Introduction

An instrumental view of law – the idea that law is a means to an end – is taken for granted in the United States, almost a part of the air we breathe. This operates in various ways: as an account of the nature of law, as an attitude toward law that professors teach students, as a form of constitutional analysis, as a theoretical perspective on law, as an orientation of lawyers in their daily practice, as a strategic approach of organized groups that use litigation to further their agendas, as a view toward judges and judging, as a perception of legislators and administrators when enacting laws or regulations. In all of these contexts, people see law as an instrument of power to advance their personal interests or the interests or policies of the individuals or groups they support. Today, law is widely viewed as an empty vessel to be filled as desired, and to be manipulated, invoked, and utilized in the furtherance of ends.

A few centuries ago, in contrast, law was widely understood to possess a necessary content and integrity that was, in some sense, given or predetermined. Law was the right ordering of society binding on all. Law was not entirely subject to our individual or group whims or will. There were several versions of this. Law was thought to consist of rules or principles immanent within the customs or culture of the society, or of God-given principles disclosed by revelation or discoverable through the application of reason, or of principles dictated by human nature, or of the logically necessary requirements of objective legal concepts. These ideas about the nature and content of law, each of which had its day, have mostly fallen by the wayside in the past century. Their obsolescence opened the way for an instrumental view to seep through and permeate every legal context. Now this view thrives throughout law.

Although instrumental views of law have taken hold in many societies, the U.S. legal culture has moved the furthest in this direction. In a sense, we have embarked upon a vast social experiment with no prior examples to provide guidance or warn of pitfalls. There are manifold signs that this experiment may be ill-fated.

The root danger can be stated summarily: In situations of sharp disagreement over the social good, when law is perceived as a powerful instrument, individuals and groups within society will endeavor to seize or co-opt the law in every way possible; to fill in, interpret, manipulate, and utilize the law to serve their own ends. This will spawn a Hobbsean conflict of all against all carried on within and

through the legal order. Rather than function to maintain social order and resolve disputes, as Hobbes suggested was the role of law, combatants will fight to control and use the implements of the law as weapons in social, political, religious, and economic disputes. Law will thus generate disputes as much as resolve them. Even when one side prevails, victory will mark only a momentary respite before the battle is resumed. These battles will take place in every state and federal arena – legislative, executive, judicial – from struggles over the content of laws to struggles over how those laws will be enforced, applied, and interpreted, and by whom. Even those groups that might prefer to abstain from these battles over law will nonetheless be forced to engage in the contest, if only defensively to keep their less restrained opponents from using the law as a hammer against them. Spiraling conflicts will ensue with no evident halting point or termination short of exhaustion of resources or total conquest by one side.

Such struggles over and through law are openly visible today, and worsening. Beneath the surface of these battles lies a more subtle and insidious threat: The spread of instrumental thinking about law harbors the potential to damage the rule of law. An instrumental view of law and the rule of law ideal are two fundamental pillars of the U.S. legal tradition. Anyone raised in this tradition would naturally think that they are complementary, as I did. Not until completing the research for my previous book, *On the Rule of Law: History, Politics, Theory*, did I realize that this joinder of ideas has a relatively recent provenance, and, furthermore, that in several distinct ways an instrumental view of law has a powerful tendency to corrode the rule of law ideal.

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 in the United States and elsewhere. Nor is it my contention that *only* instrumental views of law circulate in the United States today. Non-instrumental understandings of law are still present. In one context after another, however, they have been (or are in the process of being) shunted to the margins as instrumental views take over. 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 across the full gamut of legal contexts a sea change is occurring in the direction of consummately instrumental views. The problems I identify in each arena of legal activity will be familiar to many; what is less familiar is that they are linked by the shared phenomenon of creeping instrumentalism.

I do not assert that the all-out Hobbsean war fought through and over law just laid out is our inevitable fate. Rather, my contention is that we have traveled far down this path, and that intellectual developments and the logic of the situation portend a worsening that, if not somehow contained, may well eventuate in this nightmarish scenario. Events have yet to play out in their fullness, and human ingenuity is irrepressible, so the denouement of these trends cannot be known with certainty. This book is an attempt to convey in broad strokes where we have come from, where we stand now, and where we are headed, in the conviction that we must become cognizant of the attendant risks.

This is not the first time a theorist has written about rampant instrumental uses of and battles over law. John Dewey, a founding figure of philosophical pragmatism, wrote a startlingly blunt essay on law in 1916, entitled "Force and Coercion," that raised a similar set of issues:

> [I]s not the essence of all law coercion?. . . . Are our effective legislative enactments anything more than registrations of results of *battles* previously fought out on the field of human endurance? In many social fields, reformers are now *struggling* for an extension of governmental activity by way of supervision and regulation. Does not such action always amount to an effort to extend the exercise of force on the part of some section of society, with a corresponding restriction of the forces employed by others?[1]

Dewey portrayed law in thoroughly instrumental terms: "since the attainment of ends requires the use of means, law is essentially a formulation of the use of force."[2]

Four decades before Dewey's essay, Rudolph von Jhering, a German legal theorist prominent in his day but now largely forgotten, published two books, *The Struggle for Law* and *Law as a Means to an End* (the latter of which provides the title for this book). Jhering elaborated the thesis that the driving force behind legal development is continuous struggles among individuals and groups within society to have their interests reflected in and backed up by legal coercion. "In the course of time," Jhering wrote, "the interests of thousands of individuals, and of whole classes, have become bound up with the existing principles of law in such a manner that these cannot be done away with, without doing the greatest injury to the former . . . Hence every such attempt, in natural obedience to the law of self-preservation, calls forth the most violent opposition of the imperiled interests, and with it a struggle in which, as in every struggle, the issue is decided not by the weight of reason, but by the relative strength of opposing forces . . . "[3] Jhering asserted that law is coercive state power that individuals and groups utilize instrumentally to achieve and advance their often selfish purposes (frequently in the name of right).

Both Jhering and Dewey were critical of prevailing non-instrumental views of law. Jhering scoffed at the notions popular among jurists of his day that law is an emanation of the culture or consciousness of the people, or a matter of natural principles. Putting a skeptical, purely instrumental cast on what were sacrosanct ideas at the time, Dewey wrote that "liberty" and "rights" are "finally a question of the most efficient use of means for ends."[4] Law can be whatever we want it to be, they asserted, for it is the product of our will. These were shocking views, expressed at a time when non-instrumental understandings of law still held sway among the legal elite. Jhering's work influenced Oliver Wendell Holmes, Roscoe Pound, and the Legal Realists, and Dewey was an early contributor to Legal Realism.

Collectively, these were the figures most responsible for promoting an instrumental view of law in the United States. A century later it is possible to take stock of

1 John Dewey, "Force and Coercion," 26 *International J. of Ethics* 359, 359 (1916)(emphasis added).
2 Id. 367.
3 Rudolph von Jhering, *The Struggle for Law* (Westport, Conn.: Hyperion Press 1979) 10–11.
4 Dewey, "Force and Coercion," supra 366.

what has been wrought by the understanding of law they promoted. This is not to say that these legal theorists and reformers are responsible for the situation today. The views of law they advocated, as we shall see, in key respects were merely catching up with the reality of instrumental legal activity. Their intention was to improve the functioning of the legal system, not to undermine it. In hindsight, their main failing was perhaps excessive optimism (Holmes aside) about the human capacity to strive for and achieve the greater good.

A difference of great moment exists between the circumstances today and the period when they wrote. Jhering envisioned a generally cohesive society with laws that matched, so he construed the incessant struggles surrounding law in positive terms, as an engine of healthy legal change. Dewey believed that the proper social ends to be served by law could be identified by sound judgment and with the assistance of social science. Pound and most Legal Realists were secure in the faith that beneficial balances among competing interests could be found or that socially optimal ends could be arrived at in law. The critical difference between then and now lies not in the existence of conflicts among groups, which was also present at a high level at the close of the nineteenth century. The critical difference is that in the intervening period, faith in the existence of common social purposes, or in our collective ability to agree upon them, has progressively disintegrated.

This is the key point. The notion that law is an instrument was urged by its early proponents in an integrated two-part proposition: Law is an instrument *to serve the social good.* The crucial twist is that in the course of the twentieth century, the first half of this proposition swept the legal culture while the second half became increasingly untenable. As the century wore on, the seemingly inexorable penetration of moral relativism, combined with the multiplication of groups aggressively pursuing their own agendas, convinced in the rightness of their claims, dealt a deep wound to the notion of a shared social good. This book traces out the myriad worrisome implications of this twist. Rather than represent a means to advance the public welfare, the law is becoming a means pure and simple, with the ends up for grabs.

Many readers of this Introduction may be skeptical that a real transition from a non-instrumental to an instrumental view of law has taken place or is in the process of taking place. So inured have we become to an instrumental view of law that it is difficult to give credence to non-instrumental views of law: Law has always been seen and treated instrumentally, has it not, regardless of claims to the contrary? Chapters 1 and 2 articulate several versions of non-instrumental views of law that circulated for centuries in the Anglo-American common law system, continuing into the early twentieth century in the United States. The presence, consistency, and longevity of these views are impressive and undeniable.

It is also undeniable, however, that there were large mythical components to these non-instrumental views; they invoked abstractions and offered accounts of law and judging that, in hindsight, appear patently implausible. Nonetheless, they were widely espoused and sincerely believed, especially by the legal elite – by judges,

legal scholars, and prominent lawyers. The only way to understand these views, to grasp what they meant and what their consequences were, is to strive to get beyond our consummate instrumentalism to participate in a mindset that was less jaded about law.

Skeptics of a more radical ilk will insist that law has always served elite or particular interests, that lawyers have always manipulated the law to achieve ends, or that judges have always shaped and interpreted legal doctrine with class or personal biases, which non-instrumental accounts of law – whether sincerely held or offered as a subterfuge – served to conceal. 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. Former domination of law by specific interests *sub silentio* has been replaced by an open contest over the power of law in which all (or at least those with resources) can engage. This is a real change with real consequences, but it is not a change from a fundamentally non-instrumental law to an instrumental law. The law has been instrumental beneath the surface all along. Exposing this underlying reality is a positive change because engaging in an overt contest for law will produce better results, or at least exposes legal domination for what it is.

Without the accompanying radical politics, this was, in essence, the position of Jhering and Holmes. They argued that the non-instrumental view of law was descriptively incorrect, an erroneous depiction of the reality of legal development. Holmes began *The Common Law* with his famous declaration that "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."[5] Holmes contended that "hitherto this process has been largely unconscious,"[6] and he thought the law could be made more socially optimal if this process was instead done consciously.

The retort of the skeptic contains a large measure of truth. Law has always been used instrumentally to advance particular interests. Even when it was characterized in non-instrumental terms, law regularly originated in and changed through instrumentally motivated contests. Chapter 3 shows that legislation and the actual practice of law in the nineteenth century were seen in largely instrumental terms, notwithstanding the many non-instrumental accounts of law repeated during this period.

But this is not the whole story. Non-instrumental accounts of law were widely expressed and believed, and these beliefs were acted upon accordingly. In important ways the law had achieved autonomy or semi-autonomy, with its own internal integrity, because lawyers and judges treated it that way, not always and not entirely,

5 Oliver Wendell Holmes, *The Common Law* (New Brunswick, N.J.: Transaction Publishers 2005 [1881]) 5.
6 Id. 32.

but often enough to matter. Many critically important consequences – some good, some bad – have followed from the removal of the old non-instrumental cloak that had been draped over law for more than a thousand years.

One of the themes of this study is that ideals have the potential to create a reality in their image only so long as they are believed in and acted pursuant to. This might sound fanciful, like suggesting that something can be conjured up by wishful thinking; or it might sound elitist, like the "noble lie," the idea that it is sometimes better for the masses to believe in myths because the truth is too much to handle. But it is neither. It is a routine application of the proposition widely accepted among social theorists and social scientists that much of social reality is the construction of our ideas and beliefs.

Another theme, which rubs against but is no less true than the one just discussed, is that unintentional consequences often follow from intentional actions. This book recounts a long string of good intentions by reformers – from the Enlightenment philosophers, to the Realists, to the Warren Court, to liberal cause litigators – leading to unanticipated results that were contrary to their hopes and expectations.

The thrust of these comments make it easy to misread my position. Although this book explores the implications of a pervasive instrumental view of law with a sense of urgent foreboding, this should not be interpreted as a wholesale rejection of the idea that law is an instrument. This view of law was promoted for sound reasons and offers many advantages. More to the point, this view of law is here to stay. Circumstances in the economy, in politics, and in culture have changed in ways that preclude a return to non-instrumental views of law. A broad society-wide movement toward instrumental rationality, Max Weber argued a century ago, is characteristic of capitalist economics and mass bureaucratic organizations. This is the modern condition. The solution to the problems identified herein lies not in repudiating the view that law is an instrument, but in setting limits and restraints on this view, in recognizing the situations in which it is inappropriate, and in recognizing that certain uses of this instrument are dangerous and must be guarded against.

An Instrumental Mindset Toward Law

The proposition that law is pervasively understood and utilized as a means to an end, when stated as such, is clear enough. What this means in concrete terms varies depending upon the context, however. An instrumental understanding of law thus appears in markedly different forms. Beneath this apparent variety they are united by a common underlying orientation. An instrumental view of law means that law – encompassing legal rules, legal institutions, and legal processes – is *consciously* viewed by people and groups as a *tool* or *means* with which to achieve *ends*. The supply of possible ends is open and limitless, ranging from personal (enrichment, harassment, or advancement), to ideological (furthering a cause), to social goals like maximizing social welfare or finding a balance of competing interests.

Several examples will make this point more concrete. Lawyers with a purely instrumental view of law will manipulate legal rules and processes to advance their clients' ends; lawyers with a non-instrumental view, in contrast, will accord greater respect for the binding quality of legal rules and will strive to maintain the integrity of the law. Cause lawyers incite litigation to bring about desired social change, an exclusively instrumental course of action for which there is no non-instrumental counterpart. An instrumental judge manipulates the applicable legal rules to arrive at a preferred end, whereas a non-instrumental judge is committed to following the applicable legal rules no matter what the outcome. Groups that take an instrumental view of judging strive to secure the election or appointment of judges they expect will interpret the legal rules to favor their ends; groups with a non-instrumental view of judging seek the appointment of judges who will diligently apply the law with no preconceived controlling end in mind. Legislators with an instrumental view will promote whatever law will help secure their re-election (personal end), or further their ideological position (political end), or advance the public good (social end); a legislator with a non-instrumental view, a view that had currency two centuries ago but has long been defunct, will seek to declare the immanent norms of the community or natural principles.

Running through the aforementioned examples, legal instrumentalism takes on two distinct but interacting forms. The first is the *conscious attitude toward law* held by legal actors and others in society – the attitude that law (including legal rules, judges, enforcement officials, etc.) is a tool to be utilized to achieve ends. The second is a *theory or account of the nature of law* held by legal actors and others in society – the theory that law is purely a means to an end, an empty vessel devoid of any inherent principle or binding content or integrity unto itself. These are independent propositions that can coexist in different combinations with non-instrumental views of law at various levels. In the late nineteenth century, for example, the prevailing theory of the nature of law among the legal elite was non-instrumental, while conscious attitudes toward law among legislators and lawyers often were instrumental in one of the ways mentioned earlier.

The story told herein involves tracing the consequences of the collapse of the non-instrumental theory of the nature of law, the second sense discussed, in unleashing a purely instrumental conscious attitude toward law, the first sense discussed. Our contemporary legal culture pairs a pervasively held instrumental theory of the nature of law with consummately instrumental attitudes toward law, a unique combination in which the attitude and theory are mutually reinforcing.

Plan of the Book

The references just given may be too abbreviated to be enlightening at this early juncture, but they are offered as general words of guidance that will become more meaningful as the text progresses. The book proceeds chronologically and thematically, divided into three Parts. The first Part begins with non-instrumental views of

the nature of law and traces out the emergence and spread of instrumental views. This mostly historical exploration conveys non-instrumental views of the common law that circulated in the eighteenth and nineteenth centuries (Chapters 1 and 2). Legislation and the practice of law, already viewed in largely instrumental terms in the nineteenth century, are covered next (Chapter 3). This is followed by the early twentieth-century promotion of an instrumental view of law by Holmes, Pound, and the Legal Realists (Chapter 4). Finally, a series of watershed events and themes in connection with the twentieth-century Supreme Court that fueled the instrumental perception toward law and judges is taken up (Chapter 5).

The second Part surveys contemporary instrumental views of law in the following contexts: legal education (Chapter 6), legal theory (Chapter 7), the practice of law (Chapter 8), cause litigation (Chapter 9), judging and judicial appointments (Chapter 10), and legislation and administrative law (Chapter 11). The 1960s and 1970s, it turns out, was a pivotal period that combined the entrenchment of an instrumental view of law in the legal culture with irresolvable disputes over the social good. A harshly politicized tone set in at that time, with consequences that continue to reverberate in the legal culture.

The third Part unpacks the ways in which an instrumental view of law and the battles it generates are detrimental to the rule of law. Four separate developments are covered: The collapse of fundamental legal limitations that required the law to conform to right, and deterioration of belief in the public good (Chapter 12).The reduction in the binding quality of legal rules, and spreading doubts about judicial objectivity (Chapter 13). Legal theorists recognize these problems for the rule of law separately; this discussion shows they are connected by a common antipathy to, and pressure from, an instrumental view of law.

As this summary indicates, a great deal of ground is canvassed in this work. Depth of coverage has been sacrificed to maintain a focused narrative. Each chapter is limited to conveying an instrumental view of law and its implications in the particular context covered. Only in this way can the broad scope of the situation be presented in a single work. Liberally mixing intellectual history with rational reconstruction, supported by empirical studies whenever available – drawing from the fields of legal theory, legal history, constitutional theory, professional ethics, public interest law, political science, and legal sociology – this book lays out an extended argument that the view that law is purely a means to an end lies at the heart of many of our most intractable problems, and that matters are worsening. This book offers a diagnosis of our worrisome time.

Part 1

The spread of legal instrumentalism

1

Non-instrumental views 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 but commingled types of law possessed these characteristics. The first type was natural law and divine law in the Catholic tradition – the Ten Commandments, for example. Divine and natural law were thought to be binding upon and to be infused in 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, providing the content of and setting limits upon positive law. These laws and principles were disclosed through revelation (mainly scripture) and discerned through the application of reason implanted in man by God. As medieval scholar Walter Ullmann put it, "the law itself as the external regulator of society was based upon faith. Faith and law stood to each other in the relation of cause and effect effect."[1]

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, and 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. Law was "'the law of one's fathers,' the preexisting, objective, legal situation . . . "[2] As such, the content of customary law was not the product of any particular individual's 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.

1 Walter Ullmann, *A History of Political Thought: The Middle Ages* (Middlesex: Penguin 1965) 103.
2 Fritz Kern, *Kingship and Law in the Middle Ages* (New York: Harper Torchbooks 1956) 70–1.