

Review: Instrumentalisms

Reviewed Work(s): Law as a Means to an End: Threat to the Rule of Law by Brian Z. Tamanaha

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Source: *Harvard Law Review*, Vol. 120, No. 8 (Jun., 2007), pp. 2113-2132

Published by: The Harvard Law Review Association

Stable URL: <http://www.jstor.org/stable/40042654>

Accessed: 04-12-2017 17:59 UTC

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BOOK REVIEW

INSTRUMENTALISMS

LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW. By Brian Z. Tamanaha. New York: Cambridge University Press. 2006. Pp. xii, 254. \$29.99.

*Reviewed by Adrian Vermeule**

Law as a Means to an End: Threat to the Rule of Law (LME) announces that the American legal system is off course, heading “toward turbulent waters with threatening shoals,” and that “[w]e must pay heed to the signs now” (p. 250). The danger is to the very rule of law, and the source of the danger is legal instrumentalism, the idea that “law is a means to an end” (p. 1). Instrumentalism is a cause, a by-product, and a diagnostic signal of increasing conflict in the legal system, a dim jungle in which interest groups battle endlessly (in mutual self-defense) by manipulating legislatures, agencies, and courts; in which judges have mostly become freewheeling policymakers; and in which law professors and law students have mostly become cynical consequentialists.

LME’s central contribution is to raise important questions. What exactly is legal instrumentalism? What additional theoretical utility, if any, does that category have, over and above the better-known categories of consequentialism and pragmatism? What is or are the antonym(s) of legal instrumentalism, and what does a critic of legal instrumentalism end up defending? In most of what follows, I attempt to clarify the theoretical puzzles posed by *LME*’s critique.

My basic suggestion, in Part I, is that there is no such thing as “instrumentalism.” There is only a variety of instrumentalisms, offered in different theoretical contexts for different purposes. The merits of these different instrumentalisms must be evaluated locally rather than globally. Furthermore — this is a separate point, but a complementary one — there are several antonyms for legal instrumentalism that are materially different. It is no more coherent to praise all of them, just because they are not instrumentalism, than it would be to praise all of

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anarchism, fascism, and communism because they are alternatives to liberal democracy.

Subsequently, in Part II, I ask what prescriptions for the legal system follow from a critique of legal instrumentalism. I suggest that in a legal culture pervaded by instrumentalism (in all of its possible senses), there are powerful discursive pressures to justify an anti-instrumental view by reference to the beneficial effects that holding such a view will produce — by reference, that is, to the instrumental benefits of anti-instrumentalism. When combined with the claim that anti-instrumentalism requires certain beliefs, not merely certain actions, this is an intrinsically paradoxical stance; it leads, perhaps unavoidably, to a type of *esoteric legalism*, under which the theorist is quite willing to promote a false belief in the truth of anti-instrumentalism in order to secure the benefits of that belief.¹ Unfortunately, however, there are well-known paradoxes of esotericism that make views of this sort self-defeating.

In the Conclusion, I suggest that despite the theoretical puzzles underlying *LME*, it possesses a thematic and emotional unity as a kind of legal dystopia. As such, its contributions should be assessed by literary as well as theoretical criteria.

I. INSTRUMENTALISM AND ITS ANTONYMS

What view might a critique of legal instrumentalism mean to target, and what alternative view would a critique of this sort favor instead? At a high level of generality, *LME* equates the “instrumental view of law” with the view that “law is a means to an end” (p. 1). But as it turns out, that formulation is a conceptual portmanteau into which several different claims can be stuffed. These claims are not entailed by one another, and in some cases they are even in tension with one another. There is no one view or approach that can be described as legal instrumentalism, only a variety of instrumentalisms. And there is no internal unity among the different versions of non-instrumentalism, “just as the set of things that are not edible by man include stones, toadstools, thunderclaps, and the Pythagorean theorem.”² So I will advance two claims: first, instrumentalism is intrinsically plural, not unitary; and second, instrumentalism has many antonyms, not one. These claims are logically independent but substantively related, because a mistake about one can easily cause or at least facilitate a mistake about the other. I will order the discussion

¹ This is just a preliminary description; below, I offer a more extended account of two versions of esoteric legalism. See *infra* Part II, pp. 2125–30.

² Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1560 (1998).

by examining several different ideas, views, or claims that a critique of legal instrumentalism might be intended to target.³

A. *First-Order Consequentialism in Adjudication*

A critique of legal instrumentalism might target consequentialism, especially as used by judges to decide cases. On this view, the “Consciously Ends-Oriented” (CEO) judge “strives to achieve ideologically preferred ends in each case and interprets and manipulates the legal rules to the extent necessary to achieve the ends desired” (p. 241). In the broadest version, the CEO judge might ask what decision will produce the best consequences in the case at hand, and then beat the legal materials into shape accordingly. In a narrower version, the judge does take the legal materials into account, but only as a side constraint on what the judge would otherwise like to hold. If the legal materials are clear, the judge will respect them, because violation of clear law has bad consequences. But when they are unclear, the judge will not go on to consider which side has the better account of the law, all things considered; rather, the judge will rule in accordance with her best guess about sound policy. In either the broad or narrow version, there is some domain of cases in which the judge acts in a first-order instrumental way, attempting to advance her views about what ruling would be best. In contrast to the CEO judge, there is the “Consciously Bound” judge who “strives to abide by the binding dictates of applicable legal rules to come up with the most correct legal interpretation in each case” (*id.*).

If one objects to the CEO judge,⁴ what exactly might the objection be? One idea might be that “instrumental” judging will itself have bad consequences for the legal system.⁵ On this construal, the main worry is that case-specific consequentialism in adjudication might itself be systemically objectionable on consequentialist grounds. It might turn out, in certain states of the world, that the legal system will produce the best consequences, according to some theory or other of good consequences, if judges do not themselves attempt to make the ruling that is consequentially best in particular cases (or perhaps for particular legal rules).

³ I arrange these views or positions in descending order of exegetical support for describing them as principal targets of *LME*'s critique. The succeeding notes document the relative importance of these ideas in *LME*.

⁴ It seems clear that *LME* does object to either version of the CEO judge (pp. 241–45).

⁵ This is the thrust of *LME* (pp. 244–45). *LME* also stresses that an approach in which “judges pay attention to social consequences and strive to achieve legislative purposes and social policies when deciding cases . . . has detrimental consequences for the rule-bound nature of the system” (p. 228).

This goes beyond even the narrow version of CEO judging. It is not just that the judge acknowledges that clear legal materials are a valid side constraint on her all-things-considered estimate of best consequences; rather the judge does not allow such an estimate to have any legal status in the first place. The best consequences will ensue only as a byproduct of a system in which judges confine themselves to the legal materials narrowly defined. And indeed, “the pragmatic judge [might] think the pragmatic thing to be would be a formalist” (p. 130),⁶ because judicial formalism — where “formalism” means decisionmaking tightly anchored to the legal materials — would have good consequences, best enabling the legal system to reach its goals (p. 130).

Whether this second-order thesis holds true for a given court would depend on many institutional variables, including the proportion of legally determinate to indeterminate cases that judges at various levels of the court system must decide, the ability and willingness of judges to coordinate on a particular interpretive approach, and more generally the motivations, information, and decisionmaking capacities of judges, legislatures, and agencies.⁷ It might hold true at some levels of the judicial system but not others, in some legal systems but not others, or at some times but not others. Indeed, we might not have sufficient information to know whether it holds true, and thus be forced to fall back on various decision-theoretic techniques for selecting a desirable theory of adjudication under conditions of risk or uncertainty.⁸

For present purposes, what matters is that the second-order thesis does not underwrite an objection to legal instrumentalism, in any possible sense of legal instrumentalism. The thesis just shifts from the first-order question about how particular cases should be decided to the second-order question about how a system for processing an array of cases should work.⁹ The second-order shift may or may not be useful or plausible,¹⁰ but it does not somehow imply a critique of legal in-

⁶ The author quotes RICHARD A. POSNER, *OVERCOMING LAW* 401 (1995). Internal quotation marks have been omitted.

⁷ See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 53 (2006); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000); cf. Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 728–31 (1992) (arguing that a plain meaning approach in legal interpretation may be justified on systemic grounds even if absurd results are produced in particular cases).

⁸ See VERMEULE, *supra* note 7, at 153–288.

⁹ See generally Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, in *BEHAVIORAL LAW AND ECONOMICS* 187 (Cass R. Sunstein ed., 2000) (providing a conceptual map of second-order decision rules). For an application to constitutional interpretation, see Cass R. Sunstein, *Second-Order Perfectionism* (Univ. of Chi. John M. Olin Law & Econ. Working Paper No. 319, 2006), available at <http://ssrn.com/abstract=948788>.

¹⁰ For affirmative arguments in favor of second-order consequentialism in adjudication, see VERMEULE, *supra* note 7, at 5, 66–85. For useful criticisms, see William N. Eskridge, Jr., *No*

strumentalism, any more than a philosopher who proposes a shift from act-utilitarianism to rule-utilitarianism thereby shows that the principle of utility is intrinsically objectionable.

B. Legal Consequentialism and Pragmatism

One might use instrumentalism as a rough synonym for consequentialism, the thesis that an act (or rule or disposition) is good just insofar as its consequences are good — according to some value theory specifying what counts as a good consequence. A different rough synonym might be pragmatism, which, as applied to law by Judge Posner, is the thesis that legal acts, particularly the acts of judges, are good insofar as they are “reasonable.”¹¹ And one might then go on to speak of views that acknowledge law’s intrinsic integrity, or autonomy, or bindingness as antonyms of pragmatism and consequentialism.¹²

However, consequentialism and pragmatism are not synonymous. Ronald Dworkin, for example, offers an avowedly consequentialist theory of adjudication¹³ but sharply criticizes the Posnerian version of legal pragmatism. On this view, consequentialism is a well-defined philosophical position, right or wrong, but telling judges to decide “reasonably” is meaningless, like telling them to decide “uffishly.”¹⁴ More generally, Posnerian pragmatism is only one version; pragmatism is notoriously a many-headed beast. Some strands of pragmatism offer philosophical views about truth, epistemology, the scientific method, and the social functions of language; some offer philosophical accounts of practical reasoning; still others, like “everyday pragmatism,”¹⁵ attempt to transcend or escape the philosophical frame altogether, with

Frills Textualism, 119 HARV. L. REV. 2041 (2006) (book review), and Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329 (2007) (book review).

¹¹ See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 65 (2003). *LME* devotes most of its attention to the Posnerian account (pp. 126–30).

¹² *LME* often refers to pragmatism (pp. 62–65, 126–30), but it does not speak explicitly of consequentialism. However, a contrast between consequentialism and non-consequentialism, and a tacit equation of pragmatism and consequentialism, is fairly implicit in many of *LME*’s formulations. For example, there is a running contrast between the “pragmatic judge who focuses on outcomes” (p. 243) — a formulation that runs together pragmatism and consequentialism — and the “consciously rule-bound judge” who “feel[s] obliged to search out and apply the strongest legal decision” (*id.*).

¹³ See Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 364 (1997) (“[T]he embedded approach [to legal reasoning] I defend . . . is plainly consequential rather than deontological.”). Oddly, *LME* uses Dworkin as an exemplar of anti-instrumentalism (p. 131). Some other sense of instrumentalism must be in play here, but it is unclear which one. To be fair, however, this is a common mistake about Dworkin, which probably arises because Dworkin defends a deontological account of political morality.

¹⁴ I borrow here from Lewis Carroll, *Jabberwocky*, in *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 21, 22 (Macmillan 1996) (1872). Cf. Dworkin, *supra* note 13, at 367 (noting that it is empty to advise lawyers and judges to do whatever “works”).

¹⁵ See POSNER, *supra* note 11, at 49–56.

dubious success. Here too, it is essential to discriminate among different versions of instrumentalism and different antonyms for instrumentalism — antonyms that seem synonymous with each other but in fact are not.

C. *Designed Law*

A critique of legal instrumentalism might also target designed law — legal rules that are produced by the deliberate or willful engineering of some official or set of officials.¹⁶ Here again, however, there is a grievous material ambiguity, because designed law might itself have two very different antonyms.

First, designed law might be contrasted with law that is “the result of human action, but not of human design.”¹⁷ This is the category of emergent law, which subsumes a range of invisible-hand phenomena, collective action problems, and social choice paradoxes. In these cases, an equilibrium arises from the deliberate actions or strategies of individuals, but the final outcome is just the intersection of these strategies and may not correspond to the intentions of any of the relevant actors. Thus there is no guarantee that the final law will be coherent in what-ever sense a law designed by a single lawmaker might be coherent.

Clear examples of emergent law include customary law, which is designed by no one but takes account of the *opinio juris* of everyone, and the prices and allocations that emerge from markets, which are “law” in the sense that the law authorizes market participants to charge those prices subject to various constraints. More controversial examples include statutory law,¹⁸ written constitutional law, and the opinions of multimember courts. In all these cases, social choice theo-

¹⁶ In this vein, *LME* laments the decline of natural law, reason, and immemorial custom as higher sources of law binding upon and superior to the positive law of the state. The crucial feature of these “[c]lassical rule of law limits” is that they “were thought to exist entirely apart from the will of law-makers” (p. 217). On this account, the shift to an emphasis on written constitutionalism, a feature of legal theory in the nineteenth and twentieth centuries, emphasizes that “constitutional limits on legislation represent contingent acts of will by law-makers that exist only as long as they remain in the document” (p. 218). By contrast, the “former limits imposed by natural principles and common law principles . . . were not the product of human will but were immanent principles of right” (*id.*). See also *LME*’s discussion of the idea that “law should be used to direct the course of social change” (p. 34), which it seems to equate with “an instrumental view of law” (*id.*).

¹⁷ Jon Elster, *Comments on the Paper by Ferejohn and Pasquino*, 2 INT’L J. CONST. L. 240, 241 (2004).

¹⁸ For the case of legislation, see generally GERRY MACKIE, *DEMOCRACY DEFENDED* (2003) (arguing that cycling and other social choice paradoxes rarely occur in Congress). Of course cycling — roughly, the phenomenon in which individual preferences are well-ordered but group preferences display intransitivity, as when A is collectively preferred to B which is collectively preferred to C which is collectively preferred to A — is not the only possible source of incoherence; much work remains to be done on the basic question of how much law is incoherent, in any sense.

rists argue that the outcome of multiperson lawmaking bodies may often reflect no individual's intentions, although all participants act purposively.¹⁹

Second, and more radically, designed law might be contrasted with law that does not arise from human action at all. We might call this latter category *inhuman* law. Perhaps it arises from divine action;²⁰ perhaps it is just there, somehow immanent in nature or the world, more or less accessible to human reason but not a product of human activity. In either case, it is not the product of the lawmakers' will just because it is not the product of any (human) will at all.

For some anti-instrumentalists, it might seem tempting to criticize designed law and to praise both emergent law and inhuman law, neither of which arises from the intentional action of human officials at a particular place and time. But this is like praising both oil and water because neither of them is fire. Undesigned law in the sense of emergent law fits comfortably within any view that might be labeled instrumental. Hayekians and others believe that emergent legal systems have second-order instrumental virtues, because emergent systems aggregate dispersed information, dilute or check centralized official power, and reduce arbitrary treatment.²¹

Indeed, if the move to second-order instrumentalism is admitted, it is clear that lawmakers might exercise their will to set up emergent systems, because the lawmakers anticipate that those systems will have good consequences. Consider that the principal actors within many institutions deliberately leave some domain of the institution's activities to be governed by emergent norms or customs, based on a prediction that the resulting norms will prove superior to whatever rules could be enforced through top-down regulation. So too, markets themselves are emergent systems that in many cases have been deliberately created with a view to the benefits they generate,²² and that in

¹⁹ For written law, see Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) (arguing that "the concept of 'legislative intent'" is meaningless because "[i]ndividuals have intentions . . . [but] collections of individuals do not"); for courts, see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 832 (1982) (concluding that "[c]alls for the Court to be united and to be consistent in all things are forms of utopian argument"). There are large literatures on each of these topics. For an overview, see MAXWELL STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997).

²⁰ *LME* acknowledges this possibility. For example, it identifies a version of noninstrumental law in which "[l]aw was thought to consist of . . . God-given principles disclosed by revelation" (p. 1).

²¹ See, e.g., 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER (1973) (praising common law for its instrumental advantages).

²² Lewis Kornhauser offers the nice large-scale example of deliberate engineering of free markets by the post-1989 democracies of Eastern Europe. See Lewis A. Kornhauser, *Legal Foundations of Economic Analysis of Law* 47–48 (May 31, 2006) (unpublished manuscript). On a smaller

all modern economies are at least sustained by the deliberate ongoing action of officials.²³ Emergent law is just another tool in the instrumentalist's kitbag.

Undesigned law in the sense of inhuman law, however, is much more fundamentally inconsistent with any version of instrumentalism. It deprives humans of agency in the making and amendment of law, except perhaps through pleas for divine intercession. It is an old story in legal theory that emergent customary law and inhuman natural or divine law are in tension with one another,²⁴ in part because the former is bound by time and place while the latter has universal pretensions. In general, it is theoretically counterproductive to stuff both emergent law and inhuman law into a single box labeled "non-instrumental" law.

D. *The Lack of a Common Good*

A critique of legal instrumentalism might not really be criticizing instrumentalism at all, at least not in and of itself. "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" (p. 4). On this view, instrumentalism taken alone is not the problem; rather the problem is that the nature of the ends to which the legal instrument is devoted have changed. The combination of legal instrumentalism and the decline of a common good²⁵ might produce toxic effects, although either element might be inert taken alone.²⁶

It is not at all clear, however, in what sense one might claim that the belief in a common or social good has evaporated, and what this has to do with legal instrumentalism. If the combination of these two developments is the problem, why should legal instrumentalism, merely one of the two interacting elements, be picked out as the main culprit? Moreover, legal theory of the sort that anti-instrumentalists are seemingly most worried about — legal theory influenced by economics, harder forms of political science, and scientific psychology (pp.

scale, firms, nonprofits, and governments within ongoing market systems have recently created internal "prediction markets" with a view to benefiting from the power of such markets to aggregate information.

²³ This is a central theme of CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* (1997).

²⁴ See, e.g., Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209 (1995).

²⁵ *LME* describes developments that have "undermine[d] the notion of the common good" (p. 215).

²⁶ I believe the claim in text is implicit in the following:

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. (p. 4)

118–32) — itself draws on consequentialist disciplines that have enriched our repertoire of accounts of the common good. Those disciplines, which include consequentialist metaethics, political philosophy and political theory, welfare economics, law and economics, and consequentialist political science and theory, offer and endlessly debate a variety of criteria of social evaluation, many of which are plausibly understood as accounts of the common good, and some of which were originally offered as such. Examples include the Pareto principle, the utilitarian social welfare function (in either its total or average versions), and the Kaldor-Hicks criterion, including its many refinements in the discipline of cost-benefit analysis.²⁷

One might hold that legal instrumentalism resting on evaluative criteria like these has the wrong conception of the common good, but that does not show that the concept itself has somehow become untenable. One might point out that these evaluative criteria are hotly debated and that the metacriteria for evaluating them are contested as well; this infinite regress of disagreement might itself be taken to show that a common standard of common good is lacking. But then the problem is not that belief in the common good is itself untenable; it is that there are too many beliefs about the common good — too many sincere people who believe that they have the single best account of the good of all. In any case, however, once an unselfconscious social consensus about what counts as the common good has been shattered, it is not at all clear that it can be restored, even in principle.²⁸

E. Rational Choice and Welfarism

Finally, a critique of legal instrumentalism might target the application to law of the standard model of rational choice, in both its positive and normative forms. Legal instrumentalism amounts to using law “as a means to an end” (p. 6); using the best possible means to given ends has sometimes been offered as a definition of rational action itself.²⁹ Compatible with rational choice, although not entailed by it, is the standard philosophical thesis of welfarism: actions or rules should be evaluated solely by their effects on human well-being, or al-

²⁷ For a recent overview of these criteria and their connections to cost-benefit analysis, see MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006).

²⁸ *LME* acknowledges this point, noting that “a return to former non-instrumental understandings of law . . . appears impossible” (p. 246).

²⁹ See, e.g., Posner, *supra* note 2, at 1551. However, this is a nonstandard definition of rationality. In the standard formal model of rational choice, rationality means the satisfaction of a small set of well-defined choice axioms, notably including completeness (roughly, no options are incommensurable) and transitivity (roughly, no cyclical preferences). See, e.g., SHAUN HARGREAVES HEAP ET AL., *THE THEORY OF CHOICE* 3–14 (1992).

ternatively, states of affairs should be ranked solely as a function of human well-being in those states of affairs.³⁰

Why link rational choice and welfarism? After all, rational choice is either a positive or normative account of individual behavior, while welfarism is principally a criterion for social evaluation.³¹ One can accept rational choice while rejecting welfarism, if one thinks that goods other than human well-being should affect the ranking of actions or states of affairs. Conversely, one might accept welfarism while rejecting rational choice as a positive account, and perhaps even as a normative account, of individual decisionmaking. The reason to link the two ideas is sociological, not conceptual. There is a strong, though not ironclad, correlation or overlap between theorists who work within the rational choice paradigm and theorists who accept welfarism at the level of social evaluation. Practitioners of theoretical disciplines that are instrumentalist in some loose sense — economics, rationalist political science, public choice theory, positive political theory, and social choice theory — typically, though not necessarily, proceed under both banners at once.

On this reading,³² the critique of legal instrumentalism expresses a suite of anxieties about rational choice and welfarism that are standard among legal theorists who draw on disciplines such as legal philosophy

³⁰ See ADLER & POSNER, *supra* note 27. Thanks to Frank Michelman for suggesting that welfarism might be a major target of *LME*.

³¹ At least this is so in its currently controversial forms. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001). Welfarism can also be a metaethical principle for individual action, as in the case of utilitarianism. However, many who reject individual-level utilitarianism accept some form of utilitarianism or welfarism as a social criterion. See, e.g., ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* (1995).

³² Exegetically, it is unclear whether rational choice and welfarism are or are not principal targets of *LME*'s critique. That hypothesis does account for otherwise puzzling features of *LME*, such as the failure to discuss in any depth the Pareto and Kaldor-Hicks criteria as plausible accounts of the common good: if welfarism is a main target, then these maximizing and welfarist criteria are ruled out right from the start. (The Pareto principle, however, can also be interpreted in voluntarist or consent-based rather than welfarist terms. See Kornhauser, *supra* note 22, at 134.) However, the exegetical problem is that rational choice and welfarism are emphatically academic views with no public resonance, while much of *LME* focuses on events in the broader legal profession, the courts, litigation and lobbying, and public politics generally. Sometimes *LME* suggests that rationalist and welfarist theories have corrupted the law students who go on to become litigants, lobbyists, legislators and judges (p. 117), echoing Keynes's aphorism that practical men are the slaves of some defunct economist. But at other times *LME* seems to date the instrumentalization of legal theory as far back as the 1920s and '30s, with the Realists (pp. 65–69) (at least the "[r]adical" Realists such as Jerome Frank "in his most extreme moments" (p. 237)), or even to the late nineteenth and early twentieth centuries, with von Jhering, Holmes, and Pound (pp. 61–65). Those theorists were of course not rationalist or welfarist in any modern sense, unless everything is a precursor of everything else. Finally, *LME* does not discuss rights as such; it discusses higher law as a constraint on sovereign lawmaking, and it does not offer any version of the standard views that rights are a side constraint on the maximization of the good, or a trump on policymaking, and so on. Nor is there much at all in *LME* about distributive justice. If *LME* is suggesting a standard Kantian or Rawlsian view, it chooses a curiously garbled way of doing so.

and jurisprudence, sociology, and history, who in many cases feel besieged by the advances of rationalist and welfarist theorizing in law since the 1960s and '70s.³³ One set of anxieties is positive: rational choice does not capture these theorists' intuitions about how people behave, because their sociological and historical work frequently shows people acting in altruistic, role-bound, cognitively sloppy, and emotionally inflected ways. Another set is normative: welfarism is a maximizing criterion of social evaluation, one that attempts to maximize some good, and critics of instrumentalism are typically inclined toward views that place side constraints on welfarist maximization, usually in the name of rights or distributive justice. They code rational choice and welfarism as Benthamite doctrines that rub against their Kantian and Rawlsian sympathies and that threaten to extinguish strong protection for rights or strong concern for distributive justice.

I will not attempt to untangle these anxieties, beyond a few brief remarks. On the positive side, the rational choice framework by itself assumes nothing at all about whether people are self-interested or altruistic, are committed to roles by socialization or training, are prone to cognitive mistakes, or are driven hither and yon by emotions. Work in many rationalist disciplines has examined such questions by extending the framework in various directions.³⁴ On the normative side, the criteria of social evaluation can themselves build in as much concern as one likes for distributive justice, as in recent "prioritarian" accounts,³⁵ and one can build concern for rights into a broadly consequentialist framework by defining rights violations as bad consequences.³⁶ There are methodological and empirical controversies surrounding these ideas, of course; I mention them only to suggest that the anxieties I have described tend to key off simplistic conceptions of the suspect theories and tend to exaggerate the substantive commit-

³³ *LME* cites this era as the full flowering of instrumentalism in legal theory (p. 118).

³⁴ I can mention only a tiny fraction of this literature, for illustrative purposes. For rationalist accounts of preference formation, see GARY S. BECKER, *ACCOUNTING FOR TASTES* (1996). For a strategic account of the emotions, see ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988). For other analyses of the emotions within a broadly rationalist framework, see, for example, Jennifer S. Lerner, Deborah A. Small, & George Loewenstein, *Heart Strings and Purse Strings: Carryover Effects of Emotions on Economic Decisions*, 15 *PSYCHOL. SCI.* 337 (2004), and Eric A. Posner, *Law and the Emotions*, 89 *GEO. L.J.* 1977 (2001). For a rationalist account of sociological roles, see MARTIN HOLLIS, *THE CUNNING OF REASON* 146–72 (1987). For the economics of altruism and other motivations, see *THE ECONOMICS OF RECIPROCITY, GIVING, AND ALTRUISM* (L.A. Gérard-Varet, S.C. Kolm, & J. Mercier Ythier eds., 2000).

³⁵ See Christoph Lumer, *Prioritarian Welfare Functions: An Elaboration and Justification, in DEMOCRACY AND WELFARE* (Daniel Schoch ed.) (forthcoming), available at <http://mora.rente.nhh.no/projects/EqualityExchange/Portals/o/articles/lumer1.pdf>.

³⁶ See Amartya Sen, *Rights and Agency*, 11 *PHIL. & PUB. AFF.* 3 (1982).

ments that these theories entail. Rational choice and even welfarism are capacious frameworks for analyzing positive and normative problems, and as such are compatible with a wider range of substantive commitments and views than theorists from older frameworks tend to assume.

Bracketing these deeper questions, however, I will restrict myself to some remarks about the relationship among instrumentalism, rational choice, and welfarism. To the extent that a critique of instrumentalism takes rational choice and welfarism to be its main targets, the problem is that these views have no unique or well-defined antonym(s). Because each view, even taken separately, can itself be denied on many dissimilar grounds, one cannot generate a coherent view just by putting a negative sign in front of either or both of them.

Welfarism in its standard version, for example, might be opposed by denying that concern for rights or distributive justice can adequately be built into the social welfare function; by denying the ethical status of the Pareto principle on egalitarian or other grounds;³⁷ by advocating nonstandard social welfare functions, such as the Nietzschean view that society should be judged by the highest peaks of welfare it can produce, rather than by the average or total welfare it produces;³⁸ or by advancing a myriad of other arguments. The only thing that binds all these views together is their common enemy, but it is not true that the enemy of my enemy is my friend; he may well be just another enemy. Many of the competitors to welfarism are mutually antagonistic, and one can oppose welfarism as an *exclusive* criterion of evaluation while admitting that welfare is at least relevant to or a component of the common good.³⁹ It is not obvious what it means to be “against welfarism,” if indeed that is a position anyone takes.

So too with rational choice. One can easily deny that the rationalist framework can be stretched far enough to cover endogenous preference formation, or role morality, or cognitive deficiencies, or emotionally inflected decisionmaking. But these denials themselves entail very different views that can easily be in tension with one another. Consider, for example, the role that emotions play as a constraint on socialization by parents or the state. Once *homo economicus* is slain, *homo sociologicus* and *homo psychologicus* will fall to fighting amongst themselves.

³⁷ For an overview of the tension between Paretianism and egalitarianism, see Patrick Shaw, *The Pareto Argument and Inequality*, 49 PHIL. Q. 353 (1999).

³⁸ See Oliver Wendell Holmes, Jr., *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 584 (1873), reprinted in THE ESSENTIAL HOLMES 120, 122 (Richard A. Posner ed., 1992) (“Why should the greatest number be preferred? Why not the greatest good of the most intelligent and most highly developed?”).

³⁹ See ADLER & POSNER, *supra* note 27.

I conclude both that instrumentalism itself is plural, not unitary, and that the antonyms of instrumentalism are plural as well. There is no such view as instrumentalism; there are only different instrumentalisms that lack any essential common property and are related only through a chain of family resemblances. Overall, there is no point attempting a global or wholesale critique of the different instrumentalisms, which are too disparate a set of targets to be hit by a single arrow. Instead one must evaluate different instrumentalisms in different contexts and for different purposes.

For these reasons, the net benefit of identifying or reviving “instrumentalism” as a theoretical category, over and above the now-standard categories of consequentialism and pragmatism, is small or even negative. Theoretical entities should not be multiplied unnecessarily, beyond the point at which the marginal costs exceed the marginal benefits. On the benefits side, an inherently ambiguous category of “instrumentalism” adds little to the standard categories of consequentialism and pragmatism; it does not dispel any significant confusions that would otherwise exist. On the cost side, disentangling the overlaps, conflicts, and relationships between consequentialism and pragmatism is hard enough already. Adding more isms just thickens the semantic and conceptual fog, especially because instrumentalism is internally heterogeneous and thereby tends to sow confusion. Absent some better reason than has yet been advanced to recognize or revive “instrumentalism” as a useful theoretical category, I believe it is of little utility.⁴⁰

II. ESOTERIC LEGALISM

If instrumentalism in any of the foregoing senses is the problem, what is the solution? What prescriptions for the legal system would flow from a critique of legal instrumentalism, somehow defined? Despite the semantic and conceptual ambiguities outlined so far, it is possible to say something general about what follows from a critique of legal instrumentalism. I will confine the discussion to prescriptions that are broadly compatible with any of the senses of instrumentalism, and any of the antonyms of instrumentalism, discussed in Part I. As we will see, the logical structure of the problems discussed in this Part does not depend on what exactly instrumentalism is taken to mean,

⁴⁰ I do not mean to imply the absurd historical claim that “instrumentalism” has not previously been used as a theoretical category. As *LME* amply documents, the term and the idea have a long history (pp. 61–65). However, in legal theory after World War II, including legal philosophy and jurisprudence, instrumentalism has been largely eclipsed by other theoretical categories. If *LME*'s suggestion is that the term and idea should be revived as central theoretical tools, my suggestion is that the benefits of such a revival are small and the costs large.

nor does the discussion presuppose that the different instrumentalisms share some essential common property rather than a relationship of family resemblance.

The main prescription of *LME* is a type of *esoteric legalism*: the thesis that the legal system will in some way work best if actors within the system believe, falsely, that law is not merely a means to an end. Unfortunately, this sort of view is afflicted by well-known paradoxes that make it self-defeating. Although I shall illustrate the problems through exegesis of *LME*, I shall further suggest that esoteric legalism is not an accidental or dispensable feature of a particular work; it is a discursive trap into which anti-instrumentalists routinely fall, and perhaps cannot avoid, in a legal culture pervaded by legal instrumentalism in all its many senses.

A striking feature of *LME* is that it does not argue, substantively, that law really does consist of divine commands or natural law principles or immemorial custom or immanent reason or any of the other views it labels non-instrumental. *LME* does not argue that such views are true. Quite explicitly, *LME* does “not vouch for the veracity of claims that law embodied principle, reason, and the customs and order of the community” (p. 246), and indeed acknowledges that non-instrumental views of law had “large mythical components” (p. 4).

Rather, the central argument of *LME* is that such views were useful — that the decline of the belief in those views has had bad consequences for the legal system. *LME* places “its emphasis on the untoward consequences of moving from a non-instrumental to an instrumental *view* of law” (p. 246).⁴¹ Notice that we are here discussing what *beliefs* it is beneficial to have, not what *actions* it is useful to take. As *LME* puts it:

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. (p. 6)⁴²

Overall, in summarizing its prescriptions, *LME* says:

⁴¹ Emphasis has been added.

⁴² Other passages are more ambiguous about whether the focus is on beliefs or actions. For example:

The present threat to the rule of law . . . is not that it is impossible for judges to be consciously rule-bound when rendering their decisions, striving to set aside subjective preferences and abide by the legal rules. Rather the threat comes from the *belief* that it cannot be done or the *choice* not to do it. (p. 244)

[L]egislators must be genuinely oriented toward enacting laws that are in the *common* good or *public* interest. . . . [G]overnment officials must see it as their solemn duty to abide by the law in good faith [J]udges, when rendering their decisions, must be committed to searching for the strongest, most correct *legal* answer These three points . . . are the minimal conditions necessary for a properly functioning *instrumental* system of law. (p. 250)⁴³

The last sentence is crucial. Recall that the beliefs *LME* is urging that officials hold are the very beliefs that the rest of the book labels non-instrumental.⁴⁴ The criterion for praising those beliefs, however, is that they produce the instrumentally best system of law, or at least an instrumentally functional system of law. The basic argument, then, is that non-instrumentalism is or was largely mythical, but that belief in it is instrumentally useful.

In combination, these claims produce esoteric legalism. The theorist employs an evaluative criterion that would be self-defeating if disclosed to the subjects of the theory — a criterion that must “usher itself from the scene,”⁴⁵ as in esoteric versions of utilitarianism.⁴⁶ Were legal actors to realize that the non-instrumentality of law is largely mythical, and that others realize this as well, the system would become conceptually and psychologically unstable, however desirable the myth might be on instrumental grounds.

However, we must distinguish two possible versions of esoteric legalism. Under *strong esoteric legalism*, the claim is that the legal system will work (or work best) only if all actors within the system believe that law is not instrumental.⁴⁷ A subtly different view is *weak esoteric legalism*: a necessary condition for the instrumental functioning of the legal system is that a sufficient number of actors believe that a sufficient number of other actors believe in the non-instrumentality of law. The first mass of actors need not themselves believe in the non-instrumentality of law, but they must believe that a critical mass of others do believe in it, and will sanction behavior that is different from the behavior in which a genuine believer would engage.

It is compatible with weak esoteric legalism that in fact none of the actors in the system actually believes in the non-instrumentality of law;

⁴³ The final emphasis has been added.

⁴⁴ I do not see how to square this prescription with the admission that “a return to former non-instrumental understandings of law . . . appears impossible” (p. 246). An additional puzzle, then, is that *LME*'s prescriptions may be ruled out by the very developments identified in *LME*'s diagnosis. For a general analysis of this problem, see Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 *FORDHAM L. REV.* 631 (2006). The discussion in text, however, brackets these problems.

⁴⁵ J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 134 (1973).

⁴⁶ See, e.g., HENRY SIDGWICK, *THE METHODS OF ETHICS* 489–90 (Hackett 1981) (1907).

⁴⁷ The prescriptions quoted above point in this direction.

the beliefs of some that others hold that belief may in fact be false. The theorist is still on a privileged plane, however, because only she is allowed to know that in fact *no one* believes in the non-instrumentality of law, if that is true. Were that knowledge to become general, there would be no fear of sanctions imposed by true believers, and the system would again implode. By contrast, under second-order consequentialism, there is no problem if everyone has true beliefs about the beliefs of others.

Something like the fear of sanctions from true believers underpins *LME*'s argument that belief in the non-instrumental character of law has beneficial consequences for the legal system. The argument is from the "civilizing force of hypocrisy"⁴⁸ — the idea that a pretense of public spiritedness can constrain behavior motivated by individual or class interests — although *LME* does not put it in these terms. One mechanism behind the civilizing force of hypocrisy is that the pretense becomes the real motivation, because the face grows to fit the mask.⁴⁹ However, *LME* does not appeal to that mechanism. Rather, *LME* emphasizes that actors motivated by individual or class interests generate public credibility by sometimes following their professed principles rather than their interests (p. 247). Drawing an analogy to E.P. Thompson's Marxist account of eighteenth-century English property law,⁵⁰ *LME* says that the often-repeated non-instrumental claims about law, honored initially by the elite for the sake of securing credibility, carried their own implications and imposed their own demands. Honoring those claims conferred benefits upon non-elites, and regularly hamstrung those in power who wished to wield the law instrumentally for their own advantage (p. 247).

If the elite seek credibility by occasionally honoring the legal principles they created to serve their ends, they must fear that there is some sort of reputational sanction for failing to do so; and this requires that the elites believe that some actors somewhere are true believers in non-instrumental law, or no one would ever expect principled behavior or sanction its absence.⁵¹ Whatever the precise account, there is a

⁴⁸ JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 341 (1999) (emphasis omitted).

⁴⁹ *Id.* at 341–49.

⁵⁰ See E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 261–64 (1975).

⁵¹ On the other hand, *LME* also sometimes suggests the opposite:

It is also undeniable . . . 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. (pp. 4–5)

minimum core of esotericism that is common to both the strong and the weak versions: in a properly functioning instrumental system of law, it is at least not the case that all actors in the system can have knowledge of law's instrumental character and also know that all others know likewise.

The problems with such esoteric theories are familiar. For one thing, they risk violating moral and democratic principles of publicity or transparency.⁵² For another, they risk denying the moral agency or autonomy of the theory's subjects, who must be kept in the dark if the system is to work. Putting aside those issues, I will focus on the consequentialist objection that esotericism is a self-defeating theoretical stance.⁵³

Esoteric legalism may defeat itself in at least two ways. First, under esotericism the legal theorist occupies a paradoxical stance in relationship to his own prescriptions: to publicize the problem, as by writing books about it, is to exacerbate the problem. Consider the suggestion that

[t]he threat to the rule of law posed by this complex of ideas [roughly, political science work that debunks judicial motivations] is not that judges are incapable of rendering decisions in an objective fashion. Rather, the threat is that judges come to *believe* that it cannot be done or that most fellow judges are not doing it. This skepticism, if it becomes pervasive among lawyers, judges, and the public, will precipitate a self-fulfilling collapse in the rule of law. (p. 236)

But if the problem is that we are near a tipping point where too many judges come to believe that most fellow judges cannot or will

The claim in this passage is that legal elites by and large really did believe in the non-instrumental character of law; in the passage quoted in text the assumption is that for the most part they did not.

⁵² See David Luban, *The Publicity Principle, in THE THEORY OF INSTITUTIONAL DESIGN* 154, 155–56 (Robert E. Goodin ed., 1996) (“Publicity will enable citizens to submit . . . public policies . . . to the scrutiny of their own understanding. If the Enlightenment’s [faith in open government] is correct, such public debate and scrutiny are highly desirable . . .”).

⁵³ By contrast, the suggestion in Part I that it might be consequentially best for the legal system overall if judges did not attempt to pursue good consequences in particular cases is not an example of esoteric legalism. Under this standard sort of second-order consequentialism, the judges need not believe that second-order consequentialism is false. Quite the contrary, what they must believe is precisely that ignoring their own first-order, all-things-considered views about what ruling will produce the best consequences in the case at hand is itself a practice that has second-order consequentialist virtues. Under esoteric legalism, by contrast, the judges cannot hold the second-order beliefs (that non-instrumentalism is mythical, but that first-order belief in non-instrumentalism is instrumentally best) that the theorist knows to be true. Here the requisite first-order and second-order beliefs are not conceptually or psychologically compatible. The crucial difference is that second-order consequentialism does not include the belief that non-consequentialism is mythical, only that it is bad, when practiced by certain officials in certain institutions. Second-order consequentialism as applied to adjudication may be objectionable on other grounds, but it is not esoteric.

not play by the rules, then publishing a book like *LME* is a perilous enterprise. Its warnings about the corrosion of the rule of law may just confirm and spread this dangerous belief, bringing about the very belief state it warns against. The effort to prevent a self-fulfilling collapse in the rule of law risks creating a self-fulfilling collapse in the rule of law.

Furthermore, the basic prescription of *LME* is that judges and officials should all believe that they can and should abide by the law in good faith (in the strong version), or should at least believe that a critical mass of others will do so and will sanction deviants (in the weak version). How are beliefs like these to be generated, where they do not already exist? A belief that law is non-instrumental, or that others believe that it is, cannot be willed into being for the sake of its beneficial effects; it can only arise as a byproduct of evidence or argument.⁵⁴ Consider the parallel case of a book urging others to believe that murderers will invariably be punished by evil spirits, not because there are independent grounds for that belief, but because a widespread belief to that effect will produce social benefits. To urge officials to believe in law's non-instrumentality precisely because their doing so will have instrumental advantages is to guarantee the failure of the enterprise.⁵⁵

If all this were no more than a dispensable feature of a particular argument, it would be of limited interest. What makes it more significant is that the trap of esotericism is one anti-instrumentalists will predictably find difficult to avoid, once the belief that anti-instrumentalism is mythical has become widespread in the legal culture. Addressing audiences who tend to think instrumentally (in one or more of the senses discussed in Part I), there will be powerful pressure to argue that a belief in non-instrumentalism, even if mythical, itself has beneficial effects — instrumental advantages, if you will. Perhaps this is conceptually unavoidable, once the apple of instrumentalism has been tasted; I am not sure. However, even if it is possible to avoid the esotericist trap, it is in all likelihood discursively infeasible to do so. One must give people reasons for adopting a particular theoretical stance, and in an instrumentalist culture, the pressure to give instrumentalist reasons will be overwhelming, even if the result is that one's own theoretical stance becomes paradoxical.

⁵⁴ Cf. JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 51 (1983) ("Belief, like courage, can be instrumentally useful, and yet be out of reach for instrumental rationality.").

⁵⁵ A similar problem arises if the idea is that norms sanctioning first-order instrumental judging should be created because the existence of such norms would produce a second-order instrumental benefit. Aside from the point, made above, that this claim is an example of instrumentalism (however conceived) rather than an indictment of it, the deeper problem is that norms do not arise merely because their existence would be socially beneficial; they arise as a byproduct of decentralized decisions by many individuals to sanction the deviant behavior for other reasons.

CONCLUSION: ANTI-INSTRUMENTALISM
AND LEGAL DYSTOPIA

Part I tried to clarify the theoretical status and utility of instrumentalism, while Part II suggested that in a pervasively instrumental legal culture, anti-instrumental prescriptions for the legal system risk falling into self-defeating esotericism. To end there, however, would leave out an important feature of *LME*, which is its thematic and emotional unity. Besides raising useful questions about the theoretical status of instrumentalism, *LME* offers a relentless malefic vision of a legal system overrun by corruption, cynicism, and fanaticism. Interest groups, either of the venal or ideological variety, use their puppet representatives to dominate legislative and administrative bodies and use the judicial system as just another forum for promoting their aims. Judges who have imbibed too much cynically instrumental theory have become cynical themselves, and treat the legal materials as obstacles rather than instructions. Legal scholars are thinly disguised economists and political scientists, rather than devotees of legal craft, and use their bully pulpits to undermine law's integrity from within. Law students ask only what law can do for them, in either a material or ideological sense, not how they can serve the law. Law itself has degenerated into a plaything for conflicting agendas. To a certain sort of theorist, this is a dystopic vision of law and regulation, with a dash of muckraking narrative thrown in — two parts Kafka,⁵⁶ one part Upton Sinclair.⁵⁷

LME does not assert, as a matter of fact, that the legal system has already reached its terminal state. Dystopias are conditional prophecies, not unconditional ones; part of the motivation for dystopic writing is to offer a last clear warning, causing the audience to clutch desperately for whatever remedy the visionary has on offer. Nor does *LME* offer any precise timeline for the collapse of the rule of law, which would reduce the vision to a mere falsifiable hypothesis. Rather, *LME* braids together the darkest interpretations of public choice theory, attitudinalist political science, legal realism, and law and economics in order to dramatize the impending collapse. After the collapse, law will be only a darkling plain on which self-interested or fanatical armies clash, with no one left (but a few esoteric theorists) who remembers that law used to have, or was at least believed to have, an autonomy or integrity or inner principle transcending both self-interest and ideology.

⁵⁶ *E.g.*, FRANZ KAFKA, *THE TRIAL* (Edwin Muir & Willa Muir trans., Schocken 1968) (1925).

⁵⁷ UPTON SINCLAIR, *THE JUNGLE* (Penguin Books 2006) (1906).

All this is, of course, a feverish exaggeration of the legal system's ills. It is possible, I suppose, that the increasing dominance of law and economics, political science attitudinalism, rational choice, and various strands of legal realism will in the long run fatally undermine or corrode the internalized sense of legal rule-following by officials and the public that is part of what we call the "rule of law."⁵⁸ (Is the fear that one day, when the Supreme Court attempts to check some legislative or presidential excess, no one will listen because people have been told too often that, after all, judging is just "instrumental" anyway?) But the mechanisms driving this worry are vague as can be. The rule of law has consequentialist or pragmatic or, if you like, "instrumental" virtues, so why exactly should the spread of instrumentalism corrode the rule of law? Perhaps officials or citizens should not think too much about the second-order benefits of following the rules; but no worry — they won't. More importantly, there is no evidence that the supposed effect is at all plausible, or at least *LME* does not supply that evidence in any systematic form. As various forms of instrumentalism have spread through the legal culture since, say, the 1970s, the boundaries of law's empire have if anything expanded relentlessly. More and more domains of social and political life have been legalized. The Supreme Court goes from strength to strength. Where's the corrosion?

Unproven or exaggerated though they may be, *LME*'s dystopic predictions are memorable, and they make good literary sense. A global critique of something called "instrumentalism" helps the reader to imagine herself as, simultaneously, a member of the theoretical vanguard and as a defender of the rule of law, and it creates a single vivid antagonist to excoriate. Instrumentalism as such is too internally heterogeneous to be a very useful theoretical category, and on net adds little to the standard categories of consequentialism and pragmatism; but it may yet turn out to be a useful rallying point for critics of the dominant trends in legal theory and practice.

⁵⁸ For various senses of the "rule of law," see Richard H. Fallon, Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).