I. The instrumentalist thesis

No one doubts that individual laws often serve as means to promote or secure certain ends. The rule against perpetuities is a means of setting temporal limitations on the grant of an estate. Bundles of laws working through statutes or fields of doctrine are also means to ends, including ends that are, under other descriptions, means to further ends. Enacting the *Fewer School Boards Act*, for example, was intended as a means to the end of reducing the number of school boards, which was in turn intended as a means of uncoupling education from property tax, which was intended as means of asserting financial discipline (and other sorts of discipline) over local schools, which the government of the day considered a desirable end. Examples like that make the instrumentality of laws sound like a top-down affair. Just as often it is bottom-up. It is not only legislatures and courts but also individuals who use laws as means to their ends. Leona Helmsley wanted her dog to be adequately provided for after her own death. So she left it $12 million dollars in trust, through the helpful instrumentality of the laws of New York State. And every day lots of sensible people make ordinary wills, contracts, and powers of attorney; they marry, sue and incorporate, all using the special means that laws provide. None of this is remotely controversial.

The same cannot be said of the following thesis: ‘[L]aw is a means, a specific social means, not an end.’ In fact, few

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propositions in general jurisprudence are as controversial as that one. For Kelsen is not just saying that particular laws are instruments for securing collective or individual ends. He is saying that this is true of law itself. And he goes further. Kelsen says that law is not only a means, but a means of a special sort, and not an end of any sort. I’m going to call that the instrumentalist thesis about law, and I am going to defend a qualified version of it here.

Lon Fuller considered some such thesis to lie at the core of his disputes with HLA Hart (and others) over the nature of law. Fuller writes, “A statute is obviously a purposive thing, serving some end or congeries of related ends. What is objected to is not the assignment of purposes to particular laws, but to law as a whole.” And if law does have a purpose, then why not organize our theories of law around that purpose, instead of focussing so much on the means, procedures, and structures characteristic of legal systems? Aren’t we putting the cart before the horse?

Hart, on the other hand, agrees with Kelsen: we cannot assign significant ends or purposes to law ‘as a whole’. Undeniably, there are things that law necessarily does. For example, law regulates human conduct through rules. But that is not law’s end—it is the means by which law goes about its ends. Hart thought law’s means fell into two broad classes: those that are ‘means of social control,’ and those that provide individuals with ‘facilities for the realization of wishes and choices.’ Law does both through the creation, recognition and application of rules. Other social institutions can pursue the same ends by other means, for example, by creating economic incentives to which people are likely to respond, by altering the physical

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environment to change their feasible options, or by assassinating them before they can interfere with the government’s plans.⁵

To assert that law does not have an end as such is consistent with thinking that there are things that law does, as such. Kelsen argues that there are several things law necessarily does (it sets norms; it regulates its own creation; it mandates enforcement). But these are laws modalities, not its purposes. What he denies is that there are built-in social or individual ends, things like peace, justice, tolerance, harmony, co-operation or wealth, that law qua law necessarily achieves or even attempts. Those are matters that vary among legal systems, and the variance is explained by the uses to which law is put.

Before trying to assess that account, we should acknowledge that it is not the only idea about law that has ever been called ‘instrumentalist’. Brian Tamanaha assembles quite a list of others, covering most of the alleged sins of the American legal system.⁶ He complains that, in the United States, law is widely practiced with indifference to the social good, that judges reason from the bottom line up, that lawyers care more for wealth and power than for humanity or justice, that ‘cause lawyering’ corrupts legality, and so on. The thread linking his miscellany is the alleged fact that in the United States ‘law is widely viewed as an empty vessel to be filled as desired, and to be manipulated, invoked, and utilized in the furtherance of ends.’⁷ But that view is not the thesis advanced by Kelsen, nor does it resemble the views of any other significant instrumentalist. And what makes it so repugnant has little to do with the claim that law is a means, and much to do with the idea that law may be ‘filled as desired,’ and with the chilling hint that any sort of manipulation in service of such desires would be just fine. That is not a jurisprudential thesis called ‘instrumentalism.’ It is a vice, and one that in plain speech is usually called selfishness.

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⁵ This does not entail that law never creates incentives, changes the environment, or helps hire assassins. But governments can do such things without relying on the law (and, in hiring assassins, they usually try to avoid the modalities of law).


⁷ Ibid.
Isolating the instrumentalist thesis from such irrelevant if depressing ideas does not vindicate it. It only clears the path for a closer assessment. I am going to try to establish a case for the thesis here. The case will be indirect. First, I show that the thesis, though controversial, is a rendering of a view of law that it is not controversial. That gets the instrumentalist thesis on the table as a candidate interpretation of that view. Then, I am going to clear what seem to be the leading falsehoods and fallacies standing in the way of accepting the instrumentalist thesis. I would be inclined to stop there, for I doubt there is much more that legal philosophy can contribute to this sort of problem. But I shall nonetheless conclude by briefly addressing Fuller’s view that a theory of law must be not only correct, but hygienic. I think that view is wrong, and that even if it were true it would not satisfy the worries that tempted Fuller to advance it.

2. The Instrumentalist Conception of Law

Law is not a surd feature of the universe, like the speed of light or Planck’s constant. Law belongs to the meaningful world of ends and means. By ‘ends and means’ I intend what we ordinarily mean by that. By ‘meaningful’ I refer to the fact that we can make sense of a lot of human action by understanding it as adopting means to achieve certain ends in light of the situation as the agents see it.8 The view of law as primarily about means to ends is the foundation of Jeremy Bentham’s entire legal philosophy. It is elaborated, crudely and at length, in Rudolf von Ihering’s late works.9 It structurs Max Weber’s analysis of the state and law, and in different way, Karl Marx’s theory of law (to the extent that he can be said to have a

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8 And also as attempts to avoid certain ends, and to identify valuable ends. What about human action that is expressive? It comes within the instrumental paradigm to the extent that it is also communicative. Purely expressive actions are possible, but are marginal cases to the expressive activity in law, most of which is intended to be communicative.

theory of law). It is implicit in HLA Hart’s idea that law is an institutionalized system of social rules aimed at securing some basic goods, for at least some people. And it is explicit in Joseph Raz’s observation that, ‘The law is not just a fact of life. It is a form of social organization which should be used properly and for the proper ends,’ an expression of what he calls ‘an instrumental conception of law.’

Those names might lead you to suspect that it is only positivists and their fellow-travelers who adopt an instrumental conception of law. Nothing could be further from the truth. There is no other way to understand Aquinas, who says, ‘A law, properly speaking, regards first and foremost the order to the common good.’ Law is oriented to that good, but it is so oriented in a particular way: as a general kind of order, issued by an authoritative source, promulgated to its subjects. For Aquinas, these features are explained by the fact that law is a means in the service of ends:

Whenever a thing is for an end, its form must be determined proportionately to that end; as the form of a saw is such as to be suitable for cutting. Again, everything that is ruled and measured must have a form proportionate to its rule and measure. Now both these conditions are verified of human law: since it is both something ordained to an end; and is a rule or measure ruled or measured by a higher measure.

Aquinas’ view parts company with the instrumental thesis set out in Section 1; but it just as obviously it embraces an instrumental conception of law. One cannot have teleology without teloi, and in law those ends are brought about through certain means, to which Aquinas paid careful attention. The false association between an instrumental conception of law and legal positivism—the thesis that all law is a human artifact, a social construction—flows from the false assumption that nothing can be an instrument unless it is also an artifact. Not so. An instrument may be an object trouvé, a conveniently

11 S.T., I-II Q 95 art 3
chipped piece of flint, made by no one, but picked up and put to use. An artifactual rule may be measured by a ‘higher measure’ that is not itself an artifact, and it may be a defective specimen if it doesn’t fully measure up. But that artifactual rule is still a means of assessing conduct as required, permitted or prohibited.

Is Aquinas a special case? Not in the least. Teleological instrumentalism lives on, overtly and covertly, in many contemporary theories of law. It is overt in John Finnis’s theory, according to which law is a necessary means for coordinating action for the common good of a whole community. It is presupposed in Ronald Dworkin’s idea that there is an ‘abstract and fundamental point of legal practice’, namely, ‘to guide and constrain the power of government’ in accordance with standards of legality. And it is vigorously asserted by Fuller, who, while agreeing with Hart that law ‘subject[s] human conduct to the governance of rules,’ thinks that Hart misses the upshot that law must therefore be a ‘purposeful enterprise.’ Now, ‘purposes’ and ‘enterprises’ have, it is true, nuances absent from ‘ends’ and ‘means’, and Fuller often prefers the former terms in order to emphasize the special features of his own brand of instrumentalism. But at other times he is just as happy to speak bluntly. Of his famous desiderata of legality, he simply says, “All of them are means toward a single end.” Law, on Fuller’s account, is an institution on a mission.

What all these writers thus share is the instrumental conception of law. What divides them is (inter alia) the instrumental thesis about law, the claim that within an instrumental conception, law is better understood by focusing on its (species-typical) means rather than on its (variable) ends. I suspect that thesis marks a more significant division in legal philosophy than do many of the more familiar ones, including the distinction between positivism and anti-positivism. But

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14 Fuller, *Morality of Law*, 74.
15 *Ibid.*, 145
16 *Ibid.*, 104
I cannot pursue that hypothesis here. In preparation for the argument, let me instead turn to some abstract, but necessary, observations about the nature of instruments and values.

2. Means, Instruments and Ends

Kelsen says that law is a means, not an end. The hardest part is the second, negative, proposition: Law is not an end. We cannot decide whether that is false unless we have some grasp of how it could be true. But the affirmative claim is no less puzzling: What would it take for law to be ‘an end’?

The creation of particular laws is among the ends of law, in both legislation and adjudication. So those laws can be ends. One might make it one’s end to establish legal systems where there are none, or to improve or protect them where they already exist. But that will not show that law is an end; it will show that law-establishing and law-protecting can be ends, which hardly seems controversial.

Could Kelsen be suggesting that we can understand law without reference to ends? Surely not. He repeatedly affirms that law is a means; but in the context ‘means’ is a relational term, and the relevant relata are means and ends (which is why we can speak of a ‘means-ends relation’). If law is a means at all, there must be some end or ends to which it is, or is taken to, be a means.

A more promising interpretation is this: the nature of law is more clearly revealed in its means than in its ends. Law has ends, and law should serve good ends; but what marks law off from other social institutions are the means by which it serves its ends. And law’s ends are not distinctive; and there are no ends universal or unique to law as such. Thus, Kelsen’s cryptic remark that ‘law may have any content’. He does not mean that a law could be a rock or a slug. Indeed, he asserts that every law has features that could quite naturally be called the ‘content’ of law (e.g. delicts and sanctions). His substantive point is this: the same means that gave us the Fewer School Boards Act could also have given us a More School Boards Act, or a School Boards (Restoration) Act, and all of these acts would have been law, and they would have been law in virtue of the means by which
they are produced, rather than the character (moral or otherwise) of the ends at which they were aimed. But isn’t that legal positivism after all? No. To get positivism we need to add at least the proposition that the ultimate law-producing means are artifacts. We have not said that.

What, then, of ‘means’? To the extent that there is a difference between means and instruments, the instrumentalist thesis interprets law as an instrument. It is a fine point, but important. It is perfectly acceptable to say, ‘Drawing an equilateral triangle is a means of drawing an equiangular triangle.’ After all, to do the second, you need only do the first, and having done the first, you have an iron-clad guarantee that you have achieved the second. But that is not a means in the instrumentalists’ sense. The instruments with which one might draw an equiangular triangle include things like protractors and pencils, not equilateral triangles. This has nothing to do with the concreteness of the former. Many instruments are abstract objects, including mnemonic devices, truth-tables, and, of special interest to jurisprudence, rules and systems of rules. What is important is that these instruments are distinct from the ends to which they are put, are capable of being brought under intentional control, and can be assessed as being more or less well adapted to produce their ends. An instrument produces ends as a consequence, not merely as a logical result, of someone’s use of that instrument.

This explains why there is such a close relationship between L being instrumental to E and L being causally efficacious in helping to bring about E. The role of causal efficacy tempted some, including Weber, to suppose that instrumental reasoning, in law or elsewhere, is somehow more objective or scientific than any reasoning about value. That could at best be true of the causal premises in instrumental reasoning. It is not true of all the premises or of the conclusions. We reason: (1) L most effectively produces E, and we enthymematically conclude, (3) Someone ought to adopt L. The

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17 Law may also have unintended ends; it may have what Robert K Merton called ‘latent’ as well as ‘manifest’ functions. There are (other) instrumental theses about law that are based mainly on law’s unintended consequences. I do not explore them here. For some brief remarks on that issue see Leslie Green, ‘The Functions of Law’, 12 Cogito (1998) 117-124.
suppressed crucial premise is (2): *E is worth producing*. But neither (2) nor (3) are ‘objective’ or ‘scientific’ in any way that would have impressed Weber. That is evident with respect to (2), since it is about what values merit pursuit; but it is also true of (3), since that is a deontic statement telling someone what to do.

This is worth mentioning, not in order to open a discussion about Weber’s demarcation of science, but because it points to a central issue about instrumental value. Some find it tempting to say that if L* is \textit{better} able to produce E than is L’, then L* has \textit{greater} instrumental value than L’, on the ground that it gives more E-bang for one’s L-buck. But this does not follow. Nothing has instrumental value that lacks value. Something inherits its instrumental value from the end to which it is a means. If that end is worthless, then it has no value to pass on to L. So L* may be more effective than L’ in producing E and yet at the same time utterly valueless. This sounds odd only because it is sometimes useful to speak of L* \textit{as if} it had instrumental value, prescinding from any assessment of its ends. That is how we often talk about people’s reasoning when we are uncommitted to, or uncertain about, the value of the ends they pursue. It is how the bureaucrat or economist or democrat might speak when considering how to attain an end taken as ‘given’ by the government, the client, or the people.

Kelsen is aware of this issue, but mistakenly thinks it shows that all effective means have \textit{relative} value: if L efficiently produces E, then L has E-relative value.\footnote{Hans Kelsen, \textit{Introduction to the Problems of Legal Theory}, 16. On this point, Kelsen may have been influenced by Kant’s discussion of ‘objective’ and ‘relative’ ends: \textit{Groundwork for the Metaphysics of Morals}, trans. A.Zweig (Oxford: Oxford University Press, 2002), 228ff.} Now, relative values certainly exist. American dollars have relative value, for their value as a medium of exchange or store of value varies \textit{in relation to} the demand for other currencies. But the fact that L stands in a means-end relationship to some E does not show \textit{anything} about L’s value. What gives dollars their value is their \textit{use} as a medium of exchange or store of value, which media and stores are themselves valuable, and therefore worth pursuing as (intermediate) ends. In contrast, if E is worthless (e.g.
the satisfaction of a desire for a saucer of mud, for no further reason)\textsuperscript{19} then \textit{L} does not get relative value from \textit{E}, for \textit{E} has no value to contribute. Even the most effective pump draws no water from an empty well.

Of course, not all ends are instrumental. On plausible assumptions about value, chains of instrumental reasoning must ultimately bottom in ends that are \textit{not} of value as means to further ends. I shall follow traditional usage and say that non-instrumental ends are \textit{intrinsically} valuable. Unfortunately, this term is also in common use to pick out ends that are \textit{absolutely} or \textit{inexplicably} valuable. I want to leave open the possibility that intrinsic values may be relative to time and place and in that sense not absolute, and also the possibility that intrinsic values are all liable to (philosophical) explanation. These are not matters we need to settle here. But we do need to mark a distinction \textit{within} the realm of intrinsic values. I am going to call it the difference between dependent and free-standing values\textsuperscript{20}. An intrinsic value is \textit{dependent} if the explanation for why it is of value necessarily includes reference to the fact that it is of value \textit{to} or \textit{for} someone (or something) capable of appreciating the value that it has. A beautiful sunset is of intrinsic value because it is of value \textit{to} people (or animals) that have the capacity to take sensual pleasure in its colours or to respond to it under the aspect of beauty.

Doesn’t that turn sunsets into instrumental values? No. The way in which sunsets are of value to their responders is not as a useful instrument that might be manipulated or adjusted so as to produce more of what we are enjoying. A sunset is not an instrument at all: it is not subject to direction or control in the performance of any action or pursuit of any end. We value sunsets for what they \textit{contribute} to our lives, not for what we can do or attain by ‘using’ them.

\textsuperscript{19} I’m adapting Elizabeth Anscombe’s famous example, in \textit{Intention} (Cambridge MA: Harvard University Press, 2000) 70-1 (f.p. 1957). I am not endorsing all conclusions she draws in that discussion.

\textsuperscript{20} For a discussion of a similar division, though with a different terminology and to a different purpose, see Joseph Raz, \textit{Value, Reason and Attachment} (Oxford: Oxford University Press, 2001), which influenced my thinking at several points in this section. For exploration of some aspects of Raz’s views on these issues, see Leslie Green, ‘Two Worries about Respect,’ forthcoming.
If there are things whose intrinsic value is not explained in that sort of way—i.e. by the fact that they are of value to or for an appreciating subject—then they are ‘free-standing.’ As such, they would be of value, not as means to some end, like income, and not of value to or for someone or other, like sunsets. They would be of value for their own sake, in themselves. This last idea is difficult to explain, though many, including Kant, think it easy to exemplify: persons have that sort of value. Hence, someone who is not only of no use to anyone or for anything, and who is not loved, admired, or even considered by anyone, even he has value in himself. Kant called such things ‘ends in themselves.’

Into these murky waters I wade no further. I do not think that law is or could be an ‘end in itself’, nor am I aware of any opponent of the instrumentalist thesis who coherently advances the contrary view. My focus will therefore be on law’s instrumental or dependent-intrinsic value, and on how law’s means stand in relation to such values.

3. Five Fallacies about Instrumentalism

As I said, the instrumentalist thesis is one interpretation of a commonplace view about law, a view that is not in fact denied and that seems hard to imagine anyone denying. But it is also an interpretation so encrusted with fallacies that it is can be difficult to see the thesis for what it is.

Kelsen himself is responsible for some of these errors. In the first edition of the *Pure Theory of Law* he elaborated the thesis in this way: ‘The law is a coercive apparatus having in and of itself no political or ethical value, a coercive apparatus whose value depends, rather, on ends that transcend the law qua means.’21 The elaboration spins out two further claims. The first is that law is not only a means, but a coercive means. The second is that, because law is a means, it can

have no moral or political value ‘in and of itself’. Otherwise put, law is a mere means.

Both elaborations are mistaken. It is not necessary to repeat here all the arguments that establish that the use of coercive force is neither essential to law nor unique to law. That work has been done for us.\(^\text{22}\) But Kelsen’s second elaboration, that law has ‘in and of itself no political or ethical value’ is equally doubtful.

Law is (or can be) a means to valuable ends, so law has (or can have) instrumental value. But why does that commit us to denying that law can also have non-instrumental value? How does it commit us to the view that law is a ‘mere’ means? (It is curious how often in legal philosophy the noun ‘means’ is preceded by the deflationary ‘mere’.) Consider the general claim:

\[(F1) \text{ If law is an instrument then it is a mere instrument and has no non-instrumental value.}\]

As it stands, (F1) is a plain non-sequitur; yet arguments have occasionally been offered for it. Writing in 1908, John McTaggart criticized the idea that the state might have non-instrumental value, and there is no reason to think he would have spared (or even distinguished) its legal system. In a warning to his fellow idealists who, he feared, were stumbling down the path to state-worship, McTaggart wrote,

> Whatever activity it is desirable for the State to have, it will only be desirable as a means….Compared with the worship of the State, zoolatry is rational and dignified. A bull or crocodile may not have much intrinsic value, but it has some, for it is a conscious being. The state has none. It would be as reasonable

to worship a sewage pipe, which also possesses considerable value as a means.23

Fine mockery; and in its day possibly therapeutic. But the argument doesn't come to much without the implied (idealistic) assumption that only conscious beings can have intrinsic value. Possibly McTaggart is concerned with that only because he is trying to show that the state does not merit worship. But worship, taken literally, is a very special way of engaging with things of intrinsic value. Many things that are not worship-worthy are nonetheless of great intrinsic value: Ben Nevis, the great redwoods, the Goldberg Variations, the Mona Lisa.24

Mountains, forests and works of art are not instruments, so they do not directly test (F1). But there is any number of cases right on point. The Victoria and Albert museum owns an eighteenth-century flute made by Peter Bressan. New, it was a superb instrument, of such good acoustical design that copies are still made and played today. Yet none of that explains why Bressan's flute is under glass in the V&A. That has to do with a different aspect of its value. The Bressan flute is a splendid example of the woodturner’s craft. Its ebony is sectioned by elegantly proportioned silver bands, and into the wood the maker insinuated, in tiny hand-cut channels, strands of silver wire, achieving the effect of a delicate engraving on the wood’s surface. The Bressan flute is certainly an instrument; that was (and remains) its primary role in human culture. But it is no mere instrument; for it also has value that cannot be explained by the fact that it could be played easily and in tune.

Could (F1) be false in general yet true of law? I doubt we can make sense of the idea that law has aesthetic value, though I have heard proud draftsmen speak as if their work does, and some civilians and code-enthusiasts revere the orderly arrangement of legal materials as if they had the spare beauty of Wittgenstein’s Tractatus. Those attitudes seem misplaced, but perhaps that betrays my own

24 Or, at any rate, if their value merits some kind of worship, it is not the kind that worried McTaggart.
insensitivities: if a proof can be elegant, why can’t a legal system, abstractly considered, be beautiful? In any event, there are clearer cases to consider.

The first is genealogical. The law now in force did not spring into existence a moment ago. It developed and evolved over long periods, subject to many influences, and bearing the imprint of crucial junctures in our history. Drawing-board constitutions and legal systems sketched out by philosophers or law professors tend to remain on the drawing boards—when we are lucky. If they take life without causing social catastrophe, it is usually because they have adapted to their societies in ways unanticipated, and perhaps unwelcomed, by their authors. Every legal system thus comes to have a history that is in part the deposit of the society it regulates. That it developed particular techniques, honoured particular values, vested authority in certain institutions—these are all culture- and path-dependent features of law. Provided its paths are not shameful and its vices not intolerable, the law will have value independent of its success at serving the ends it is meant to serve. Its legacies, ceremonies and formalities will have value in themselves and may even merit honour. When things go well, the legal system itself will deserve respect, even when it includes rules that are suboptimal and rulings that are off-mark.

To forestall possible misunderstanding, I am not suggesting that the intrinsic value in a legal system’s history is its dominant value, or that it should always be honored, efficiency be damned. That would be silly. But exaggerating genealogical values is not the only way of being silly. Holmes complained, ‘It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.’25 If there is no reason for altering such a rule, then we also have no reason to fret about its antiquity, let alone to be revolted by it. We can even take pride, not only in the fact that it has served us well, but also in the fact that it was laid down in the time of Henry IV. This would probably have struck Holmes as nonsense, for it recognizes values that cannot get past his self-imposed blinkers. In

the continuation of that famous passage, the blinkers are on ostentatious display:

for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.26

If one responds to history only ‘for the light it throws upon the present’, and if the only aspect of the present one cares about is the ‘explanation of [legal] dogma,’ then a lot of good, and evil, in one’s history is bound to pass one by. But there are reasons for caring about the history of law that are not (now) reasons for adopting that law, and there are reasons for concern about our law’s history that have nothing to do with how we should write a treatise or advise a client. They include the value of knowing one’s history, and one’s place in it, and of making sense of all that to the extent that one can.

The second sort of intrinsic value in law is a time-slice of the first. Law may have organic value as an aspect and expression of the society it serves.27 (This is subject, again, to the conditions and hedges we placed on genealogical value.) Our legal system can be of value to our society because it is our law. It is easy to lose sight of this amid cosmopolitan enthusiasms. And in mobile, pluralist societies, the word ‘our’ sounds unpleasantly nativist, essentialist, and exclusionary. It need be none of those things. The law of an open, fluid and tolerant society is still its law;28 and the involvement of such a society in creating and administering that law is something that is of value even when (instrumentally) better results might have been produced by different means, for example, by rule of the foreign law of an imperial master. The extent to which law has organic value

26 Ibid,
27 See Joseph Raz, The Authority of Law, 258-260.
28 And thus the openness of a legal system to foreign or international law, does not show that it has ceased to be ‘our law’.
varies, as do the aspects of the legal system most likely to express it. In the nineteenth-century, the English used to hold the common law in this sort of regard, in the United States it has mostly been reserved for the Constitution, in Québec for the Civil Code, and in Scotland for any aspect of the legal system that is certifiably not-English.

As I said, genealogical and organic values are not present in all legal systems (never mind all possible legal systems). They are contingent on aspects of the political culture, and on the content of the laws. Nor, when present, are they the most important values that those systems have—that would be to confuse intrinsic value with great value. Acknowledging the reality of law’s non-instrumental value therefore requires reforming, not abandoning, the instrumentalist thesis. We need to drop the idea that law can have no value in and of itself. But at the same time, it is improbable that law would have such intrinsic values if it did not also have instrumental value—if it were an ‘idle ceremonial.’ Law’s (potential for) great instrumental value makes it a central political institution, and that centrality sustains its (dependent) intrinsic value for the society whose law it is. Nonetheless, the possibility that intrinsic value accompanies law’s instrumental value shows that (F1) is lumber that the instrumentalist thesis needs to shed.

(F2) If law is an instrument, then there is a generic end that law necessarily serves.

I turn now to the main ground for divorce, or at least separation, between the two great families of instrumentalist views. (F2) is denied by the negative limb of the instrumentalist thesis. It is a thesis that marks an important division between Fuller and Hart, and between Hart and Dworkin.

29 It is possible for law not to play that value at all, to be totally alienated from its society. See H.L.A. Hart, The Concept of Law, 117. This is a standing risk that flows from the nature of law itself. See Leslie Green, ‘Positivism and the Inseparability of Law and Morals,’ 83 NYU Law Review 1035 (2008).

30 I borrow the phrase from David Hume, An Enquiry Concerning the Principles of Morals, Sec 3, Pt 1., where uses it to describe what would become of justice when respect for its rules no longer served human ends.
I frame (F2) as if instrumentalism commits one to the existence of a generic end for law. In truth, Fuller only says that it is ironical to affirm that laws have purposes while holding that law itself does not. He doesn’t explicitly deny that the irony could result from a correct assessment of the nature of things (as in ‘It’s ironic that the government’s enthusiasm for deregulation led to nationalization of banks’). But Fuller plainly thinks the consequent is true, and so do other legal philosophers. And if it is true, then the instrumentalist thesis will need more radical revision than resulted from our study of (F1).

One of the difficulties in interpreting Fuller is that he sometimes treats as the end of law what almost everyone else counts as its species-typical means: viz., the guidance of human action by norms, rules, or principles or some sort. It is possible that Fuller thought the instrumentalists’ mistake was to take for law’s means what is really its end, rendering (F2) true but trivial? Not likely, otherwise he would not have pursued his claim that there is a correlation between a state of affairs in which law’s means are in good order, and a state of affairs in which law satisfies the proper ends of law identified by its ‘external morality.’ More likely, Fuller is groping towards the point we took from Aquinas: ‘Whenever a thing is for an end, its form must be determined proportionately to that end; as the form of a saw is such as to be suitable for cutting.’ That accords with Fuller’s observation that, while legal philosophers try to distinguish legal order from ‘the gunman situation writ large,’ they fail to see that ‘It is…precisely because law is a purposeful enterprise that it displays structural constancies which the legal theorist can discover and treat as uniformities in the factually given.’ But the ‘structural constancies’ do not require a generic end for law. The fact that law necessarily contains rules, and that they are the sort of rules that are potentially knowable by their subjects is best explained if we assume

31 Fuller, The Morality of Law, 150.
32 Lon Fuller, ‘Positivism and Fidelity to Law—A Reply to Professor Hart,’ 71 Harvard Law Review 630, 636 (1957), and, much less tentatively, in his Morality of Law, chap.4.
33 Above, note 11.
34 Ibid., 151.
that law pursues its ends—any ends—by providing up-front guides to conduct. Other features that are clearly desirable in law, and at some modest threshold possibly even necessary (e.g. that laws be clear, stable, guide official conduct etc.) are easily explained on the assumption that law is trying to pursue its ends while ensuring that it means also conform to important independent values (such as supporting reciprocity among people, protecting legitimate expectations, respecting persons, and so on). These explanations mention various ends that law might adopt; they do not need hypothesis of a single, generic or unifying end. In any case, nothing in the instrumentalist thesis denies that an instrument often is, and in any case should be, shaped by the tasks it is meant to perform.\textsuperscript{35} And it goes without saying that law’s means should conform to all sound moral constraints.

There have, however, been many other efforts to show that law has a generic end, and I cannot even mention them all here. Some try to develop Aristotle’s idea that, ‘if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.’\textsuperscript{36} This passage needs clarification before we can do much with it. There is an ‘if’ to discharge, and there are quantifiers to sort out. Maybe there are communities that do not aim at any good, and maybe of those that do, there is no (single) common good at which they all aim. And maybe an all-embracing good is not a highest good but only the lowest common denominator among a plurality of goods. These points are all familiar.

\textsuperscript{35} This interpretation of (F2) can lead in directions likely to make Fuller and Fullerians uncomfortable. For if we say that it is the law’s task is to guide conduct, then it must be the kind of thing that can communicate to its subjects the direction in which their conduct is to be guided; and for that to be possible, its subjects must be able to grasp what law requires without already knowing in which direction they ought to be heading. Not all things have, or are capable of having, those features. Joseph Raz, relies on such features in defense of the sources thesis in, ‘Authority, Law and Morality,’ in his Ethics in the Public Domain. (Oxford: Clarendon Press, 1994), 210-237.

\textsuperscript{36} Aristotle, Politics, Bk I, Part 1, trans B Jowett.
Some modern attempts to identify a generic end for law proceed by side-ways shuffles into procedure and then to argue (à la Fuller) that those procedures either are law’s end, or reflect a necessary commitment to an end. Others move to higher altitudes of abstraction: we hear that aim of law is to maintain framework conditions for the pursuit of goods, or to provide the state with a general coercion license, or to keep order, as the law sees it. Some versions are so vaguely specified as to be impossible to assess, but many fall to the objection that they present possible, desirable, but hardly necessary ends of all legal systems.

Be that as it may, anyone who thinks that law is a means thinks it has ends. And even if it has no super-end, it may have species-typical ends. Hart thought so, and thought that without reference to what he sometimes called the ‘minimum content’ of natural law, we would be without a criterion for distinguishing legal systems from other institutionalized rule-systems effective in a society. A full-fledged legal system would typically aim to regulate violence, property, kinship, and promises. Fuller seems largely uninterested in this problem, because he denies any significant difference between the ‘enterprise’ of law and the enterprise involved in the internal regulation of clubs, churches, schools, or agricultural fairs. It is fair enough to point out that anyone running an institution according to rules ought to be concerned about the character as well as the content of those rules—universities and unions should both try to keep their regulations clear, prospective, stable and so forth. But that is not the end of it, for there are additional requirements that apply to legal systems, in virtue of the fact that they exercise compulsory jurisdiction over their subjects, and there is additional urgency to some of the shared requirements, in virtue


38 Fuller, Morality of Law, 124-5.
of the importance and scope of the interests that legal systems regulate.

The truth of the matter is that law is less like Aquinas’s saw than it is like a Swiss-Army knife: a multi-purpose tool handy for lots of ends. Some of these ends typify normal legal systems, though they do not add up to any overall end. Many of these ends have structural ramifications of the sort Aquinas notices, but the ramifications are complex and variable. If law aims at guiding conduct, then its action-guiding rules will need to be laid down in advance of the conduct they are to guide. If law aims at evaluating conduct (as right or wrong, good or bad), then there is no conceptual requirement that the standards be prospective, but there is a requirement that they not be hopelessly vague. And if law is to educate its subjects about the moral significance of the standards it declares, then the reasons for these standards will need to be more transparent than they would if law’s aim were simply to secure coordination and conformity around them. What we do not find, however, is what (F2) proposes: a generic end of law that explains all features of law’s specific means.

(F3) If law is an instrument, then law always has some instrumental value.

I turn now to an objection that comes from the other direction. We already laid the ground for it in Section 2. Offhand, (F3) seems out of place. Isn’t the message of the instrumentalist thesis that whether law has any value, and what value it has, depends on the ends that law serves, and on how well it serves them? What instrumentalist would even moot a proposition like (F3)?

Kelsen comes close. He begins on the footing that a law exists only when it is valid. An invalid statute is not a statute that has the property of invalidity; it is no statute at all: ‘validity is the specific mode of existence of a norm.’\(^{39}\) But then Kelsen complicates things

\(^{39}\)Hans Kelsen, The Pure Theory of Law, trans M Knight (Berkley: University of California Press, 1967), 10. This need not deny that some invalid laws are used as if
by maintaining that a valid norm is not merely one that belongs to the legal system, but also one that is binding, i.e., is such that its subjects ought to do as it requires. He obviously needs an escape route, not only because some actually-existing laws are awful and ought to be disobeyed, but because also the question whether a law ought to be obeyed is a moral question, and on his own account to be excluded from a pure theory of law.

Here is Kelsen’s (F3)-style solution. Whenever we use a norm (however stupid, inhumane or unjust) to assess conduct as being in or out conformity with that norm, we assess it in terms of one kind of value, namely, relative value. Since law regulates its own creation, a valid law always therefore has value relative to the higher norms that authorize, permit or require its creation. This does not give law the absolute value that Kelsen thought a natural lawyer must impute to valid laws: “no absolute value is claimed for law. It is taken to have entirely hypothetical-relative validity.” All the same, relative value is a kind of value, and Kelsen invokes it again when he explains the lawyer’s notion of justice: ‘judging something to be just is simply to express the relative value of conformity to a norm.’

Even Hart was guilty of this error, if only in the second degree. He never followed Kelsen in denying absolute values, or in denying that there are moral values that can conflict with law’s demands and prevail over them. But something of (F3) infects his controversy with Fuller. When Fuller says the desiderata of legality add up to an internal morality of law, Hart bridles. His first line of defense is concessive: Fuller’s desiderata require rules, and when rules are steadfastly applied we may not have substantive justice, but we do have like cases being treated alike, and thus ‘one essential element of the concept of justice.’ ‘So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if it is utterly neutral, without any necessary contact with

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*they were valid, or that courts sometimes give people benefits of an void marriage as if it were valid, on equitable or other grounds.*


41 Kelsen, *Introduction to the Problems of Legal Theory*, 16
Some legal positivists grumble about that concession, since it doesn’t sound like something a positivist should concede. But that is trivial compared to the fact that the concession is wrong. If the rules are bad enough no justice of any kind, administrative, formal or otherwise, results from their steadfast application. When an evil rule is not applied to someone covered by its terms, there is no one to whom an injustice is done, no one entitled to demand that the evil be perpetuated.

Hart’s second line of defense is offense. He says Fuller moves illicitly from what ‘ought’ to be done relative to some standard or other, to what ‘ought’ to be done morally speaking. We say to our neighbor, “you ought not to lie,” and that may certainly be a moral judgment, but we should remember that the baffled poisoner may say, “I ought to have given her a second dose.” So when we think about the principles that ‘ought’ to be followed in order to regulate society by law, it does not follow that we are engaged in moral reasoning. Nor does it follow from the fact that we freely talk about how a law ‘ought’ to be interpreted, that we have found a moral basis to legal interpretation. There are lots and lots of oughts. The ‘inner morality of law’ falls among the non-moral ones, alongside the oughts of cookery and carpentry.

Even if we are willing to live with Hart’s plurality of ‘oughts’, there is trouble brewing in an assumption that underlies his case. He seems to think that the principles need to do moral good in order to count among the moral ‘oughts’. But it is surely enough that in being clear, prospective, promulgated etc they may prevent moral harms, thus constituting, as Raz puts it, ‘negative virtues.’ No one ever said that utilitarianism (‘maximize aggregate welfare!’) articulates a moral ought whereas ‘negative utilitarianism’ (‘minimize aggregate suffering!’) expresses an ‘ought’ of an entirely different sort.

Whether this really saves (F3) is uncertain. For in order to actually prevent harms, the principles of legality—all of them matters

44 Ibid., 613
of degree—need to reach a certain threshold, which threshold, for Fuller, coincides with the existence conditions for a legal system. But there is notoriously quite a lot of retrospectivity, vagueness, and normative conflict in familiar Anglo-American legal systems. Unless we are going to say that *many* actually existing legal systems are not what they appear to be, the threshold of conformity will therefore need to be set quite low, and at that level may not, after all, prevent harm. At this point, Fuller may be tempted to rely on another of his theses: that *every* single departure from the principles of legality constitutes an insult to the dignity of people as responsible beings.46 So there may be no harm, but there will be a wrong. Yet that is just too extreme. It is as unreasonable as saying a failure to say ‘thank you’ to the teller is an insult to his dignity. Finally, this move is inconsistent with Fuller’s own view that some retroactivity and some unclarity can actually make law *better*, not just all-thing-considered, but *pro tanto*, for there comes a point when prospectivity and clarity become vices, and a move to reduce them is therefore an improvement.

There is something depressing in these arguments, on both sides. Hart and Fuller both neglect the point stressed in Section 2. Nothing has instrumental value unless the ends it serves do have value. Probably they simply take this for granted, for they share the common view that all existing legal systems do *some* good, even if only in getting the trains to run on time. All the same, that common view is not universally shared, and it is still worth defending. Kropotkin appraised three centuries of the rule of law thus:

The millions of laws which exist for the regulation of humanity, appear upon investigation to be divided into three principal categories— protection of property, protection of persons, protection of government. And by analysing each of these three categories, we

46 Fuller, *The Morality of Law*, 162
arrive at the same logical and necessary conclusion: the uselessness and hurtfulness of law.47

Kropotkin’s judgment is swift and harsh. But for the legal instrumentalist, it is the territory on which the (F3) needs to be fought, not among ‘relative’ values, multiple ‘oughts’, or ‘inner’ moralities. And the result will be that we must modify (F3) so that it is conditioned on the ends that law actually pursues, and on its actual success in pursuing them.

(F4) If law is an instrument, then it is a neutral instrument.

Much ink has been wasted proving the non-neutrality of law, especially when that is taken to involve such easily dispatched theses as the following: (a) Law is neutral among all sorts of conduct; (b) Law is neutral among all political ideologies; or (c) Law is neutrally applied to all its subjects. The first is absurd, the second hovers on the margins of absurdity, and the third is an appealing ideal regularly falsified in fact. I therefore disregard these and other possible interpretations of (F4) in favour of one that is at least linked to the instrumentalist thesis. Raz writes, ‘Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of an instrument as an instrument. For the law this virtue is the rule of law.’48 Notice that this does not make any claim about the neutrality of law. The claim is about the neutrality of law’s specific virtue, i.e. legality or the rule of law. That virtue—law’s analogue to efficiency—is said to be neutral with respect to law’s pursuit of its decidedly non-neutral ends. This suggests that the problem with (F4) is its ambiguity: does it commit the instrumentalist to thinking law is neutral, or to thinking that the rule of law is neutral?

48 Raz, The Authority of Law, 226.
Fuller concedes that, over a wide range, his principles of legality are ‘ready to serve a variety of aims with equal efficiency.’ That is a qualified endorsement of Raz’s thesis. The qualifications are as follows. First, Fuller says there is a tendency for any instrument satisfying his principles to do good. In some cases it does so positively, for example, by encouraging open government and public scrutiny, and in others negatively, by ensuring that there are certain evils that governments cannot perpetrate. Second, as noted above, Fuller thinks that every departure from his principles is an insult to the dignity of people as responsible agents. Third, he thinks that law, even when well-ordered, is a limited-purpose instrument. He says law is bad at economic allocation. (Fuller clearly absorbed some of von Mises’ and Hayek’s economics, melded with curious views about the philosophy of science.) He also thinks that adjudication as a social technique is trustworthy only when confined to the traditional role of deciding cases between two (or a few) parties, without becoming embroiled what he calls ‘polycentric’ issues—moral problems involving complex principles and consequences for many people, including non-parties. There are indeed such issues, and they pose challenges in governance. But Fuller is wrong to think they are absent in traditional adjudication: polycentricity is everywhere in the law, and it always has been.

What, then, has become of (F4)? The answer is that Raz and Fuller are both on the right track, though Fuller’s track tends to curve around his ideological predilections. An instrumentalist view can acknowledge that law has specific virtues that are neutral vis-à-vis law’s own ends. But it must reject any interpretation of (F4) that commits it to the neutrality of law’s ends.

I said that law is more like a Swiss-Army knife than like Aquinas’ saw. I meant, of course, that it is not so much a single instrument as a union of various instruments. However, it is not a

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49 Fuller, The Morality of Law, 153,
50 Strangely, Fuller thinks that racial discrimination is among them, for to target a given race requires defining the indefinable, whereas a statute prohibiting discrimination on grounds of race is safe from that kind of vagueness. Ibid., 160-161.
union of every possible instrument, and in trying to order one’s own affairs, let alone those of others, one may find oneself stuck with a task for which none of the legal instruments are very good. Each of law’s tools has its limits, and there are some things that cannot be directly achieved by any of law’s tools. (‘You can’t legislate love’—which is not to say that you shouldn’t try.)

(F5) If law is an instrument, then law is subject only to instrumental evaluation.

The final claim saddles the instrumentalist thesis about the nature of law with exclusively instrumental standards for evaluating law: the end (and only the end) justifies the means.

If L is a valuable instrument, then one important question is how effective L is, as compared to the feasible alternatives, in achieving the valued ends. The criteria of effectiveness vary with the instrument and the end: an effective knife should cut well, an effective algorithm should compute well, an effective flute should play well. When an instrument can be identified by its intended or typical end, then the criteria of effectiveness take on a special caste: they are criteria that must be met (allowing for adjustment or repair) if the instrument is to count as a full-fledged member of the class. A baseball is not an ineffective knife; it is not a knife at all, though a blunt or bent knife is. We can speak of these, as Fuller does, as ‘internal’ criteria of evaluation: instrumental standards called for by the nature of the instrument itself. Law has such criteria, and Fuller identifies several of them. But as Fuller also acknowledges, they do not distinguish law as a kind, for they are the same internal criteria that apply to all other rule-governed enterprises.

What is most important here, however, is to notice that the existence of internal criteria of evaluation does not establish any of the following propositions.
(a) The internal criteria are the most morally important criteria for evaluating law.
(b) The moral significance of the internal criteria is exhausted by their instrumental contribution to value of the law.
(c) A moral criticism of law may be ousted by showing that it is not based on internal criteria for evaluating law.
(d) With respect to any internal criterion, any change that improves its effectiveness is morally desirable.

Some of these propositions are more obviously wrong than others, in particular (a) and (b) simply confuse the functional importance with moral importance. Proposition (c) almost suggests that an institution gets to choose the moral standards that it would like to meet, that it can face an examination board best suited to its nature and ambitions. And this thought occasionally gets reversed, so that from the premise that there is a standard that law must meet (say, that its allocative norms should be just) it is held to follow that law must meet that standard in virtue of the fact that it is law. In reality, law must answer to justice, not because a modicum of justice is required for it to count as law, but because as an institution that allocates burdens and benefits among people, law is apt for appraisal as being just or unjust. In the same way, a market, whose internal virtue is efficiency, cannot oust appraisals of its distributive effects by pleading, ‘I wasn’t trying to do justice’.

Finally, (d) simply ignores all other moral constraints to which a valuable instrument must conform. Nothing in the fact that law is a means licenses this omission. On the way to securing its ends, law must respect all sound deontological constraints, it must treat its subjects with respect, it must not opt for short-term solutions that are in the long run self-defeating, and so on. To the extent that Fuller wants us not only to keep this in mind, but also to take it to heart, his reminder is welcome. But it is not as if the instrumentalists named at the outset express sympathy for (d), not even Bentham or Ihering, who came closer than any to supposing that ‘the end justifies the means.’ And Hart’s theory of law is, on the normative side, quite surrounded by non-instrumental constraints: his case for duty to obey the law rests the principles of reciprocity and fairness; his case for punishment includes distributive constraints on who may be

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punished; his account of justice acknowledges—though admittedly with little elaboration—principles of legality that Fuller prizes.

Fuller accuses Hart’s theory of law as being ‘managerialist’, epitomizing it as a ‘one-way projection of authority…simply acting on the citizen—morally or immorally, justly of unjustly, as the case may be.’ The final clause intimates, absurdly, that Hart cares less about whether the law acted morally or immorally than he does about the conceptual distinction between the moral and the immoral. The penultimate clause asserts, falsely, that Hart is unaware that law is as much bottom-up as it is top-down, expressed not only in the various facilities it provides for private individuals to arrange their own affairs, but also in the voluntary cooperation of large numbers of people without which law could not exist. And the initial charge, associating a rule-based instrumentalism with something called ‘managerialism,’ is either a bare stipulation, or strong indication that Fuller either misunderstands Hart, or misunderstands how managers actually run enterprises.

4. Jurisprudence as a means to an End?

I have tried to make the instrumentalist thesis about law—or at least an instrumentalist thesis about law—plausible, first, by showing that it belongs to an instrumental conception of law that, if not undeniable, is in any case undenied by most legal philosophers. I then tried to make it seem a plausible interpretation of that conception by arguing that the most influential charges against it cannot be sustained. The instrumentalist is not committed to those fallacies. On the other hand, not all versions of the thesis survive unscathed. We had to abandon the claim that law is a coercive instrument, and also the claim that law can only have instrumental value. And in response to the charge that instrumentalism presupposes a (false) claim about the neutrality of law we need to discriminate. Law itself is not a neutral means to any end whatsoever: there are some ends for which law is useless, and many ends for

53 Fuller, The Morality of Law, 192
which it is not very good. But the principles of legality are largely neutral in the pursuit of law’s (non-neutral) ends. In other respects, however, the charges against instrumentalism proved to be a matter of guilt by (mistaken) association.

We could just leave it there. But some may be worried by the fact that such mistaken associations were made by writers as perceptive as Fuller. If he could slip up so badly, then what about others? And what about people in general? What if the instrumentalist thesis is true of law, but is so liable to mistaken interpretation that it is one of those truths that social hygiene demands we not spread around?

There are traces of that attitude in Fuller. He begins his essay with the baffling declaration that he is happy to find that he and Hart finally agree that ‘one of the chief issues is how we can best define and serve the ideal of fidelity to law,’ in view of their further agreement that law deserves loyalty and is a significant human achievement.\footnote{Ibid., 632} He speculates about whether an evil judge would find it more useful to openly invoke a ‘higher law’, or whether he would do better to hide behind the pretense that his decision is ‘demanded by the law itself.’\footnote{Fuller, ‘Positivism and Fidelity to Law,’ 637} Fuller reminds legal philosophers to choose their words carefully for ‘we are in an area where words have a powerful effect on human attitudes.’\footnote{Ibid., 649} And as for any attempt to explain the concept of law, he writes,

> When we ask what purpose these definitions serve, we receive the answer, ‘why no purpose, except to describe accurately the social reality that corresponds to the word “law”. When we reply, “But it does not look like that to me,” the answer comes back, “Well, it does to me.” There the matter has to rest.\footnote{Ibid., 631.}

Against the background of such unstintingly instrumentalist attitudes to jurisprudence it is not surprising to find Fuller trying to figure out what best to say about law so as to provide ‘direction posts for the
application of human energies.’ And the direction in which Fuller wants our energies to flow towards greater ‘fidelity to law.’ We might conclude, then, with scrutiny of one last charge:

(F6) Although law is not a means to an end, jurisprudence is a means to an end.

Maybe this best captures what Fuller and his anti-instrumentalist heirs are really on about. On the familiar view, general jurisprudence comes with a built-in end: it aims to discover the truth about the nature of law. But if there is, for some reason or another, nothing to discover, or nothing worth discovering, or no reliable way to go about it, then perhaps jurisprudence can re-imagine itself. It can console; it can inspire. To do this, however, it may also need to take on board another end—it may need to conceal, for it will console and inspire best when it packages its cheery wares, not as commendations, but as the truth—the real truth—about the nature of law.

Some have detected even in Hart a hint of this way of thinking, for didn’t he ultimately justify his preference for the ‘broad’ concept at least partly on grounds of moral hygiene? Actually, no. Hart’s justification is that his analysis conforms to ordinary views about law; it deepens our understanding of the structure and commitments of those views; it explains their relations to other important concepts in social theory; and it does so consistently with such secure empirical knowledge about the law as we have. The so-called ‘normative’ case for positivism, with which other writers tried to develop, was not Hart’s positive case.58 It was Hart’s reply to a conceptual re-former who warns that if we dare to accept Hart’s arguments—be they sound or not—there will be jackboots in the halls. A proposal for reform cannot be disproved; it can only be refused, and the moral and pragmatic considerations Hart mentions are his reasons for refusing.

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58 The ‘moral pragmatic’ considerations are more prominent in Concept of Law than they are in ‘Positivism and the Separation of Morals,’ but I think that reflects more of a change in the order of exposition than in Hart’s argument. (Wil Waluchow confirms that Hart told him, late in his career, that he had serious reservations about the so-called ‘normative’ argument for legal positivism.)
Whatever Fuller’s motivation for instrumentalism about jurisprudence, it is reasonable to have doubts about its prospects. If we shift from asking ‘what is law?’ and begin to ask, ‘how would it be good to think of law?’, do we really stand any better prospects of theoretical convergence? Will we be in any better position to deal with controversy and vagueness in our concepts? After all, it is not exactly clear what we mean by ‘fidelity’ to law, and it is far from agreed that the main vice of our legal systems is a lack of it. Fuller imagines the endgame of general jurisprudence as involving a couple of philosophers glaring across a seminar table, one muttering, ‘it does not look like that to me,’ only to be met with, ‘Well, it does to me.’ But that fear—of a bottom-line, bedrock difference of judgment, with no common ground on which to stand is, first, a lot rarer than he supposes. Second, it is no less of a risk if jurisprudence is refashioned as tool in the service of political ends. For the tool will have value only if its ends do, and we have no more guarantee against bedrock disagreements about those than we have against bedrock disagreements about the nature of law. There is just no reason to think that the normative side-step will get us all waltzing in time.

About one aspect of instrumentalism in jurisprudence, however, I fear that the Fullerian is right. It is hard to inspire, or direct energies, without banners and slogans. And if that is the game, instrumentalism begins with a handicap. As promotional material, ‘Law is a means!’ is a real dud. It would flop as a theme for an address to a graduating class. The tone called for on such occasions is entirely different. We want something in the order of, say, ‘[T]he life of the law is not logic but experience’, or perhaps, ‘Law’s empire …aims… to lay principle over practice to show the best route to a better future, keeping right faith with the past.’

As every law student knows, a lot of law is boring enough on its own, without the help of legal philosophers adding the leaden suggestion that law is a special means to secure social ends. But we might remember that, as Fuller would say, every enterprise has its internal criteria of excellence, governed by its proper end. Can we

59 Ronald Dworlin, Law’s Empire, 413
really bring ourselves to believe that the end of jurisprudence is anything other than what its name suggests? I hope not.