological opponents who lack similar qualms. No side can trust others to stand down, to refrain from attempting to co-opt the judiciary, so all sides must engage in this effort.

This battle is precisely what we see today at all levels of federal and state courts. The nasty controversy in the spring of 2005 over the use of the filibuster by Democratic Senators to prevent President Bush's most extreme judicial nominees from coming to a floor vote was only the latest of an ever escalating acrimonious fight over the appointment of judges. Republicans who complain about outrageous Democratic obstructionism conveniently forget "the acrimonious judicial selection politics of the Clinton years and what many would characterize as unprecedented mistreatment of Clinton's nominees."¹⁷⁰ Republicans openly opposed Clinton's appointments on ideological grounds, and systematically delayed or obstructed the process. When Clinton left office 42 of his nominees were unconfirmed, 38 of whom never received a hearing.¹⁷¹ During the final six years of Clinton's presidency Republicans engaged in "a highly politicized, partisan, and divisive judicial confirmation process for lower federal court judges."¹⁷² Republicans, on their part, point to the earlier singular outrage of the ideologically motivated dumping of Ronald Reagan's impeccably qualified nominee for the Supreme Court Robert Bork, an injustice over which they are still seething.

Presidents Regan, George H.W. Bush and George W. Bush all systematically screened federal judicial appointments on ideological grounds. President Clinton, to the dismay of many of his supporters on the left, appeared generally unconcerned about judicial appointments, and made mostly moderate appointments. Now both Republicans and Democrats, and a multitude of outside political groups, pay vigilant attention to the ideologies of prospective judges in the appointments process.

Controversies surrounding federal judicial appointments have received the bulk of the national attention, but equally heated ideological contests have been taking place at the state level. Judges face elections in thirty-eight states, either in the first instance or for retention after a term of year. Beginning in the early 1990's, widespread alarm has been expressed, in the media and in academia, at the increasingly vituperative judicial campaigns. A brief sampling of reports from across the country show: "the bitterest state judicial races in memory" (Wisconsin); "angriest and most expensive" (West Virginia); "wildest results" (Texas); "surprising and extraordinary" (Nevada); judicial elections everywhere have become "noisier, nastier, and costlier."¹⁷³ In addition to the above states, Oklahoma, Tennessee, Alabama, Ohio, California, Mississippi, Idaho, South Carolina, Florida, Idaho, Louisiana, and Michigan, all experienced caustic judicial election campaigns since the 1990's, worsening with time.¹⁷⁴ "The 2000 judicial elections were unprecedented, with campaigns far more costly than ever, and outside groups' participation far

¹⁷⁰ Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni, "W. Bush Remaking the Judiciary: Like Father Like Son?" 86 *Judicature* 282,294 (2003).

¹⁷¹ John Anthony Maltese, "Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush," 3 *Journal of Appellate Practice and Process* 1,21 (2003).

¹⁷² Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Gary Zuk, "Clinton's Judges: Summing Up the Legacy," 84 *Judicature* 228, 254 (2001).

¹⁷³ Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 *Chicago L. Rev.* 689,734 (1995)(citations omitted).

¹⁷⁴ Anthony Champagne, "Interest Groups and Judicial Elections," 34 *Loyola L.A. L. Rev.* 1391 (2000-01); Stephen J. Ware, "Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama," 15 *Journal of Law and Politics* 649 (1999); John D. Echeverria, "Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections," 9 *NYU Environmental L.J.* 217 (2000-01).

more active and nasty than every, even ‘sleazy,’ ‘a national disgrace,’ ‘rotten to the core.’”¹⁷⁵ Millions of dollars now flow into these judicial campaigns—unheard of two decades ago—the overwhelming bulk of which is derived from groups that are seeking the election of judges they perceive to be more friendly to their interests.

At both federal and state levels, battles surrounding the appointment or election of judges have been over judicial treatment of abortion, toughness on crime, tort reform, gun control, friendliness or hostility to business, family values (gay rights), affirmative action, the place of religion in public institutions, the death penalty, deference to legislative branches, and more. At both federal and state levels leading participants in the battles are “public interest” groups on the left and right of the political spectrum—environmental groups, women’s groups, advocates for business, fundamentalist Christian groups, etc.¹⁷⁶ Many of the very same groups bringing cause litigation are also vigorously attempting to shape the ideological profiles of the judges who will hear their cases, operating on the assumption that their efforts to use courts to effectuate their particular interests will be more successful if the judges share their underlying ideological views.

A few observers suggest that what is happening today is not novel, that throughout the history of the US judges have been appointed for ideological reasons.¹⁷⁷ This point is correct—the ideological views of judges have risen to the fore in appointments decisions at past intervals in the US history—but also terribly misleading. The focus on ideology and the effort to seat like-minded judges has never before been of such duration, so systematic, so extreme, so widespread, so single-minded and unrelenting. As with the subjects covered in earlier Parts of this essay, this situation reflects a marked worsening, a deepening, a coarsening, that goes beyond what has been the case previously, owing to the spread and entrenchment of instrumental views of law in a context of sharp disagreement over the social good.

IV THE PERILS OF PERVASIVE LEGAL INSTRUMENTALISM

The foregoing survey shows that in one legal context after another in the US pitched battles are taking place within and through legal institutions to further particular agendas. The same process is occurring with respect to legislation and administrative regulations (not covered for lack of space), where hundreds of millions of dollars are spent in campaign contributions and lobbying to secure favorable legal regimes. This is what results from an instrumental view of law in a situation of sharp conflict over. That is what was meant at the outset of this essay by the assertion that a Hobbsean conflict of all against all had been transplanted to the legal arena.

One more recent example will help drive home the point. In 1993, the Hawaii Supreme Court held in *Baehr v. Lewin* that the Equal Protection Clause of the Hawaii Constitution required that gays and lesbians be allowed to marry.¹⁷⁸ Lambda Legal, a gay cause litigation firm, helped bring the case. Initially *Baehr* was celebrated by gay organizations as a momentous victory, the first ever of its kind. However, the decision galvanized religious conservatives across the country to successfully prompt state legislatures to enact bills that prohibited recognition of same sex marriages. Hawaii passed a constitutional amendment to the same effect. A former Lambda Legal lawyer subsequently summed up the effect of the case: “In short, one encouraging judicial decision in only one of the fifty states...touched off a national political and legal avalanche with

¹⁷⁵ Roy A. Schotland, “Financing Judicial Elections, 2000: Change and Challenge,” 2001 L. Rev. Mich. St. U. Det. C.L. 849, 850 (2001).

¹⁷⁶ See Anthony Champagne, “Interest Groups and Judicial Elections,” 34 Loyola L.A. L. Rev. 1391 (2000-02).

¹⁷⁷ Erwin Chemerinsky, “Ideology and the Selection of Federal Judges,” 36 U.C. Davis L. Rev. 619 (2003).

¹⁷⁸ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

horrifying consequences for gay people.”¹⁷⁹ This event was replayed according to script following the 2003 Massachusetts Supreme Court decision finding that under the State Constitution gays were entitled to equivalent rights as those conferred in marriage.¹⁸⁰ Gays nationwide again were jubilant. Caught up in the aftermath of the decision, officials in San Francisco and several other cities conducted a number of gay marriages, which were prominently covered on national news broadcasts. Predictably, in the following election, eleven states passed constitutional amendments that flatly banned gay marriage. A federal district judge, in a challenge subsequently brought by Lambda Legal, invalidated Nebraska’s constitutional amendment as a violation of the US Constitution (a decision which will certainly be appealed).¹⁸¹ This decision was, in turn, cited by conservatives as confirmation that Bush’s conservative judicial nominees must be confirmed.¹⁸² There is no end in sight to this spiraling conflict fought within law.

Perhaps it is comforting to think that it is preferable that these battles take place in the legal arena rather than in the streets. But aside from all the others problems with such battles, it’s not a fair fight. Legal battles are costly. The more money one has the more successfully can one fight in this arena. Furthermore, groups with money can consolidate their advantage by coordinating a comprehensive strategy that involves seeking favorable legislation, seeking favorable administrative regulations and enforcement, seeking the appointment of friendly judges, and bringing cause litigation, all to pursue their interests in and through the law. And indeed certain well financed groups with a national reach, like the corporate funded US Chamber of Commerce,¹⁸³ are doing precisely that.

More critically, legal instrumentalism, and the battle it has generated, threatens to corrode the integrity of law, in at least two different respects. A distinguishing characteristic of law has always been that it is a manifestation of *public* power that is to be wielded in furtherance the *public good*. The legitimacy of the law, its claim to obedience, is based upon this claim. Without this characteristic law is raw coercion. If the law is an empty vessel, an instrument to be filled in and applied to the advantage of any group that successfully controls it, then law will involve the application of public power to private advantage, in the pursuit of a private agenda. When that is case, it is not obvious why there would be an obligation to abide by the law. If more and more people come to hold this view, the law may lose the widespread routine voluntary compliance that it depends upon.

The second threat is to the binding quality that is the core distinguishing characteristic of law, in particular as it relates to judges. Owing to the influence of the Realists, the view that judges’ decisions are based upon ideologically preferred outcomes has grown in strength. By the Realist account, this operates as a subconscious process on the part of judges, who perceive the law through their ideologically colored lens. But it can also be conscious: when necessary, in the same way that a lawyer manipulates legal rules instrumentally to serve the interests of clients, legal rules can be twisted by judges to achieve the ends they desire. “The ‘law’...becomes mere instruments or barriers that judges must utilize strategically to advance their *a priori* political objectives.”¹⁸⁴

¹⁷⁹ Thomas B. Stoddard, “Bleeding Heart: Reflections on Using the Law to Make Social Change” 72 N.Y.U. L. Rev. 967,988 (1997).

¹⁸⁰ *Goodridge v. Massachusetts Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁸¹ “Judge Voids Same-Sex Marriage Ban in Nebraska,” New York Times, May 13, 2005, A14.

¹⁸² Carl Hulse, “Senate Republicans to Open Filibuster War Next Week,” New York Times, May 14, 2005, A9.

¹⁸³ See Public Citizen Report, Congress Watch, *Tom Donohue: U.S. Chamber of Commerce President Oversees Renegade Corporations While Pushing for Limits to Corporate Accountability* (February 2005).

¹⁸⁴ Cornell W. Clayton, “The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be So Positive About the Judicialization of Politics?)” 65 Law & Contemp. Probs. 69 (2002).

This raises the crux of the matter. Viewing the law through the prism of one's personal beliefs is perhaps unavoidable, though judges can also attempt to scrutinize the effect particular prejudices might have on their decisions. What is not inevitable is that a judge would cross over from abiding by the binding quality of law, sincerely trying to figure out what the law requires (however unclear), to instrumentally manipulating the legal rules to reach a personally desired end, much as a lawyer does in service of the client. This traverses the large divide between instructing judges to come to the outcome determined by the law or instructing judges to come to the outcome they prefer.

The critical question is whether the pervasive spread of consummately instrumental views of law generally, and specifically the spread of the instrumental views taken toward the appointment of judges, who increasingly are selected *owing primarily* to their ideological views, will have the effect of encouraging more judges more often to cross over from the first orientation to the second. That will shift judges over to a purely instrumental approach toward legal rules. Most every case they decide will be what they personally prefer, to further the aims of the groups that support them, notwithstanding what the law says. This is no longer a system in which the legal rules have any binding effect on judges. It would no longer be a system of law.

V. GOOD INTENTIONS OF REFORMERS GONE BAD

Judging from what they wrote, it is fair to say that the Realists would have been aghast at the scene today. They believed in law, and in its capacity to enhance the general social good. Their goal was to make it better, more efficient and efficacious. The Realists understood that legal rules have a built in binding, non-instrumental aspect which defines them as law. Holmes and Pound, even when they criticized judicial decisions based upon laissez faire views, admired core formalist tenets, particularly the fundamental one that legal rules had a binding quality that, for the most part, ought to be followed.¹⁸⁵ John Dewey, a vigorous proponent of an instrumental view of law, stated: "There is of course every reason why rules of law should be as regular and definite as possible."¹⁸⁶ Despite their intentions, the implications of the ideas they espoused may turn out to undermine the binding quality of law.

This essay recites a string of good intentions that led to unanticipated bad consequences. The Enlightenment thinkers wanted to dispel ignorance and blind superstition but in the process left us with no moral grounding, which they certainly did not desire nor expect. Bentham wanted to reform the common law, which was badly in need of it, and so advocated the instrumental approach, but his Utilitarian answer to the question of ends proved unsatisfactory. The Legal Realists were progressive law reformers who wanted to stop formalist judges from erecting barriers to the social welfare state. They promoted an instrumental approach to law with the understanding that it would serve social needs; we have adopted the instrumental understanding, but lost faith in the idea of a shared social good. The Warren Court tried to bring about greater social justice, but they generated a backlash both in the political and judicial arena in which the progressive values they supported are now threatened by a conservative judiciary. Liberal groups used cause litigation to bring about social change they desired, and now worry as conservative groups turn their own tactics against them.

In each case it did not work out as the reformers had hoped or expected, at least not entirely. That is not a reason to conclude that the reformist efforts were mistakes. Besides being

¹⁸⁵ This point is persuasively argued by Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford Univ. Press 1996) Chap. 1; Grant Gilmore, *The Ages of American Law* (New Haven, Conn: Yale Univ. Press 1977).

¹⁸⁶ Dewey, "Logical Method and Law," *supra* 25.

an absurd and pointless conclusion to draw, many of the results were positive, and to not have brought about the reforms may well have been worse.

But I will end by sounding a Burkean note. Edmund Burke was a famous critic of the glorious French Revolution, who counseled that it was impossible, foolish, and wrong, to discard all traditions. Certainly society's cultural and political institutions must be scrutinized, but we ought not to scorn them or be derisive of them, and we ought not to do whatever it takes to accomplish their complete annihilation. If a mistake was made in the critical attacks of reformists, it was that, in the pursuit of victory, their attacks went too far. Their attacks were wholesale, taken to an extreme.

After the clouds of the battle clear, the reformers themselves must build, and they may discover that the material they need to construct new foundations was destroyed in the all-out destructive attack. They may also find that the battle is not truly over, for it never is. In the shadows, embittered by the loss and wanton destruction of what they hold dear, will be the other side, the temporarily vanquished, awaiting the opportunity to direct all of the same tactics and arguments used by the critical reformers back against the critical reformers themselves, but with double the bitterness and conviction.

Unlike the stereotypical American story, this essay does not have a predictably happy ending. It is impossible to know how far the spread and deepening of instrumental views about law will go, or what the full implications of this development will be. There are enough signs, however, to make it clear that we would be foolish to pay it no heed. A system of law cannot exist for long, it would seem, without a widespread conviction that law has its own integrity. Pervasive legal instrumentalism puts that at risk.