

# FORWARD AND ADDENDUM TO: LEGISLATIVE METHODOLOGY

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## FORWARD

The attached paper is about the United States Congress, and argues that that institution needs to adopt a more effective methodology for designing statutes. It further argues that scholars in law, political science and other fields have failed to address this topic because they assume that legislators are motivated exclusively by politics, and that it is therefore pointless for scholars to address normative recommendations to them. To the contrary, the paper argues, empirical evidence strongly indicates that legislators are at least partially motivated by the desire to enact good public policy. Examination of the American legislative process reveals that a large part of the process occurs in what can be described as the “policy space,” that is, an area where political considerations will generally be weak, and where the legislators desire to serve the public is likely to prevail. To be sure, the extent of this area varies, and its boundaries are porous, but it is always present. This leads to the conclusion that the effectiveness of modern legislation could be substantially improved by a normative academic discourse that frames recommendations to legislators about the best way to design legislation. The paper concludes with three

specific recommendations that would improve the methodology for drafting statutes that Congress currently employs. These recommendations are derived from policy analysis, and based on the premise that modern legislation is generally an effort to implement social policy, rather than a declaration of norms. The three recommendations are that the legislative process should begin with a problem statement rather than a drafted bill, that the first committee hearings should focus on alternative for solving the problem and that empirical information about these alternatives should be provided to the committee in a comprehensive, systematic manner.

For the purposes of this talk, I would like to discuss two implications of this paper, the first for the general concept of law, and the second for parliamentary (as opposed to presidential) democracies such as Canada. These two discussions serve as an addendum to the main paper.

## ADDENDUM

### Implications For the Concept of Law

The following is an excerpt from a book I previously published, entitled *Beyond Camelot: Rethinking Politics and Law for the Modern State*. That book was the basis for the attached paper about legislative methodology; thus, the theory of law presented in the book is implied by the paper. The excerpt is reprinted here without footnotes.

## Natural Law

In the pre-modern era, most legal thinkers, whether they were philosophers such as St. Thomas or treatise writers such as Gratian, connected law with reason. Natural and human law are not merely a set of commands that govern human conduct, according to this view, but display a deeper regularity, a regularity analogous to that of the physical world. The physical world obviously exists independently of humans—having been created by God—but humans can perceive and understand it with their God-given faculties. These faculties will only provide access to the reality of the physical world if that world is constructed in a manner that allows them to do so, but, of course, that is what God has ordained. Similarly, the moral order exists independently of human beings, but they can understand it with their God-given mental faculties, specifically the faculty of reason. Reason will only provide access to the objective moral order if that order is so constructed that it is accessible to reason, and here too God has so ordained it through His eternal law. That is why natural law can be discerned by human reason, and what St. Thomas meant when he said that natural law was promulgated by having been inscribed in every person's mind.

In order to be accessible to reason, natural law must possess an essential coherence or regularity; its various provisions must fit together in a manner that can be described as logical. Were they not so connected, were they merely a set of separate rules promulgated by God's will, they could not be perceived by reason, but only by faith or revelation. The underlying conception is best conveyed by a popular T-shirt that reads: "Gravity: It's not just a good idea—it's the law." When we say that something is not just a good idea but the law, we are referring to a human artifact. Gravity is not a law in this sense, but a regularity of the physical world, and the joke lies in describing this physical reality as an ordinary legal enactment. But to St. Thomas, his contemporaries, and his successors for some five centuries to follow, this was not a joke at all. Moral precepts and physical descriptions were both law in roughly the same sense; they were regularities of the external world that were accessible to human perception and reason because they were so structured by God through His eternal law.

With the exception of the London fishmonger who wrote *The Mirror of the Justices*, no medieval legal writer believed that all actual laws could be directly derived from natural law. According to St. Thomas's sophisticated and vastly influential formulation, human law, whether statutory, adjudicatory, or customary, was the product of secular decision-making. Nonetheless, St. Thomas argued, it comported with the natural law that God established and it displayed a related regularity. The product of reason, human law represented an elaboration of its divinely ordained template. In the case of customary law, these regularities were established by the reason God had instilled in every human being; since this law was the product of many people's actions, over

long periods of time, it reflected the cumulation of such reasoned efforts. In the case of statutory or adjudicatory law, the internal coherence and the congruence with natural law resulted from the lawmaker's reason, again instilled by God. Thus, the relationship among customary law, enacted law, and moral precepts did not seem as conflictual to St. Thomas as it appears to most contemporary scholars. This irenic balance was achieved, however, by simply ignoring a multitude of budgetary, military, administrative, and genuinely reformist actions taken by the ruling monarchs of the day. The monarchs, and society in general, cooperated with St. Thomas to achieve this result by characterizing these actions as something other than law.

The same belief in the universal applicability of reason, and the resulting regularity within and between the different types of law, enabled St. Thomas to link two other elements that do not appear conflictual to modern scholars because we link them still. This is the law's amphibious character, its role as a set of rules governing human conduct that are enforced by the sovereign and its role as a constraint on the sovereign himself. Natural law applies to everyone, whether ruler or subject. Human law, derived from natural law by practical reason, displays this same universal applicability. Because of the way human societies are governed, the sovereign can enforce the law against the subjects, but no one can enforce it against the sovereign. This creates a practical problem, which legal theorists generally sidestepped, but it does not alter the universal applicability of law. St. Thomas's concept of a law as an internally coherent system, based on reason, thus explains the amphibious quality of law as a means of governance and a constraint on government.

The idea of laws to which the sovereign voluntarily submits may seem like a pious fantasy at present, but it did not seem so in St. Thomas' time. After all, it was not only the kings whose subjection to the law was voluntary. In large parts of Europe, barons, or even lesser nobles, could only be tried in a royal court if they agreed to the court's jurisdiction, a situation that had been even more widespread two or three centuries earlier. Moreover, self-enforcing bodies of law or rules were common. The Benedictine Rule that governed many medieval monasteries was, in part, an administrative provision backed by Church authority, but included many instructions about personal humility, solitary prayer, and spiritual attitudes that could not be externally enforced. The Code of Love, a set of judgments in legal form embodying the romantic sensibility of the era and possibly promulgated by informal groups of aristocratic women, could only have been conceived as self-enforcing. The rules of chivalry, governing the battlefield behavior and personal comportment of the nobility, possessed the same self-enforcing character. The ubiquity of self-enforcing codes in the medieval era cannot be explained merely as the substitution of divine for human punishment. Even the monastic rules were perceived as in some sense supererogatory, since lay persons could also achieve salvation, and the rules of love and chivalry were essentially secular in character, although the latter became Christianized as time went on. Rather, the idea was that people would voluntarily submit to these rules

due to their sense of honor or virtue and their general conception of their own existence—in other words, due to their desire to create meaning for themselves.

Since these rules were not promulgated by any definitive source or enforced by any authoritative entity, they could only function if they were part of a conceptually coherent system that was understood by those who were governed by them. In other words, they had to possess the same characteristics that are implicit in St. Thomas's account of law. The rules of chivalry, for example, included various provisions about hospitality toward travelers, the treatment of women, the support of just causes, and, perhaps most important, the conduct of battle. Knights were supposed to engage each other individually, or in groups of roughly equal numbers; they were supposed to charge first with their lance; when one knight was unhorsed, but otherwise uninjured, the other was supposed to dismount and engage the first on foot; when a knight was in a position to kill his opponent—which, by the time of full plate armor, often required knocking him down and unlacing his helmet—he was supposed to give his opponent the opportunity to ask for clemency; if clemency was granted, the defeated knight became the victor's prisoner and was expected to follow the victor's instructions. If a prisoner did run away, thereby committing a breach of faith, his captor would insult him by displaying the prisoner's heraldic arms in the reversed position. Rules like these, which claimed to govern a knight's behavior in the heat of mortal combat, would only be obeyed if they seemed reasonable or natural to the people who were subject to them.

Of course, as Johan Huizinga points out, these rules were not obeyed in many cases. Even contemporary laws that are enforced by heavy penalties encounter disobedience. In the Middle Ages, as today, all sorts of laws were violated so extensively that people were continually complaining about crime waves. Vassals regularly concocted reasons for rebelling against their overlords, barons refused to submit to royal jurisdiction, the monasteries were filled with corrupt and concupiscent monks, women often married men for money and slept with them for fun, and knights frequently behaved with lethal savagery. At Agincourt, the victorious English troops, on King Henry V's command, slaughtered their prisoners of war, which would be considered improper even in our own unchivalrous age. The voluntary submission to coherent, comprehended rules was partially a reality and partially a myth, or social fantasy, and it is in fantasy, not reality, that one finds chivalric behavior in its purest form.

In *Lancelot of the Lake*, a thirteenth century French prose romance that constitutes part of the Vulgate cycle, a knight appears at Camelot with two lances sticking through his body and a sword embedded in his skull. He begs Arthur's knights to remove these weapons, but warns them that there is a caveat. Although he has killed the knight who wounded him, whoever removes the weapons must "swear, on holy relics, that he will do his best to avenge me on all those who say they love the man who gave me these wounds more than they do me." Understandably, Arthur's knights are reluctant to undertake

such an open-ended commitment. Lancelot, however, accepts the challenge on the very day that he is knighted; he feels sorry for the wounded knight and besides, the wounds have begun to smell terrible. This leads, quite predictably, to a series of battles with the allies of the wounded knight's victim, who seem to be widely distributed across the length and breadth of England.

One day, Lancelot, pursuing one of his various quests, is invited to spend the night at a castle, where he is graciously entertained by its lord. To his horror, Lancelot learns that the lord stands guard every day, waiting to kill the knight who removed the weapons from the wounded man's body. Lancelot passes the night in tears; "he was so worried that he did not know what to do, whether to fight with his host or break his oath." The next morning, he asks the lord to grant him a boon, to which the lord agrees. Lancelot, still weeping, then states that the boon the lord has granted is "to say, as long as I am here, that you love the wounded man better than the man who wounded him." The lord, realizing now who Lancelot is, falls down in a faint; when he revives, he says what Lancelot has requested of him and promptly faints again. Lancelot then departs, but the lord catches up to him. Released from his oath to Lancelot, he now declares he loves the dead man, who turns out to be his uncle, more than the wounded one. Lancelot and the lord proceed to fight, of course, and, as Lancelot begins to prevail, he begs the lord to declare that he loves the wounded man better. The lord refuses; Lancelot attacks, drives him to the edge of a nearby river, unlaces his helmet, and begs him to save himself by saying he loves the wounded man better, but the lord refuses once again. Lancelot, now furious, says that the lord "would not die, please God, by any weapon of his," and drowns the man in the river.

All the fainting and weeping by these two great warriors is occasioned by the conflict between the rules of hospitality and the rules of oath taking. Lancelot is clever in avoiding an outright violation of either rule, but neither he nor the lord can prevent the ultimate outcome. Their fanatical devotion to the self-enforcing rules of chivalry, their willingness to place obedience to these rules above life itself, is a model of behavior that was certainly meaningful to medieval audiences, however frequently or rarely it was displayed in real situations. It suggests that the rules of chivalry were so deeply felt by those they governed—so deeply internalized, to use our modern parlance—that they were perceived as truly natural. Although secular in origin, they seemed to be inscribed in the order of the universe itself, and to possess the logic and comprehensibility that was attributed to God's creation.

## Natural Law and Modern Theory

In St. Thomas's work, God acts simultaneously by exercising His will and by establishing an autonomously operating system of reason. The two are equivalent because of eternal law, the system of reason by which God governs the universe. Later thinkers, who favored naturalistic explanations, were readily able to separate the two bases of action that St. Thomas had so

assiduously joined without making many other changes in his theory of law. Once the supernatural order of eternal and divine law were removed from the upper part of St. Thomas's gigantic fresco, there remained a realistic, finely drawn depiction of natural and human law that, with a little brushing up, and the addition of perspective, was entirely appealing to seventeenth- and eighteenth-century thinkers. According to this redacted picture, natural law was the product of human reason and was thus apparent to anyone who followed the classical -- or Thomist -- ideal of living in accordance with such reason, whether or not that person was following the will of God. Many of the greatest legal thinkers of this era, including Grotius, Pufendorf, and Christian Wolff, adopted this position, and devoted their efforts to demonstrating that a comprehensive body of detailed human laws could be derived from the desanctified natural law that was based on reason. As Thomas Browne explained. "Thus are there two books from whence I collect my divinity: besides that written one of God, another of his servant nature, that universal and public manuscript that lies expanded unto the eyes of all. Those that never saw him in the one have discovered him in the other." It was because natural law was linked to human reason that it could be treated as a universal set of rules infusing public life with a sense of collective purpose and shared belief, and thus survive the demise of the religious unity that characterized the Middle Ages.

According to most contemporary observers, however, natural law has now been replaced by positive law, and this positivization of law represents one of the crucial stages in the modern world's emergence from its medieval antecedents. The transition is generally viewed as having occurred during the last part of the eighteenth century and the first part of the nineteenth, with the promulgation and widespread adoption of the Napoleonic Code and of similar codes in Austria and Prussia. The newly formed United States did not engage in any similar codification, but Morton Horwitz has documented a parallel development in its judge-made law. During this same period of time, he observes, American judges stopped justifying their decisions in natural law terms and switched to social policy. They "came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct." To be sure, a number of contemporary scholars have championed natural law, including Randy Barnett, John Finnis, Robert George, Martin Golding, Heidi Hurd, Alasdair Macintyre, Jacques Maritain, Michael Moore, Henry Veatch, and Lloyd Weinreb, but they generally cast their work as a proposed revival, and acknowledge that their views oppose the prevailing mode of legal thought.

The concept of law as a coherent body of rules accessible to reason is not defunct, however. It lives on in the very same legal codes that supposedly displaced it, as well as in the thinking of most leading jurisprudentialists. With respect to legal codes, the sacerdotal concept of law persists in the view that regularity is not merely one of many virtues that a code might display, but the cardinal virtue, and that any code that cannot lay claim to

it should be counted as a failure. European codifiers have dutifully advanced this claim to regularity on behalf of their work product, although they can do so only by resorting to distortion. This insistence on the regularity of codes manifests itself in the European approach to judicial interpretation. It is obvious that no code can provide an explicit answer to every particular situation that arises under it, and that the language of the code must be interpreted to address unanticipated problems. But European jurists, particularly in France, have long maintained that all these problems can be resolved by reason, specifically by the logical extrapolation of the code's explicit language, without reliance on creative interpretation or judicial precedent. Even in England, which not only has no comprehensive code but is the mother of the common law, judges maintain the same view with respect to specialized statutes. Admittedly, this unwillingness to recognize judicial gap-filling is partially motivated by a political commitment to parliamentary supremacy, but such determined insensibility would not be possible, it would not make any sense, without a conceptual belief in the underlying regularity of general codes or specialized statutes.

A more serious problem induced by our continued reliance on the concept of law is that the insistent belief in the regularity of codes or statutes can only be preserved if the code or statute is limited to rules regulating traditional legal subject matter. As J. B. Ruhl, James Salzman, and Peter Schuck point out, the administrative state has led to an explosive growth in the number and complexity of governmental rules. The mass of detailed, technical, policy-driven statutes and regulations that administrative agencies enforce could not plausibly be regarded as exhibiting the regularity that remains central to the concept of law. As a result, the claim to, or demand for, legal regularity has banished all these administrative statutes and regulations to the vaguely charted frontiers of the legal realm. Although they are often more important, in their impact upon business, education, housing, health care, and the environment, than court-enforced provisions, they continue to be regarded as peripheral. Few comprehensive efforts have been made to organize them, to help businesses and individuals find their way through their complexities, to indicate which ones are relevant to specific social actions, to make them user-friendly or, as William Buzbee points out, to ensure that their coverage is comprehensive. Great energy continues to be lavished on civil and criminal codes, while the more important, more complex, and enormously more massive body of administratively enforced statutes and regulations remains a disorganized and relatively impenetrable mass.

The same tendency to treat law as a coherent body of rules accessible to reason can be discerned in the work of contemporary legal theorists. Consider, for example, the most influential formulation of positivism, and perhaps the most influential theory of law in the English-speaking world, H.L.A. Hart's *The Concept of Law*. The core of this work is the criticism that Hart offers of John Austin's and Hans Kelsen's positivist view that law is nothing



more than the commands of the sovereign that are backed by sanctions. But his criticism fails to confront the most basic difficulty with positivism, namely, that it is dominated by the same commitment to regularity and coherence as the natural law theory it is designed to refute. The reason for Hart's failure is that his own approach is also afflicted with this difficulty and thus cannot confront the reality of the administrative state.

First, Hart argues that the Austin-Kelsen formulation distorts law "as the price of uniformity"; law does not merely instruct officials to impose sanctions, but also instructs citizens how to behave. To describe law exclusively in terms of sanctions is like saying that the rules of baseball direct umpires to make declarations about the actions of some people running around on a field, rather than directing players how to play a game whose basic principles they understand. For example, a law providing that "no vehicle may be taken into the park" is not merely intended as an instruction to public officials; it also tells citizens not to drive their cars down the paths or across the grass. But Hart's idea that the law tells citizens how to behave suffers from the same defect as the Austin-Kelsen definition of law as commands. Both theories fail to account for a large proportion of our actual laws, specifically those that are distinctive features of a modern administrative state. Just as St. Thomas and his contemporaries excluded royal legislation from their concept of law, Hart excludes administratively oriented legislation from that concept.

Hart's law against driving in the park fits the traditional model of an instruction to citizens regarding their individual behavior. But how did the park get there in the first place? This was not a particularly important question for a traditional state, which generally did not establish public parks, but it is central to an administrative government, which not only creates and operates parks, but also schools, universities, libraries, museums, airports, train lines, bus lines, prisons, hospitals, clinics, fire stations, hazardous waste dumps, oil storage facilities, research stations, wildlife refuges, housing projects, welfare offices, job-training programs, drug rehabilitation facilities, and neighborhood youth anti-drug, alcohol, and violence counseling centers. The park, and these other facilities, came into existence because some legislative body passed what we ordinarily call a law. That law, however, does not instruct citizens how to behave; instead, it provides services to citizens by creating public institutions.

Another type of statute that is characteristic of the administrative state, and that also falls outside Hart's conception of law, as well as Austin's and Kelsen's, is one that provides monetary or various in-kind benefits to citizens--income support, medical expenses, disability payments, veterans payments, vouchers, retirement income, disaster relief, or mass injury compensation. These statutes are not designed to control citizen conduct but to transfer resources to meet citizen needs. The distribution of benefits to the blind, for example, is intended to give blind people money, not to encourage blindness; the distribution of social security is not intended to encourage people to grow old, or even to stop

saving on their own. Still a third type of statute that Austin, Kelsen, and Hart fail to consider is an appropriations bill, an allocation of the state's fiscal resources. All governments make such appropriations, but the process has become more important since the abolition of particularized fees and the creation of a centralized budget that occurred at the tipping point of the administrative state. The appropriations bill is always one of the most important pieces of legislation in any session of the U.S. Congress, and, in the absence of epochal legislation like the Civil Rights Act or the Clean Air Act, often the most important. Yet no jurisprudential theory of law, and certainly not Hart's, Austin's, or Kelsen's, takes account of such a statute.

Hart's second criticism of Austin and Kelsen reveals a similar unwillingness to confront the realities of a modern administrative state. The positivist claim that law consists of commands backed by sanctions, Hart argues, applies only imperfectly to rules that instruct public officials such as judges to fulfill certain roles, or that authorize private parties to take action such as making wills or contracts. Hart describes these as power-conferring rules, and argues that Austin and Kelsen force such rules into a Procrustean bed of their positivist theory at the expense of plausibility. Neither rules conferring jurisdiction on government agents nor rules authorizing private parties to take binding legal action, he argues, are accurately described as orders backed by sanctions. But Hart's characterization of these rules as power-conferring has forced the multiplicity of intra-governmental communications into a Procrustean bed of its own. As discussed in Chapter 3, power is an atavistic term for a set of relationships that are more accurately analyzed in terms of authorization and supervision. Statutes are only one mechanism by which government officials are authorized and supervised. There are numerous other signals, including guidelines, suggestions, advice, information, and disapproval that fulfill precisely the same function. To cordon off one type of authorization and supervision from the others by describing it as law, and then to combine it with qualitatively different actions such as regulating citizen behavior, makes a strong assertion with no obvious justification.

Moreover, even if one ignores the difficulties with the term 'power,' describing intra-governmental provisions as power conferring suffers from the same artificiality that Hart condemns. In discussing contract law, which he describes as conferring rule-making power on private citizens, Hart rejects the idea that this law can be characterized as imposing the sanction of non-enforcement for failure to follow the specified rules. The law is not designed to sanction people, Hart argues, but to grant them the capacity to take legally binding action. If that is true, however, then it is surely true that most statutes creating institutions, providing benefits, or allocating fiscal resources are not designed to confer power on government officials but to grant them the capacity to provide government services to citizens. The creation of a public school is intended to educate children, not to employ or empower principals and teachers; the distribution of welfare benefits is intended to

distribute money to the poor, not to create a welfare bureaucracy. The grant of power, like the limits on citizen behavior, is incidental to the service.

Hart's leading jurisprudential adversary is Ronald Dworkin, but Dworkin's approach to law is equally beholden to pre-modern, natural law-related concepts of regularity. Dworkin's theory of judicial decision making holds that law consists of general principles as well as specific rules. He then asserts, contrary to the view of most other legal scholars, including Hart, that there are definitive answers to all legal issues. To be sure, some issues are hard cases that rules cannot resolve, but definitive answers can be found by referring to general principles embedded in our system of law. These principles can be applied to specific cases by treating law as possessing the virtue of integrity. Dworkin defines integrity as a conceptual framework that "instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness." Judges might also decide hard cases by invoking social policy considerations, but that is a mistake, in Dworkin's view, because it represents an excursion beyond the limits of the law, an excursion that is both unjustified and, given the presence of embedded legal principles, unnecessary.

Although heavily criticized, this theory does succeed in embodying the aspiration of many American legal scholars to reconcile governmental action and law. For present purposes, the important point is that Dworkin's notion of integrity is virtually a restatement of the natural law conception that all law forms a coherent conceptual system that is accessible to reason. Dworkin can plausibly advance this position because his idea of law centers on the judiciary, and takes adjudication as its modal action. His grandly titled book, *Law's Empire*, begins: "It matters how judges decide cases." About midway through the book, however, after introducing his principle of integrity, it occurs to him that the modern legal system involves a great deal of statutory drafting as well as adjudication, and that the provisions that result from statutory drafting compose a large proportion of modern law. He then attempts to apply his natural-law derived theory of adjudication to the drafting process, or more generally, to the policy making process that defines the essence of the administrative state. Legislatures, Dworkin argues, also strive to instantiate the principle of integrity. After all, they do not reach compromises between contending political forces by making arbitrary distinctions. We think it unacceptable, for example, to resolve a political conflict about racial discrimination by forbidding it on buses but permitting it in restaurants, or a conflict about abortion by criminalizing it for pregnant women born in even-number years but not for women born in odd ones. The rejection of such "checkerboard" statutes, Dworkin argues, demonstrates that the principle of integrity applies to drafting statutes or, presumably, although he makes no mention of it, to drafting administrative regulations, just as it applies to judicial decision making.

Even if what Dworkin says were true, it would fail to prove his point. The fact that legislative or administrative drafters seek to achieve integrity only indicates that this is one of their values, one criterion for determining whether their efforts are successful. There are obviously other criteria, such as whether the statute achieves its basic purpose of providing security, prosperity, or liberty in a fair and efficient manner. But Dworkin's claim about the legislative process is not true; legislative and administrative drafters regularly enact arbitrary compromises between contending forces. This occurs, for example, nearly every time a number is selected for a statutory rule. Consumer groups want customer liability capped at fifty dollars, while banks want unlimited liability, so the statute sets liability at five hundred dollars. What drafters rarely enact, however, are insane compromises, like Dworkin's checkerboard statutes. The problem with such statutes is not that they lack integrity, but that they lack any reasonable relation to the policy that the drafters are trying to achieve. If some people oppose abortion and others favor it, there is simply no sense in forbidding it to an arbitrarily defined group of women and permitting it for others. Rather, the drafters will settle on some compromise related to the substance of the disagreement, such as permitting abortions only in the first trimester, or requiring anti-abortion counseling before the procedure can be performed. The reason Dworkin thinks that the problem with checkerboard statutes is their lack of integrity is because he ignores the policy-making aspect of the modern state. Having declared that judges should not engage in policy making – a questionable but conventional assertion-- he seems to forget that the same prohibition cannot possibly be extended to legislators and administrators. As a result, he loses track of the distinction between totally arbitrary compromises that seem unacceptable to everyone and sensible compromises, related to the underlying policy debate, that seem unacceptable only to Ronald Dworkin. In the final analysis, Dworkin's approach to law is heavily judicialized. It is at least two centuries out of date, but, like Hart's outdated view, it allows him to sustain his nostalgia-driven claim that the legal system should be governed by the inherited principle of conceptual coherence.

### Policy and Implementation as an Alternative to Law

The foregoing considerations suggest that we should bracket the concept of law, that we should suspend its claim to describe some aspect of our society in a useful or convincing way and explore the possibility of an alternative description. This alternative can be derived from the unified image of the administrative state that was presented in Part I. The governmental actions to which the concept of law refers can be characterized as signals that flow from governmental units to other governmental units or to units outside government. Various aspects of such signals have already been discussed, including their role in creating the government's internal structure (Chapters 2 and 3), and the willingness of private parties to conform to their

requirements (Chapter 5). The concern here, and in the remainder of this part, is with the purpose, or meaning, of these signals. In essence, they are the mechanism by which government formulates and implements its policies, or, more precisely, the way government officials carry out their assigned role, as they conceive it. Thus, the bracketed concept of law can be replaced, in the administrative state, with the alternative concept of policy and implementation.

Bracketing the concept of law, it should be recalled, only means that this concept will not be used as an analytic category in describing modern government. No effort is being made to extirpate the term 'law' from the English language. Thus, it would be awkward to refer to the body of judge-made rules that create and implement policy in various fields as anything other than the Common Law (a term that will be capitalized from here on). More obviously still, no effort will be made to rename antitrust law, lawyers, law school, or the LSAT. The point is not to purify the language, or to joust with definitions, but to identify useful ways of describing the features of the administrative state that has become our all-encompassing political reality.

The division of the governmental actions into policy making and implementation captures that reality; in fact, it parallels the bipartite conception of rationality that Weber identified as the essential feature of the bureaucratic state. Each policy can be regarded as a goal, or end, that can be evaluated by means of values rationality, while its implementation can be regarded as the means, or mechanism, to which instrumental rationality applies. Taken together, policy and implementation thus constitute the full range of governmental action in a modern state. Despite this comprehensive quality, the terms, being nothing more than heuristics, must be used with caution. Weber states that the formulation of goals through cost-benefit analysis can constitute a form of instrumental rationality. Herbert Simon points out that the characterization of actions as policy making or implementation is not absolute, but changes according to the institutional context; that is, a means for a particular governmental unit may become an end for its subordinate.

Recharacterizing the bracketed concept of law as policy and implementation offers a number of descriptive advantages. It connects legal scholarship with scholarship in other fields, it comports with the character of the administrative state, and it encompasses the full range of actions that the government takes in carrying out its functions. To begin with the connection between legal scholarship and scholarship in other fields, the categories of policy and implementation are central to modern political science research about the functions of government. Policy making is featured in the work of Steven Kelman, Charles Lindblom, Nelson Polsby, Herbert Simon, Edith Stokey, Richard Zeckhauser, Aaron Wildavsky, and others. Implementation has become a subject of discussion more recently, as described in Chapter 5, but has achieved similar importance through the efforts of scholars such as Ian Ayres, Eugene Bardach, John Braithwaite, Cary Coglianese, Keith Hawkins, Robert Kagan, John Scholz, and Wildavsky. In fact, only rational choice

scholars, who regard governmental action as the result of individual efforts to secure personal advantage, have consistently rejected the characterization of governmental action in policy and implementation terms. Even within this tradition, the policy and implementation approach has gradually appeared through positive political theory, which treats institutions as single actors intent on achieving emergent goals.

Legal scholars have long recognized that the continuing vitality and relevance of their field depends upon connecting it with other disciplines. Recharacterizing law in policy and implementation terms facilitates this connection by coordinating the discourse of legal scholarship with the political science approach to government. In fact, policy and implementation has become a central concern for administrative law scholars such as Ronald Cass, Colin Diver, Jody Freeman, Thomas McGarity, Mark Seidenfeld, Peter Strauss, and Cass Sunstein. But the concept of law, and the sense that law is a distinctive category of governmental action in a modern state, has operated as an impediment to all these efforts. As Brian Tamanaha points out, the question "What is law?" continues to hover over interdisciplinary studies. Much energy has been expended on the dubious assumption that the question has an answer, and that the answer will yield valuable insights of some sort. Once law is bracketed, this inquiry can be set aside, and the intellectual tools that have been developed during the past century of social science research can be applied to the legal system as part of a continuous field with the remainder of the social realm. This does not mean that legal scholarship must abandon its distinctively prescriptive stance, its efforts to recommend better rules and strategies to government decision makers. Rather, what it means is that these prescriptions can draw more comfortably on social science and be applied wherever they are justified by their own force, without being encumbered by the sense that legal scholars are straying outside their field, or that they must define the areas that they address as law.

Beyond its ability to facilitate the connection between legal and social science scholarship, the recharacterization of law as policy and implementation provides a benefit for scholars in all fields because it comports with the character of the modern administrative state. In pre-modern Europe, government in its entirety was regarded as predominantly judicial; its purpose was to discern and apply the eternal verities that were conceived in terms of natural law. The transition to the administrative state replaced this model with a policy-making approach. The articulation of purpose that constitutes part of this transition means that government actions are no longer being justified by tradition, or linked to natural law, but instead are being viewed as conscious efforts to achieve specific goals that are publicly identified as social policy. As Bronwen Morgan suggests, these policy efforts are a form of "non-judicial legality" grounded on regulatory and governance strategies. Modern government is eudaemonic; it exists to solve social and economic problems, to provide citizens with an optimal material environment, and to facilitate their individualized self-fulfillment. The

implementation of public policy is the mechanism by which this enterprise is carried out. Replacing law with policy and implementation thus reflects the shift from a sacerdotal to an instrumental conception of the state.

Finally, the concept of policy and implementation encompasses the broader range of governmental actions that characterize the modern state's effort to achieve its eudaemonic goals. This is true whether one considers the mode of discourse that government signals employ or the governance function that they fulfill. With respect to mode of discourse, our standard concept of law as a coherent set of rules governing private conduct has traditionally induced legal scholars to focus their attention on performative governmental signals, and more specifically on the subset of these signals that constitute commands. The style of governance that results is typically described as command and control regulation. Emphasis on this approach has placed other types of signals outside the boundary of law, where they are often left uncategorized, and either ignored or condemned for their unlawlike character. In recent years, however, a different approach to the administrative process, sometimes described as New Public Governance, has drawn attention to the rich variety of signals that are found in modern government. Very often, a superior influences or controls the actions of its subordinates by performative signals such as suggestions, guidelines, or judgments, rather than by command. Almost invariably, the subordinate influences its superiors by these means. Within government, this process contributes to the complex relationship between both hierarchically connected and unconnected units that is described in Chapter 3. Between government and citizens, it contributes to the interaction between regulated parties, other interest groups, and regulators described in Chapter 4. As those chapters also indicate, informative statements and judgments are equally important. Given that people are only boundedly rational, their access to information often determines the quality of their decisions and their capacity to affect the behavior of others. Subtle indications of approval or disapproval are often the best way to induce compliance, or to calibrate the precise effect that governmental officials are trying to achieve in a complex situation. There is no reason to assume that all these expressive, informative, and noncommand performative signals are less important than commands, particularly in the fluid, continuous, and comprehensive context of administrative governance. The matter should be determined by analysis, and our conceptual framework should encourage that analysis, rather than prejudging or precluding it.

With respect to the range of governance functions, the concept of policy and implementation is also substantially broader than law because it accommodates important governmental actions that do not control citizen conduct, and thus appear unlawlike in character. As Neil Komesar and Peter Schuck point out, government can sometimes achieve its goals by leaving their implementation to other mechanisms of control, such as social norms or the market, and perhaps support these mechanisms with informative or expressive signals. When government acts directly, moreover, it

often does so by creating an institution such as a park or other facility, by distributing benefits, or by allocating resources through an appropriations bill. Thus law, as we use the term, seems applicable only to that subset of governmental activities that attempts to achieve policy goals through the mechanism of generally stated rules, an important but far from exclusive approach in modern government.

Even when the government acts through rules, those rules are often part of the gigantic mass of technical, hyper-detailed regulations generated by administrative agencies. Literally speaking, they count as law, but they are not the sort of law that jurisprudential theories of the subject call to mind. In fact, judicial decisions, government's most quintessentially legal actions, are no longer particularly lawlike in the modern administrative state. To begin with, as Judith Resnik notes, judges increasingly avoid handing down decisions at all, preferring to settle cases in order to manage their massive dockets. Moreover, because complex institutions are often involved, the opinions they do issue tend to produce their effects by initiating an ongoing dialogue, or generating indirect and subtle crosscurrents, rather than by declaration or ukase. Alexander Bickel noted this phenomenon, but he treated it as a device that courts could use to guard their own legitimacy, and the outmoded notion of legitimacy obscured the full consequences of his observation. New Public Governance scholarship by Michael Dorf, Charles Sabel, William Simon, Susan Sturm, Cass Sunstein, David Zaring and others has drawn attention to the ways in which judicial decisions become part of the same recursive institutional process of threat, bargain, cajolery, reexamination, and negotiation that characterizes the unlawlike regulation of administrative agencies.

As discussed in Chapter 3, the concept of power, like the concept of law, also has the effect of focusing attention on commands to the exclusion of other modes of discourse, and on control of human conduct to the exclusion of other governance functions. This overlap between the two concepts is hardly adventitious. Both developed during the era when the government was relatively small and primarily concerned with the maintenance of civil order. In such circumstances, it generally acted at a distance from the citizens; it established basic rules of conduct and enforced those rules by means of physical compulsion. Such delimited and dramatically enforced intrusions into private life could be readily conceptualized in terms of governmental power, and readily organized into a coherent pattern recognizable as law. Administrative government, in contrast, is comprehensive in scope and vast in scale. It maintains continuous contact with the citizens it regulates and requires continuous coordination among its numerous and widely dispersed components. In this context, it employs a much broader range of discursive signals, and carries out a broader range of functions, neither of which can be organized into a coherent pattern with an internal logic that comports with our concept of law.



### *Implications for Parliamentary Systems*

Modern democracy comes in two basic forms (with variations, of course): parliamentary and presidential. The United States is a presidential system, which means that the chief executive and the legislature are independently elected. As a result, the two branches are not necessarily controlled by the same party and, in any case, do not act in direct conjunction with each other. This means that the American legislature designs and enacts its own statutes, although the chief executive often proposes legislation and always exercises considerable influence over its enactment. The attached paper deals with that situation; its insistence that scholars address normative arguments to Congress and state legislatures is based on the fact that, in the American system, these legislatures bear the primary responsibility for statutory design.

In the other basic form of modern democracy, a parliamentary system such as Canada's, the situation is distinctly different. The majority of the legislature, which in modern terms means the political party that has obtained the majority, in effect chooses the chief executive. That executive must have the confidence of the legislature, which means that the legislature must vote in favor of its major legislative proposals. The defeat of a proposal means that the chief executive, or prime minister, must resign in favor of someone whose proposals will be enacted by the legislature, or must call for new elections that produce a legislature with a majority that will enact the proposals of the original chief executive. This means that as long as a particular executive, that is, prime minister and cabinet, remains in office, all its proposals will be enacted by the legislature. Under such a system, the

executive, not the legislature, will bear the primary responsibility for statutory design. Drawing on the relatively large number of appointed government officials under its direct command, the executive will draft bills and send them to the legislature, knowing that those bills will be enacted into law.

The academic discourse by which scholars can address recommendations to such appointed officials about the general methodology that they should use to design legislation, and about the approach that they should take to particular problems, is well established. It is policy analysis, the model that the attached paper uses as the basis of the legislative methodology it recommends. It might appear, therefore, that the paper is not relevant to a parliamentary system such as Canada's. There is no need for a new academic discourse regarding statutory design in a parliamentary system because design is being carried out by appointed officials who are addressed by an existing academic discourse. Conversely, there is no need for scholars to develop an academic discourse that frames recommendations about statutory design to the legislature because the legislature is not the institution that is designing the statutes.

I am prepared to contemplate the possibility that my paper is not relevant to Canada, and that I will fall among the ranks of Americans in so many areas who ignore the differences between us and our northern neighbor. I am also willing to admit, consistent with this possibility, to a distressing level of ignorance about Canadian government. What I want to do here, however, is to speculate about the ways that an academic discourse addressing legislators about statutory design might be relevant to Canada, that the existing discourse addressed to appointed

policy analysts might not be the only type of scholarship that would be beneficial in the context of a parliamentary democracy such as Canada's.

Although the Canadian House of Commons necessarily enacts government bills as long as the particular chief executive and cabinet – or the particular legislature – remain in power, it is not regarded as the proverbial “rubber stamp.” As the group of public officials – the only public officials at the national level – elected by the people, it is expected to play at least some direct role in the legislative process other than mere approval. That role can be defined as quality control. The modernity of the terminology is intentional; although the House of Commons is based on an English model that date back to the thirteenth century, its role and meaning, like the meaning of law in general (see the preceding section) must be redefined in terms of modern administrative governance if the institution is to be relevant and effective in the modern context.

Quality control is supportive but evaluative. It accepts the basic premise and plan of the function that it is reviewing, but tests actual operations against that declared plan and premise. Importantly, it addresses both procedures and results, with the balance between the two depending on the relative expertise and information available to the primary actor and the quality assessor. The greater the advantage of the primary actor, in terms of both expertise and information, the more the assessor will focus on procedure. The question here is whether the actor employed a decision process likely to produce good results or, alternatively, whether the actor employed a process that made use of its superior expertise and information. As the actor's expertise and informational advantages decline, relative

to the assessor, the more the assessor will, or should, evaluate the substantive conclusions that the actor reached. The question here is whether the actor reached the right result, whether its decisions are likely to achieve its declared goals.

A fair synonym for such quality control is monitoring. Thinking about the quality control that a parliamentary legislature might exercise as monitoring is helpful because it mediates between (or, more colloquially, it fudges) the role of superior and subordinate. In one sense, a parliamentary legislature is the executive's superior, since it chooses the executive and has the authority to unseat it. In another sense, however, it is the executive's subordinate because, as long as the executive remains in power, the legislature is supposed to do what the executive tells it to do, at least in general outline. The concept of monitoring covers both situations. A superior should monitor her subordinates to make sure that they are acting properly. At the same time, it is important, in any democratic system, that those exercising the highest levels of authority, be monitored themselves. A good subordinate will do so, and a good system will encourage subordinates to play this role and protect them against the predictable ire of the superiors that they evaluate. This is the reason Aaron Wildavsky titled his book on policy analysis *Speaking Truth to Power*. In fact, monitoring is carried out, on a regular basis, not only by those who have subordinate governmental power, but those who have no governmental power at all, such as private policy organizations and the press. To say that a parliamentary legislature should monitor the executive through quality control, therefore, is to take no position on whether it is superior or subordinate to the executive. It simply recognizes that all decisions, and particularly decisions

about matters as complex as those a modern state confronts, should be assessed and reconsidered.

It might be argued that granting a significant role to Parliament will only mean that special interest groups wield increased influence in Canadian politics. But this makes the assumption that the attached paper argues against, namely, that elected legislators are motivated solely by the desire to secure their re-election, and never by policy-oriented consideration. All the arguments against that assumption that the paper states regarding the American Congress apply to the Canadian Parliament as well. The evidence that legislators are motivated solely by political considerations is weak, and even if it were strong, most legislative decisions occur in a policy space where the influence of politics is relatively weak. Moreover, the executive is hardly immune from lobbying by special interest groups; in fact, such lobbying is likely to be equally intense, and considerably more recondite, than the lobbying of elected legislators.

As in the attached paper, the question with respect to the Canadian Parliament is how a policy-oriented function, in this case quality control or monitoring, is to be institutionalized. It is the institutional grounding of ideas for effective policy making that transforms a recommendation from a theory to a methodology. The primary recommendation of the paper, which is that Congress begin with a problem statement rather than a drafted bill, is inapplicable to major bills in a parliamentary system because these bills are necessarily drafted by the government, and come to the legislature as fully drafted proposals. It is applicable, however, to the relatively small number of private members' bills that will be

seriously considered. It is also applicable to statutes subject to one-line votes, that is, those on which members of the majority party are free to vote as they wish. If the government is truly not taking a position, then it should not present Parliament with a drafted bill. Rather, it should suggest a problem for Parliament to solve.

In fact, the recommended procedure may be even more directly relevant to Canada in this situation than it is to Congress. The very meaning of a one-line vote should preclude the government from presenting Parliament with a drafted bill. If the government does not have a defined position, and is merely making a suggestion, it should not present a bill in the same form that it presents an essential component of its program, and one on which its continued existence depends. To do so is to give a force to the proposal that, according to the government's own views, it does not merit. Rather, the government should pose the problem, and allow Parliament to design the bill in the manner recommended in the attached paper.

One possible way to translate that paper's recommendations into the Canadian context would be that Parliament discusses the problem at the first reading, and gives guidance to the committee and the second reading. The committee would then generate alternatives, evaluate them on the basis of empirical evidence, choose the most attractive alternative on the basis of the evidence, and then draft the bill. The committee draft would then be presented to Parliament at the report stage, and be available for amendment prior to the third reading.

Bills subject to two-line votes are a closer case, but should probably be treated like major government bills, or three-line votes. They are government proposals, and the members of Parliament who participate in the executive branch

are expected to vote for them, even though other members of the majority party are free to vote their preferences. They therefore merit the force of a bill subject to a three-line vote, where members of the majority party are obligated to vote in favor, with the differences in Parliament's treatment of them coming later in the process. In other words, bills subject to both three and two line votes represent the government's solution to a problem, not merely the government's concern that a problem exists. In a parliamentary system, it makes sense to present such a solution as a fully drafted bill, because the expectation, in contrast with a presidential system, is that the legislature will endorse the government's position.

Accepting a government bill, however, does not preclude a quality control or monitoring role for Parliament. This function can be carried out in committee, as in the U.S. Congress, most probably after the second reading, and then promulgated to the full chamber at the report stage and discussed prior to the third reading. Committee consideration can be directed to either the procedure by which the bill was drafted, or the substance of the bill itself, depending on the nature of the issue and the sense of the chamber in response to the second reading. Following the proposals in the attached paper, a committee that decided to focus on procedure would inquire whether the administrative agents who drafted the bill began with a problem statement, generated a range of alternative solutions, obtained relevant empirical evidence, evaluated the alternatives in light of the evidence, and chose an alternative on the basis of evidence. If so, the bill could be accepted as is, and the committee could report to the House that the bill was properly designed and should be accepted largely or entirely in its present form. If not, the committee's options

would depend upon the nature of the bill. If the bill were subject to a two-line vote, the committee could recommend that Parliament send the bill back to the government for reconsideration, or it could proceed to exercise quality control on the basis of the bill's substance. If the bill were subject to a three-line vote, the committee would only have the second option.

A committee that decided to exercise quality control on the basis a government bill's substance, either because the government's procedures were inadequate or because the subject matter of the bill was amendable to this approach, would follow a variant of the policy procedure recommended in the attached paper. It would identify the problem that the bill was designed to solve, generate its own alternatives, gather evidence to evaluate those alternatives, and then assess the government's solution in light of this inquiry. In a bill subject to a two-line vote, the committee might then be at liberty to substitute its own bill if its analysis revealed major defects in the government's proposal. If any defects that it found were not as serious, or the bill were subject to a three-line vote, then the committee would limit itself to proposing amendments. These amendments, whatever their scope, would be generated by the recommended policy process, and would thus come to the full Parliament at the report stage with the authority that attaches to effective public policy making.

In short, legislative methodology is important in a modern parliamentary democracy as well as in a presidential one. It is true that in a parliamentary democracy the legislature does not play the leading role in designing legislation. But the notion of leadership needs to be re-examined in the modern governmental



context. Canada is not an autocracy, where one person's sovereign will determines public policy; like other contemporary democratic regimes, its governmental decisions emerge from a complex interplay of forces and result from the interaction of many individuals and institutions. Such a government can only function optimally, or even effectively, if all the institutions that participate in important decisions fulfill their tasks in an intelligent and responsible manner. Moreover, a parliamentary legislature, even in these days of party leadership, remains a repository of public accountability and collective governmental experience. The more effectively it carries out its secondary role, the larger that role is likely to become. If a parliament demonstrates an ability to evaluate, revise and improve government legislation, the government is more likely to rely upon parliament as an important partner in the enterprise of governance.