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# THE CONCEPT OF LAW AND THE NEW PUBLIC LAW SCHOLARSHIP

*Edward L. Rubin\**

## I. INTRODUCTION

This article is an attempt to identify the nature of an emerging field of legal scholarship known as "New Public Law." "New," of course, is a dangerous term. Our society's image of itself as forward looking and its tendency to market itself to itself through claims of novelty has spawned a range of phrases from the New Deal to the New Criticism to various new, improved laundry detergents. One does not hear very many positive comments about the "old" these days. The argument that old ways of doing things are better has become an emblem of mistaken thought, and the elderly have been demoted from a source of experience and wisdom to just one more underrepresented group. As a result, it is very easy to make grandiose and ultimately unjustified claims for minor changes by slapping the word "new" on them.

But there is something truly new about New Public Law; something which promises to revitalize legal scholarship by enabling it to deal with the central features of our present-day legal system. Most legal scholarship, of course, is about the present; the problem is it tends to be restricted to an increasingly secondary legal institution, namely, the judiciary. Our legal system is dominated by legislatures and administrative agencies and consists primarily of the huge volume of statutes and regulations they produce. It is difficult to gaze on this vast, recent, rapidly developing, disorganized sprawl. One is tempted to be a legal tourist, wandering among the historic, well-documented edifices at the center and ignoring the formless suburbs that comprise the major portion of the new metropolis. This is the choice that legal scholarship has made thus far.

There is nothing wrong or insignificant about this scholarship, and we should not abandon it. Judicial decisionmaking remains an important aspect of our legal system, and the current analysis of it is a worthwhile enterprise. But it is simply less important than it used to be, and the continued concentration of attention on it abandons increasingly large areas of potential inquiry. The New Public Law

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scholarship represents an effort to expand the boundaries of legal scholarship until they are once again coterminous with the boundaries of law, as they were before the administrative state evolved.

This enterprise involves much more than a shift in subject matter. The conceptual structure of existing legal scholarship is simply unsuited to an analysis of the administrative state. Legal scholars have not restricted their efforts to judicial decisionmaking because of some quixotic desire to reject the modern world; on the contrary, they are fully cognizant of its character and regularly discuss the way it affects their area of study. Their tendency to remain within the confines of that area, as established during the past century, springs from an uncertainty about the way to conceptualize the administrative apparatus. Instead legal scholars consign it to other disciplines, such as political science or public policy. Statutes, regulations, and administrative action are not regarded as "law"; they are law of course, in common parlance and in practical effect, but they are not amenable to the conceptual system of existing legal scholarship.

A new conceptual system cannot be developed out of thin air, however, or instituted by fiat. If legal scholars are to address the realities of the administrative state, they must do so with the skills available to them and within their present institutional structures. Change is possible, but anything more than incremental change in an academic discipline is unlikely, and recommendations that demand more condemn themselves to irrelevance. To put the matter another way, a New Public Law scholarship that deals with our administrative state must continue to be recognizable as law to existing legal scholars. Such an adaptation of legal analysis may not be possible, but it is certainly worth trying.

The emerging New Public Law scholarship represents such an attempt. This article discusses the changes in the law that have motivated it, the conceptual structure that it has developed in response to those changes, and the way in which that conceptual structure, despite its novelty, remains recognizable as legal scholarship.

## II. LEGAL SCHOLARSHIP AND SOCIETY'S CONCEPT OF LAW

Calls for a new mode of legal scholarship or legal education based on the realities of our modern state are far from new, of course. Indeed, they began at the same time that law schools themselves began<sup>1</sup>

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1. See, e.g., W. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT 46-59 (1982); see generally R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 39-84 (1983).

and have continued unabated to the present day. A crescendo of sorts was reached during the legal realist movement, with the work of Harold Laswell and Myers McDougal being particularly notable in its demand for policy analysis and empirical observation.<sup>2</sup> Given the regularity with which this demand has been sounded, it seems surprising that it remains so unrequited and that any effort to respond to it could be described as new. Commentators, apparently at a loss for an explanation, tend to attribute the lack of change to the baneful influence of Harvard Law School.<sup>3</sup> A more convincing explanation, however, is conceptual; legal scholars have continued to write about law the way they do because of their conception of law. Change will not come until that conception changes; as long as new approaches are defined as law-and-something else, rather than as law, the very characterization necessarily proclaims their marginality.

But why should legal scholars alter their conception of law? The most obvious response is that society's conception of law has changed and that legal scholars must keep pace. That claim, however, contains an often-overlooked complexity that is responsible for much of the disjunction between our legal scholarship and our legal system. Very few intellectual disciplines must reconceptualize their methodology because of an underlying change in their subject matter. For example, the past fifty years have seen cataclysmic historical events — World War II, the Cold War, the end of colonialism, and so forth. But these events generally are not regarded as demanding a change in the methodology of historical studies. Quite the contrary, we would look to our established methodology as a way to understand the events that have occurred.

There are two caveats to the observation, but neither comes close to the complete negation of it that apparently obtains in legal scholarship. First, events that occur in the underlying subject of study may produce a change in methodology by disproving some widely held belief. The classic example is Einstein's Theory of Relativity, which altered so many scientific theories about physical reality.<sup>4</sup> But this

2. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in Public Interest*, 52 YALE L.J. 203, 207-17 (1943); McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345 (1947); see also Gellhorn, *The Law Schools' Responsibility for Training Public Servants*, 9 U. CHI. L. REV. 469 (1942); Keyserling, *Social Objectives in Legal Education*, 33 COLUM. L. REV. 437 (1933).

3. See W. CHASE, *supra* note 1, at 23-83; R. STEVENS, *supra* note 1, at 51-64; Schlegel, *Langdell's Legacy or, The Case of the Empty Envelope* (Book Review), 36 STAN. L. REV. 1517, 1524-25 (1984).

4. For Kuhn, Einstein's theory is a classic example of a paradigm shift from one basic conception of the world to another. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 97-101 (1962). Kuhn is not particularly interested, however, in the distinction between the content

occurs less often than one might suppose; more typically, the event disproves a particular theory within the existing methodology. Einstein's theory, epochal though it was, did not really transform the methodology of modern physics. The content changed, but the discipline proceeded in much the same way as it had before.<sup>5</sup> Moreover, even this fairly limited effect of methodology is not necessary but contingent; it depends on whether the event in question disproves rather than confirms existing methodological approaches. The development of the Watson-Crick DNA model, for example, was as significant for molecular biology as Einstein's theory was for theoretical physics. But it had no methodological implications at all; Watson and Crick achieved it using the existing methodology, and it only confirmed that methodology's effectiveness.<sup>6</sup>

The second caveat is that methodologies do change, and these changes are often linked to broader patterns. But the patterns tend to be intellectual ones, related to our general conception of methodology, rather than events in the underlying subject matter. The methodology of history has changed from a narrative of public events to an analysis of socioeconomic relationships, and this change can be traced to a specific period of time. But the events that produced this change were intellectual, not historic; they can be attributed to Adam Smith or Auguste Compte much more directly than to Napoleon or Wellington. Moreover, once the change has occurred, the new methodology is equally applicable to events before the change. The historical writing of classical authors exemplifies the premodern narrative style, but it would be absurd for modern historians to view socioeconomic methods as inapplicable to Greek or Roman history.

Thus, the idea that alterations in society's conception of law require a new legal theory must depend upon some feature of legal theory that distinguishes it from other academic disciplines. This distinguishing feature is most readily identified as the prescriptive

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and the methodology of science, an issue on which he has been criticized. See Lakatos, *Falsification and the Methodology of Scientific Research Programmes* in CRITICISM AND THE GROWTH OF KNOWLEDGE 91, 178 (T. Lakatos & A. Musgrave eds. 1970). It is unclear how a change in world-view correlates with a change in method. Perhaps the most notable methodological change that Einstein's overthrow of Newtonian mechanics produced was the stochastic model of physical phenomena, a model which made Einstein himself distinctly uncomfortable. See N. BOHR, *Discussion with Einstein of Epistemological Problems in Atomic Physics*, in ATOMIC PHYSICS AND HUMAN KNOWLEDGE 32, 56 (1958); W. HEISENBERG, PHYSICS AND BEYOND 62-69 (1971).

5. With the exception of the change described in note 4, *supra*, the mode of generating and verifying empirical data did not really change, even in response to a change as large as Einstein's revision.

6. For an account of this event, see J. WATSON, THE DOUBLE HELIX (1968).

quality of legal scholarship.<sup>7</sup> While the declared purpose of most natural and social sciences is to discover observed events, and the purpose of most humanistic studies is to interpret artistic productions, the declared purpose of legal scholarship is to frame recommendations to responsible decisionmakers. This does not mean that the only criterion for judging legal scholarship is whether its recommendations are adopted. Like other fields, law constitutes a self-sustaining discipline, whose participants are capable of evaluating their own efforts. What it means is that the concept of recommendation, or prescription, structures the entire discipline, and that evaluation will be based on whether or not the work provides a reasonable or imaginative recommendation.

Because prescription is the structuring purpose of legal scholarship, that scholarship must develop a mode of discourse appropriate to its prescriptive enterprise. It must, in other words, speak explicitly to the decisionmakers who constitute the audience for its prescriptions. It must address the issues that these decisionmakers confront, speak in terms that are meaningful to them, and frame proposals that they can conceivably implement. Again, these principles only structure the discourse and are not necessarily literal requirements. Although it may be gratifying for a legal scholar to have her recommendations adopted, the quality of her work will not be judged by its adoption, but by its logic, creativity, and judgment, when viewed as a set of recommendations.

Because of the prescriptive quality of legal scholarship, changes in the way our society conceives and uses law demand changes in the scholarship's methodology. Not all changes are equally profound, of course. Just as new discoveries in natural sciences can transform the content of an entire field without altering its methodology, some changes in the legal system do not require any corresponding changes in legal scholarship. In 1937, for example, the Supreme Court changed its entire theory of the Constitution.<sup>8</sup> That shift provided a

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7. The discussion is based on Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988).

8. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding state regulation of women's wages, and overruling substantive due process decision in *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (upholding state regulation of filled milk and rejecting substantive due process rationale); *Olsen v. Nebraska*, 313 U.S. 236 (1941) (upholding state law fixing maximum fee, and explicitly denying precedential value of prior substantive due process decision in *Ribnik v. McBride*, 277 U.S. 350 (1928)). For the view that these decisions represented a transformation of the Constitution, equivalent in effect to the Civil War Amendments, see Ackerman, *Constitutional Politics/Conventional Law*, 99 YALE L.J. 453, 486-515 (1989); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1044-72 (1984).

topic of debate among constitutional scholars for several decades, but it did not require a different approach to scholarship; the Court's new theory could be subjected to the same techniques of case analysis as the old one.

The changes that have occurred in our social conception of law over the course of the past century are of a different order. They have changed the meaning of law in its entirety because they have created a new group of legal decisionmakers. These decisionmakers, primarily legislators and administrators, are now the principal law-creating officials in our society, and thus the most appropriate audience for legal scholars. To the extent that legal scholars fail to structure their works as recommendations to these decisionmakers, they will restrict the significance of their endeavors.

Legal scholars, however, need not change. They can opt for the limited significance that results from continuing to underemphasize legislative and administrative lawmaking. Because scholarly success is determined within the academy, and not by the decisionmakers whose lawmaking function is ignored, the system can perpetuate itself. This is particularly true because legal scholars, as faculty members, control entry into a lucrative profession. If those who rejected Einstein's theory, and insisted on the truth of Newtonian mechanics, controlled entry into civil engineering, they too might still grace our campuses some ninety years after their ideas ran into conceptual difficulties.<sup>9</sup>

Thus, although the transformation of our legal system ought to produce changes in a prescriptive discipline such as legal scholarship, that transformation will not compel the change. The legal academy has enough autonomy to retain its premodern attitudes. Change requires a new conception of law; scholars must not only think differently about what counts as law, but they must think differently about the essence of law itself. To explore the parameters of the process more fully, it is necessary to consider the old and new conceptions of law in greater detail.

### III. THE OLD CONCEPT OF LAW

A century ago, when law schools first appeared as graduate programs in American universities<sup>10</sup> and legal scholarship took shape as

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9. Civil engineering could be performed perfectly well on the basis of Newtonian mechanics, since relativistic effects do not appear at the velocities and energy levels involved. Our hypothetical Newtonians could not analyze the behavior of elementary particles, of course, but they might respond that the study of these particles was not physics, but quantumology, and consign it to a separate department of the university.

10. During the 1820s, and again in the 1850s and 1860s, a number of American colleges established affiliations with private law schools. See R. STEVENS, *supra* note 1, at 5-28. These

an academic discipline, law was conceived as the special province of the judiciary. The judiciary both declared the law and applied it to particular cases. Law meant the common law, the body of rules which defined crimes and governed interactions between private citizens.<sup>11</sup> Sophisticated observers recognized, of course, that the legislature could make law and that the Constitution served as the organic law of the nation. The general view, however, was that both ordinary legislation and the Constitution belonged to the realm of politics, and were somehow distinct from the process by which courts declared and applied the law.<sup>12</sup> These distinctions may seem artificial and incoherent today, but they were entirely meaningful to the attorneys and judges who comprised the legal community a century ago.

The common law that judges declared and implemented possessed a number of distinguishing features that sprang from the judiciary's institutional position and conceptual orientation. Much of this is familiar but, as Melvin Eisenberg's recent study suggests, it is too subtle and complex for easy generalizations.<sup>13</sup> For present purposes, however, a few features that distinguish the judge-made law of the previous century can be identified.

To begin with, traditional common law was regarded as embodying a set of transcendental principles, that is, principles that were not simply the enacted rules of a particular regime but general legal principles that applied to all societies.<sup>14</sup> Fault, intent, consent, causation, property, responsibility, and various other concepts were seen as universal elements of any developed legal system. This belief has an undeniable intellectual appeal, but it also rested on a strong institutional basis. As a result of our revolution we rejected the King of England, the statutes of England, the taxes of England, even the judges of England, but we did not reject the judge-made law of England.<sup>15</sup> The only

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law schools were pure trade schools — somewhat similar, one gathers, to the present-day truck driving schools that advertise on late-night television. The development of law school as a three-year graduate program was the work of Charles Eliot, as President of Harvard, and Christopher Langdell, as Dean of the Law School. *See id.* at 36-37; *see also* Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979). The new structure required the study of law to become an academic discipline as well as training for a profession.

11. *See G. GILMORE, THE AGES OF AMERICAN LAW* 41-67 (1977); L. FRIEDMAN, *HISTORY OF AMERICAN LAW* 354-56 (1973).

12. *See R. STEVENS, supra* note 1, at 39-42.

13. M. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

14. *See G. GILMORE, THE DEATH OF CONTRACT* 35-44 (1974) (discussing Williston); Grey, *Langdell's Orthodoxy*, 45 U. PITTS. L. REV. 1, 5, 11-15 (1983); White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213, 220-21 (1978).

15. *See 1 J. KENT, COMMENTARIES ON AMERICAN LAW* 472-73 (2d ed. 1832):

The common law of England has been assumed, or declared by statute, with the like modifications, as the law of every state. . . .

The best evidence of the common law is to be found in the decisions of the courts of

basis for this continued fealty to the laws of a deposed sovereign was that these laws were not the political acts of a particular regime but law itself — general or transcendental principles that were valid in all societies.

As our democracy evolved, the idea of a transcendental law was infused with the newer one that judges, unlike the legislature or the chief executive, were appointed officials who could exercise lawmaking power only when they were discovering general principles, rather than expressing their own policy preferences. Alexander Bickel christened this same concern “the counter-majoritarian difficulty” in the case where a court overturns an enacted statute on constitutional grounds.<sup>16</sup> The justification for such actions generally turns on some appeal to the Constitution itself, but common law judges, who were equally unelected, had no positive law on which they could rely; the legitimacy of their lawmaking role in a democratic government had to derive from the inherent validity of the laws that they declared — from its relationship to general principles.

Second, judge-made law must develop incrementally. Because of the institutional structure of the judiciary, judges cannot initiate law-making opportunities. They do have the power to select among the opportunities presented, even at the trial level, but they are limited to the range of cases presented to them. Moreover, this phenomenological position as a decisionmaker is contextualized within the case. To borrow Gadamer’s image, the facts presented by the case create the horizon of judges’ legitimate decisionmaking power.<sup>17</sup> While judicial notice, the Brandeis brief, and the more sociological style of contemporary legal reasoning allows some lateral expansion of this horizon, judges still have no independent fact gathering or general lawmaking powers. They are on the safest and most legitimate ground when they

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justice, contained in numerous volumes of reports, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of English history down to the present time.

Kent also allows “English statutes passed before the emigration of our ancestors” to be part of the common law of the United States. *Id.* at 473. Presumably, this is because these statutes serve as a basis for judicial decisions. Clearly, contemporary English statutes would not be treated one same way.

16. See A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962). Not all of Bickel’s concerns apply to judicial lawmaking. For example, Bickel believed that the judiciary’s power to declare enacted laws unconstitutional might weaken the democratic process because legislators would rely on the courts to correct their mistakes. *Id.* at 21-22. This is not a significant problem in common law, because legislation clearly supersedes it. But Bickel’s basic concern about lawmaking by officials who are not subject to public scrutiny and control is fully applicable.

17. H. GADAMER, TRUTH AND METHOD 269-74 (G. Barden & J. Cumming trans. 2d ed. 1975). See *id.* at 269 (“Every finite present has its limitations. We define the concept of ‘situation’ by saying that it represents a standpoint that limits the possibility of vision. Hence an essential part of the concept of situation is the concept of ‘horizon.’ ”).

restrict themselves to the range of situations that the case presents. This necessitates an incremental decisionmaking style, one that proceeds by fact-specific stages rather than by broad generalizations.<sup>18</sup> When courts, even constitutional courts, veer too far from this ideal, their decisions become suspect. The *Roe v. Wade* opinion,<sup>19</sup> with its judicial statute about trimesters, is a familiar example. While the challenge to this case is largely a political and moral one, its legitimacy certainly was impaired by the universal agreement that the Supreme Court wrote a poor opinion.<sup>20</sup>

The combination of transcendental principles with incremental decisionmaking tends to generate another characteristic of the judge-made law: its reliance upon analogy. Eisenberg indicates that analogy is not an independent technique but a mode of reasoning that must be guided by overarching rules or principles.<sup>21</sup> The converse is true as well; in traditional common law analysis, principles were typically brought to bear upon the case at hand through the medium of analogy. The reason is that these principles are found in the specific, situation-contained cases that form the arena of judicial reasoning. If cases serve as the only arena for the actuation of these principles, then they are the primary and most important source of law. To discard the use of analogy, one would need unmediated access to the principles themselves. This is possible when the transcendental principles have some independent source; the claim of divine revelation, for example, rejects established bodies of doctrine in favor of direct communication with the Almighty. Closer to home, constitutional courts sometimes reject a line of precedent by going back to the original words of the Constitution.<sup>22</sup> In the common law, however, no recognized authority establishes the guiding principles. These principles are most authoritatively established through their appearance in decided cases, much as artistic genius is actuated exclusively through specific works of art.<sup>23</sup> This

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18. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 16-17 (1948).

19. 410 U.S. 113 (1973).

20. Negative assessments of the Court's opinion are legion. See, e.g., Ely, *The Wages of Crying Wolf, A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 998-99 (1979); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

21. M. EISENBERG, *supra* note 13, at 83-96.

22. A notorious example is *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972), where the Court suddenly found that the word "property" in the due process clause had significance for the doctrine that had not been previously recognized.

23. I. KANT, CRITIQUE OF JUDGMENT 46-50 (J. Bernard trans. 1951).

compels judges to take prior cases very seriously and leads naturally to an analogical approach.

Finally, the common law is characterized by a mode of argument which can be referred to as process justification. The decisionmaker justifies her decision by setting forth the steps she used to reach it. In a typical judicial opinion, the judge begins by characterizing the facts of the case at hand and then compares this characterization with the conclusions of prior cases. By pointing out similarities and differences between these prior cases, guided by the principles that transcend each case but find expression in it, the judge will then reach a conclusion about the proper way to decide the case at hand. If this conclusion is subject to significant challenges, from one of the parties or otherwise, the judge will typically consider each challenge in order and explain why it is not persuasive. This process argument is not psychological but conceptual. The judge is not trying to recreate her actual thought patterns, but to justify her conclusion by showing that it proceeds from accepted sources by legitimate, properly argued steps.

While process reasoning is obviously compatible with an incremental, analogical approach, it is not necessarily limited to that approach. Mathematical proofs also employ process reasoning, although they generally do not rely upon analogy or incrementalism. The necessary link seems to be between process reasoning and transcendental principles. If one begins with general principles, then truth is to be found by reasoning from those principles deductively. There is no independent criterion for testing the validity of the endpoint; one must trace the path back to the principles with which one began. The process becomes more complicated, at least in theory, if one does not possess unmediated access to those principles, and must discern their contours from their contextualized expressions. This precludes pure deduction, as in mathematics, and compels reliance on techniques such as analogy.

The common law, of course, has not remained unaltered since the age of formalism. In fact, its distinctive features, as identified above, have been significantly modified by the political and conceptual events of this century.<sup>24</sup> Most notably, common law decisionmaking no longer makes a strong claim to transcendental principles, although residual traces of this claim can still be found in judicial language.<sup>25</sup>

24. See Farber & Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875 (1990); Strauss, *Review Essay: Sunstein, Statutes and the Common Law — Reconciling Markets, the Communal Impulse, and the Mammoth State*, 89 MICH. L. REV. 907 (1990).

25. Legal realism and critical legal studies have expended much of their energy in establishing the political, rather than transcendental, nature of legal principles. See, e.g., R. UNGER,

The more frequent claim is that the principles which animate judicial decisionmaking are transpolitical; although they may not be universally true, they are true for our culture because they reflect a consensus that crosses existing political boundaries. This is sufficient to establish the legitimacy of judicial lawmaking in the face of Bickel's countermajoritarian concern. It does not explain why the common law of another nation, such as England, would have authoritative force, but by the twentieth century, America's common law was sufficiently indigenous to render such an explanation unnecessary.

Along with the reinterpretation of guiding principles of common law as transpolitical rather than transcendental came the cautious use of other modes of reasoning in judicial decisionmaking. Policy sometimes displaced analogy; instead of looking to prior decisions as authority, judges would look to statutes, executive proclamations, or public opinion.<sup>26</sup> This policy orientation was linked to the change in the perceived provenance of the animating principles. If the principles were merely transpolitical, and not transcendental, they could be embodied in sources other than judicial decisions. One might find these principles reflected in particular legislative actions or particular expressions of popular opinion. The problem, of course, was to separate the transpolitical from the contingently political, the policy of the public at large from the policy of the Democratic or Republican party.<sup>27</sup> For this reason, public policy had to be invoked with care, and only in the context of proper judicial analysis. Nonetheless, it was an available source of authority, and allowed the common law to reflect broad social and political developments. These modifications produce the flexibility and continued vitality of common law results.

#### IV. THE NEW CONCEPT OF LAW

The growth of the administrative state and the associated or parallel developments in social attitudes have brought with them a new

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KNOWLEDGE AND POLITICS (1975); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). By now, the point has been fully assimilated into our legal consciousness. See B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 6-22 (1984).

26. See M. EISENBERG,, *supra* note 13, at 29-31.

27. The crucial factor is consensus. One reliable guide to consensus is a statute which, despite its partisan provenance, becomes the law of the land upon enactment. See Farber & Frickey, *supra* note 24, at 892-93, 898-99. Another guide is social attitudes that seem to the judge to be broadly, albeit not universally, held. See M. EISENBERG,, *supra* note 13, at 14-26; Greenwalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1004-05 (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 226-29 (1973). The dangers and inconsistencies of relying on each of these sources are obvious, even to judges; the point is merely that judges aspire to transpolitical, rather than contingently political, sources for their policy determinations.

conception of law, and a concomitant change in judicial attitudes and methods. Scholars frequently speak of the judge who ventures beyond the bounds of the common law for principles of legal decisionmaking and implements his conclusions by extensive, specially designed remedial orders.<sup>28</sup> In recent years, the emphasis on the judge's role as an interpreter of statutes has grown, again rejecting the boundaries of common law to deal with the judge's function in the modern state.<sup>29</sup> All this writing, however, gravely underestimates the changes that have occurred because it continues to focus on the judge. The most notable change that the administrative state has effected in our legal system is that judges are no longer our primary lawmakers. Legislators and administrators now fill that role. Consequently, any body of writing that focuses on judges is likely to overlook the truly distinctive features of law in the modern state. Those features can only be perceived by considering the lawmaking functions of legislators and administrators, and investigating what law means to these decisionmakers.

At the outset, one must recognize that the advent of legislators and administrators as our primary lawmakers is just one part of the larger set of changes produced by the administrative state. Administrators have also become our primary adjudicators,<sup>30</sup> and to the extent that adjudication continues to make law, that lawmaking process will occur within the administrative agency as well.<sup>31</sup> The Presidency has changed character, becoming much more of a coordinating and direc-

28. See, e.g., D. HOROWITZ, THE COURTS AND SOCIAL POLICY 4-9 (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976); Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2-3 (1979); Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 376-78 (1982).

29. See, e.g., G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982); Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 62-66 (1988); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Macey, *Promoting Public Regarding Legislation Through Statutory Interpretation, An Interest Group Model*, 86 COLUM. L. REV. 223, 226-27 (1986); Posner, *Statutory Interpretation — In the Classroom, In the Courtroom*, 50 U. CHI. L. REV. 800, 801-02 (1983); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 412-13 (1989).

30. For an extensive discussion of the failure of legal scholarship to deal with administrative adjudication, see W. CHASE, *supra* note 1, at 12-22. Chase's account focuses heavily on historical contingencies, particularly the domination of the Harvard Law School method. In his view, things might have gone quite differently had Ernst Freund, the hero of his account, prevailed in his plans at the University of Chicago, instead of being defeated by Joseph H. Beale and Felix Frankfurter, *id.* at 46-59, 94-135. There is poignance to the story Chase relates, but it seems difficult to believe that such large trends turned on the personal influence of a few academics.

31. For a discussion of the way in which administrative adjudication requires a reinterpretation of the adjudicative process, see J. MASHAW, BUREAUCRATIC JUSTICE 14-17 (1983); J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 12-15 (1985); Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

tion-setting office for the executive agencies and perhaps the independent agencies as well.<sup>32</sup> Other forms of control, besides formal lawmaking, have arisen or expanded in importance. All these developments are relevant to legal scholarship; for the present however, the most important development, because it represents the very essence of our new governmental system, is that legislators and administrators make the vast bulk of our laws. As a result, the entire concept of law has been transformed. The general character of this transformation has been explored by Bruce Ackerman,<sup>33</sup> and by Philippe Nonet and Philip Selznick,<sup>34</sup> among others. For present purposes, the concern is with the way that our society's dominant conception of law itself has changed since the common law era.

Legislators and administrators live in a regime of positive law, not transcendental or even transpolitical legal principles. For legislators, the law is an instrumentality by which they achieve their political or ideological goals. For administrators, some law is a set of explicit instructions from the legislature, ranging from the incredibly vague to the unbelievably detailed, but always proceeding from a definite source and having some specific purpose. The remaining law consists of the rules the administrators promulgate, and is analogous to legislation; it implements specific purposes, theoretically the purposes of the authorizing statute, but often as political or ideological as the legislature's.<sup>35</sup> Courts intercede in this modern lawmaking process, but less often than the casebooks would suggest and almost always in a supervisory capacity. They declare that the administrators have violated a governing statute, or that the legislature has violated the Constitution, but they always point to a positive legal enactment of our own nation rather than invoking transcendental principles. Legislators and administrators, in their day-to-day activities, see law as an instrumentality, a means of achieving specific purposes.

Secondly, the development of law in our modern legal regime is not necessarily incremental. Sometimes it is: statutes are amended, agencies redirected by legislative oversight, regulations amended by

32. See generally E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984, 84-191 (R. Bland, T. Hindson, J. Peltason eds. 5th ed. 1984); R. NATHAN, THE ADMINISTRATIVE PRESIDENCY (1983); R. NEUSTADT, PRESIDENTIAL POWER (1960); Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979).

33. B. ACKERMAN, *supra* note 25.

34. P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION (1978).

35. See generally E. BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1977); M. DERTHICK, NEW TOWNS IN-TOWN: WHY A FEDERAL PROGRAM FAILED (1972); I. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION (2d ed. 1979); B. RADIN, IMPLEMENTATION, CHANGE, AND THE FEDERAL BUREAUCRACY: SCHOOL DESSEGREGATION POLICY IN H.E.W. 1964-68 (1977).

the agencies, and interpretations of existing laws and regulations altered by shifts in administrative strategy. But at other times, major policy initiatives are undertaken: a new statute, a major change in executive policy, even a comprehensive regulation. The degree of change is thus the decisionmaker's choice, rather than being fixed by the decisionmaking process itself. To continue Gadamer's image, the regulatory state adds another dimension to the case-situated position of legal decisionmakers. It enables them to rise out of specific situations to an altitude where comprehensive planning over a wide area of legal terrain can occur. As a consequence, detail may be lost, but that is a specific problem that the decisionmakers may try to solve when operating at that altitude. This additional dimension allows for general declarations of law, designed to implement broad, comprehensive policies.

Because of this instrumental and potentially comprehensive approach, the development of law no longer relies upon analogy. Stated most starkly, and with only slight exaggeration, prior legislation has no binding effect on current enactments whatsoever. It may serve as a source of information; a conscientious, public-oriented legislator will look at prior laws to determine whether a particular legislative strategy is effective, while a venal, public-choice legislator will look to these laws to see whether a particular strategy got its sponsors clobbered in the last election. But neither legislator will regard prior law as a source of authority for a new enactment. The policy judgments that control their enactments, unlike the principles that control judicial decisions, are not perceived as being expressed through the medium of prior enactments.<sup>36</sup> Because these policies are contingent and instrumental, rather than transcendental, legislators can have direct access to them, and they are not necessarily expressed in prior statutes.

For administrators, the governing statute is of course an authority, but this is the authority of hierarchy and direct command, not the analogical authority of parallel decisions. Administrators also decide on the basis of policies; these may come from the statute, or from non-statutory political or ideological considerations. But they have a definite source, and need not be sought in prior regulations. Modern law develops by adding new enactments, and replacing or amending old ones, but not by analogy from prior laws. Thus, it has no need of the

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36. In narrative accounts of legislative drafting and design, politics and policy figure prominently, but prior law is hardly ever mentioned. See, e.g., S. BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946 (1950); S. DAVID, WITH DIGNITY: THE SEARCH FOR MEDICINE AND MEDICAID (1985); E. REDMAN, THE DANCE OF LEGISLATION (1973).

elaborate theory of overruling that Eisenberg has explicated for the common law.<sup>37</sup>

Finally, modern legislative and administrative law is distinguished from the common law by its mode of justification. Instead of process justification, where the decisionmaker traces an idealized path from source to conclusion, legislators and administrators use what may be described as cause-and-result justification. They take action because a problem exists,<sup>38</sup> and their choice of action is based on the expected effects. This mode of justification is set forth in the preamble of virtually every statute. The "Whereas" clause states the problem — "Whereas the legislature finds that there exists a lack of affordable rental housing within its jurisdiction . . ." — and the "hereby enacts" clause states the expected result — "the legislature hereby enacts a general limitation on rents, so that more rental units will be offered at affordable rates." It would seem irrelevant, and peculiar, for a statute to explain how the legislature figured out the provisions it enacted.<sup>39</sup> This is not simply because of Bismark's observation that anyone who loves law or sausage should not watch either being made. The legislature could readily present a sanitized version of its thought process, if that were deemed important. But it is not: statutes are regarded as instrumentalities, designed to achieve particular results, and they are justified by a perceived need to achieve results in a given area, and by the results that they achieve.

This then is the conception of law that emerged from our modern, administrative state. In some sense it simply describes the lawmaking functions of legislators and administrators, as opposed to judges, and it emphasizes the shift from common to statutory law. But it also

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37. M. EISENBERG, *supra* note 13.

38. This is the mode of thought that Max Weber identified as purposive-rational, and that he specifically linked to modern bureaucratic institutions. See M. WEBER, ECONOMY AND SOCIETY (G. Roth & C. Wittich eds. 1978). For an incisive discussion of Weber's approach, see J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 143-271 (T. McCarthy trans. 1981).

39. The growing criticism of using legislative history as a guide to interpretation is based on the perceived irrelevance of any effort to recreate the thought process of the legislature. While speeches and committee reports generally attempt to justify the statute's provisions in terms of the results to be achieved, they sometimes do advance purported descriptions of the legislative thought process. Because these descriptions have no legitimate function, they have come to be perceived as conscious efforts to manipulate subsequent interpreters of the statute. See, e.g., Begier v. IRS, 110 S. Ct. 2258, 2267 (1990) (Scalia, J., concurring); Blanchard v. Bergeron, 109 S. Ct. 939, 946 (1989) (Scalia, J., concurring); *In re Sinclair*, 870 F.2d 1340, 1341-44 (7th Cir. 1989) (Easterbrook, J.); Stoddard v. Board of Governors, 868 F.2d 1308, 1311 (D.C. Cir. 1989) (Buckley, J.) (quoting *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986)); Natural Resources Defense Council v. EPA, 822 F.2d 104, 113 (D.C. Cir. 1987) (Starr, J.); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POLY. 59 (1988); Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371. There has been no similar attack on judges' explanations of their decisions as a guide to interpretation.

represents our society's view of what "law" really is. Thus, legal decisions in other institutions, such as courts, tend to be assimilated into the dominant view. In preadministrative America, lawmaking by legislatures was regarded as an appendage to the common law, a way of overruling particularly unpopular decisions, asserting or waiving governmental rights, or enforcing judicial decrees.<sup>40</sup> Of course, legislatures did many other things as well — they appropriated funds, imposed taxes, approved treaties, acquired and distributed government property, and so forth, but these things were generally not viewed as law. Conversely, our modern view of judge-made law is that it consists of the incremental articulation of a general plan in situations where such an approach makes sense on policy grounds.<sup>41</sup> The common law authority of courts is established by tradition, but we tend to explain it in a similar manner. Moreover, that explanation — that conception of law — has been internalized by judges themselves. When they feel obligated to provide an explicit justification for a decision, they often rely on the type of policy argument that serves as the basis of legislation, rather than the principles and analogies of common law.<sup>42</sup>

## V. THE OLD LEGAL SCHOLARSHIP

Legal scholarship in the premodern era was not identical to the old concept of law described above. But because it was a prescriptive scholarship addressed to judges, it needed to adopt a mode of argument which was consistent with judicial reasoning. Thus, one of the basic tasks of legal scholars was to discern the general principles embedded in the common law. The best medium for doing so were treatises, those magisterial surveys that marshalled thousands and thousands of judicial decisions, set them in neat rows and files, discerned their general pattern and articulated it as a principle of law. These treatises came to be viewed as the apotheosis of legal scholar-

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40. See, e.g., 1 J. KENT, *supra* note 15, at 464.

41. This is an essentially positivist approach, implying that judicial power derives from positive enactments of the legislature. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961); H. KELSEN, *GENERAL THEORY OF LAW AND THE STATE* 58-64 (1945); J. RAZ, *THE AUTHORITY OF LAW* 181-97 (1979). When the legislature enacts a judicially enforced statute whose terms are vague, the courts are empowered to fill in the gaps by judicial lawmaking.

42. See M. EISENBERG, *supra* note 13, at 26-37; Chayes, *supra* note 28; Fiss, *supra* note 28; Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178 (1984). They may also rely on moral principles, see M. EISENBERG, *supra* note 13, at 14-26, and the legitimacy of their policy orientation has been questioned, see Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). But as an empirical matter, the tendency of modern courts to speak in policy terms seems clear.

ship, the aircraft carriers of the scholarly fleet.<sup>43</sup> The surest route to preeminence was to write one, and the authors of the leading treatises are still well-known by law-trained people — synonymous with the subject matter, nearly — while their equally learned contemporaries are long-forgotten.

The relationship between the treatises and judicial decisions are a classic example of what Eisenberg refers to as the responsiveness of common law.<sup>44</sup> While treatises were not authority per se, they became acceptable citations as crystallizations of the principles embodied in a line of cases. They thus provided judges with a pastor, although not a Pope — an indirect expression of the general truth that could be confirmed by the individual act of examining the precedents. The treatise writers responded by proudly filling their footnotes with “citing treatise” citations, and this became further evidence of their quasi-canonical status.

Law review articles could fulfill this same function, sometimes cautiously, as the germ of a future treatise chapter, sometimes with startling originality, as Warren and Brandeis did with the right to privacy.<sup>45</sup> More often, however, articles related to another feature of the common law, namely its incrementalism. As the common law developed on a case-by-case basis, the law reviews responded, first with case notes, soon thereafter with more detailed analyses. These articles depended on the case for their conceptual horizon, and they also depended on it for their subsequent significance. As long as the case represented a current statement of the law and a guiding precedent for other decisions, its attendant article was of significance; as the case faded in importance, to be replaced by others, the article faded into the dim obscurity of law school libraries. Of course, many articles had greater aspirations, establishing a somewhat higher altitude, and thus defining a broader conceptual horizon than the cases that inspired them. But even these generally remained in contact with the underlying case law, providing a greater, but essentially parallel perspective, like a spotter plane above advancing troops.

The reasoning of legal scholarship was not identical to judicial reasoning; it relied more on principles and less on analogy, and it was not as painstaking in its process arguments. But because it was prescrip-

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43. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 670-71 (1981).

44. M. EISENBERG,, *supra* note 13, at 12-13.

45. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). On the influence of this famous article, see Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960); Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966).

tive scholarship addressed to judges, it was compelled to adopt an approach congruent with judicial reasoning.<sup>46</sup> Analogies were regularly invoked, not with the same urgency but as important evidence. To demonstrate that a particular conclusion was justified, and another mistaken, scholars often traced the proper path of argument by process reasoning. They often criticized the reasoning in certain cases more harshly than the judges, because scholars were not bound by rules of precedent or authority, and did not feel obligated to grant prior decisions the same deference that judges did. But their analysis largely mirrored the judicial approach. Their invocation of principles was more direct, but different only in degree.

Legal scholars used judicial reasoning not simply as a technique, however, but as a system of meaning. Because the scholarship defined its role as offering prescriptions to judges, the system of judicial reasoning seemed like the law itself. Statutory and administrative law-making were defined out of the discipline, banished to the nether world of policy.<sup>47</sup> Judicial reasoning — the incremental, analogical, process argumentation indirectly guided by general principles — was assumed to be the only methodology of law. That was what legal scholars meant by the well-worn slogan, thinking like a lawyer, that they used as a basis for bedeviling their first-year classes.

Legal scholarship has changed, of course, since the classic era of treatise writing and common law analysis. Treatises have waned in their importance, to the point that they are more often regarded as guides for students and practitioners than as major scholarly achievements.<sup>48</sup> Law review articles and books, even those that represent the standard mode of scholarship, now invoke policy arguments and social science insights more often than they present close arguments from lines of doctrine. But most of this work continues to be directed largely to judges, and its modes of argument have changed only to the degree that the judges' arguments themselves have changed. Policy, for example, is considered a way of informing the judicial decision-making process, a means of redirecting the incremental, analogical flow of doctrine. It is recognized, but placed within a judicial framework, just as judges themselves do as a matter of institutional necessity. Explicit policy analysis, unconnected with the judicial

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46. This phenomenon can be termed a "unity of discourse" between judges and scholars. Rubin, *supra* note 7, at 1859-65.

47. See W. CHASE, *supra* note 1, at 46-76; R. STEVENS, *supra* note 1, at 51-64.

48. There are exceptions of course. The most notable, in recent years, is L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988) which set forth a highly developed, controversial theory of the Constitution. See also J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* (3d ed. 1988), whose views have been a factor in the scholarly debate within its field.

decisionmaking process, is consigned to other disciplines, such as economics or political science.

The shift in basic lawmaking functions from judges to legislatures and administrators might have rendered this judicial orientation untenable for a prescriptive discipline like law. Recommendations about law, after all, should be addressed primarily to those responsible for lawmaking. But the prescriptive character of legal scholarship does not require that the success of a work be measured by its real-world impact. Rather, prescription serves as a framework of meaning, establishing guidelines for creating and evaluating scholarly endeavors. The work is judged by its quality as a prescription, not by its actual effect. This internal value system, a characteristic legal scholarship shares with virtually every other discipline, gives the field its coherence. But it also enables legal scholars to continue addressing a decisionmaker who has been demoted to a subsidiary status, despite the explicitly prescriptive nature of their discourse.

Legal scholarship, to be sure, contains a number of new trends — most notably critical legal studies and the economic analysis of law. These two rather disparate movements share a desire to distance themselves from standard legal scholarship, employing other disciplines to build new intellectual constructs. Nonetheless, both movements have remained bound to the judicial orientation of standard scholarship. This is surprising given their aspirations and their rhetoric, but it indicates how alluring the siren-song of the judicial framework seems to be.

The judicial orientation of critical legal studies is the result of its origins. There is a radical tradition in American thought — one that is somewhat apologetic about its debt to Marxism, but intellectually coherent nonetheless.<sup>49</sup> This tradition could have been focused directly on the legal order, both as a critique of existing arrangements for the governance of society and as a blueprint for new laws that would achieve more justice and equality. Instead, the critical legal studies movement was formed from a mixture of this radical tradition and a complex, philosophic argument that legal doctrine is inherently incoherent.<sup>50</sup>

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49. See, e.g., C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913); G. KOLKO, THE TRIUMPH OF CONSERVATISM (1963); A. ROCHESTER, THE POPULIST MOVEMENT IN THE UNITED STATES (1943).

50. See, e.g., Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151

The incoherence argument presents a number of difficulties. To begin with, it never developed a sufficient conception of coherence, and thus was limited to responsive criticism, rather than formulating a comprehensive critique.<sup>51</sup> Second, it was attacking something of a straw person; legal realism had already criticized the coherence of legal doctrine rather effectively,<sup>52</sup> and most sophisticated defenders of doctrinal coherence probably recognized that doctrine as an uneasy practical accommodation by the time critical legal studies took shape.<sup>53</sup> This attenuates the linkage between the coherence argument and the political motivation of critical legal studies. That linkage is necessarily forged by the argument that law's claim to coherence is a means of defending the status quo and suppressing people's emancipatory instincts.<sup>54</sup> But if law no longer relies heavily on coherence arguments, its social injustice must spring from sources other than its claim to intellectual coherence.

The most serious problem with the incoherence argument, however, is that it applies almost exclusively to judges.<sup>55</sup> Judges are the only public officials whose lawmaking authority is even arguably derived from the conceptual coherence of law. They are, or were, the

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(1985); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

51. See, e.g., Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

52. See B. ACKERMAN, *supra* note 25, at 6-22. For leading legal realist criticisms, see, for example, J. FRANK, *LAW AND THE MODERN MIND* (1930); Bingham, *What Is the Law?*, 11 MICH. L. REV. 1 (1912); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

53. The relationship between critical legal studies and legal realism is explored in Peller, *supra* note 50, at 1219-59; Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986). In essence, Peller and Tushnet perceive a similarity in the critical enterprises of the two movements, although they regard the critical legal studies attack as the more thoroughgoing. The difference they perceive between these movements is that legal realism had a more optimistic, constructive tone. In fact, critical legal scholars find the proposals of the realist school just as lacking as they find the structure of the common law.

54. See, e.g., M. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 5-14 (1986); Dalton, *supra* note 50. The theoretical basis of this claim is provided by critical theory. See J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (J. Shapiro trans. 1971); M. HORKHEIMER & T. ADORNO, *DIALECTIC OF ENLIGHTENMENT* (J. Cumming trans. 1972).

55. The same is often true of two recent movements roughly allied with critical legal studies, namely radical feminism and critical race theory. See, e.g., Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (plea for listening to minority women's voices, followed by analysis of the reasoning in a judicial decision); Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (proposing pluralist, nonexist concept of discrimination, then analyzing a judicial decision); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (recommending a new legal consciousness, then exemplifying it with a judicially structured argument for reparations); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (proposing a feminist conception of law, and applying it to rape and abortion cases).

ones who claimed that they were simply extrapolating the transcendental principles that inhere in the body of decided cases. Legislators and administrators, our primary lawmakers, see themselves as implementing public policy that is derived from other sources. The coherence of the enactments they produce is of minor importance, either morally or practically. At most, it is a heuristic, a way to make enacted law easier to understand and implement.<sup>56</sup>

The critical legal studies attack on coherence, therefore, deconstructs very little as far as modern legislative and administrative enactments are concerned. As a result, the linkage between the attack and the political motivation of the movement dissolves in this arena. While some critical legal studies writers have focused on other legal decisionmakers,<sup>57</sup> the movement has generally leveled its attack on an outmoded justification by a subsidiary legal institution, and thus failed to articulate a radical critique of our basic legal structure. The reason for this diversion of attention is that critical legal studies, like traditional scholarship, remains bewitched by the judiciary. For traditionalists, judges seem like the only officials worth speaking to; for the crits, these same judges seem like the only officials worth criticizing. The whole movement smacks of an almost adolescent rebellion against the most familiar and convenient authority figure, rather than a comprehensive attack on social injustice.

Law and economics explicitly adopts an interdisciplinary framework, a framework which has been directed toward policy analysis since its very inception. One would have thought that this would have naturally and effortlessly led to the analysis of legislative and administrative actions, and to the exploration of whether these actions were economically efficient. Instead, the legal scholars who inaugurated the field focused their attention, once again, on the judiciary. Guido Calabresi used economics to analyze common law liability rules.<sup>58</sup> This

56. See Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984). Trubek perceives an empiricist theme to critical legal studies, a study of "relations among legal ideas, social beliefs, action, and order," *id.* at 603, that is directed to generating a new legal consciousness. He observes, however, that the movement has been notably averse to empirical research. *Id.* at 615-18. He connects this to the overemphasis on ideology, the unproved assumption of CLS scholars that deconstructing ideology will lead to social change. *Id.* at 610-15. But a further explanation is that CLS has mounted an attack on legal rules within the arena of judicial doctrine. Trubek's own description indicates this; he identifies the empiricism of CLS in its willingness to look at doctrine from the outside, as an observer of its social role. *Id.* at 586-600. But what is being looked at is "doctrine" — judge-made or judge-interpreted rules.

57. See, e.g., Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (legislators, among others); Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (lawyers); see also C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

58. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 LAW &

was followed, more fatefully, by Richard Posner, who quickly moved from a promising analysis of regulation to the fantastic claim that common law was economically efficient.<sup>59</sup> With that, the entire approach became bound, almost inextricably, to the analysis of judicial decisionmaking.

It is widely maintained now that Posner was wrong, that he misdescribed the common law and failed to understand its meaning.<sup>60</sup> More significantly, however, this argument, right or wrong, simply overlooked the real value of economics. Economics is an analytic tool, deriving its philosophic origin from utilitarianism, which allows us to determine whether particular strategies are economically efficient. Adam Smith used the method to critique the regulatory system of the guilds,<sup>61</sup> and Alfred Kahn used it to critique the regulatory system of the New Deal.<sup>62</sup> The question legal scholars could have asked is whether particular sets of laws were efficient, and if not, what laws should be enacted in their place. Perhaps they would have concluded that the enforcement of private agreements was the most efficient in a wide variety of contexts. Perhaps they would also have concluded that courts were the most efficient mechanisms for enforcing these agreements. But the starting point of this analysis would have been our predominant set of laws, namely, the laws enacted by the legislatures and administrative agencies. Instead, law and economics proceeded backwards. It began with the common law doctrines and tried to justify those doctrines in economic terms. It thus confined itself to judicial decisionmaking, a limitation which it has only recently and intermittently escaped.<sup>63</sup>

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CONTEMP. PROBS. 429 (1968); see Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

59. R. POSNER, ECONOMIC ANALYSIS OF LAW 25-191 (2d ed. 1977); R. POSNER, THE ECONOMICS OF JUSTICE 254-67, 282-99 (1981); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

60. See, e.g., K. SCHEPPELE, *LEGAL SECRETS* 248-65 (1988); Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 154-56 (1980); Cooter, Kornhauser & Lane, *Liability Rules, Limited Information, and the Role of Precedent*, 10 BELL J. ECON. 366 (1979); Kornhauser, *A Guide to the Perplexed: Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 610-39 (1980); Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307 (1979).

61. A. SMITH, *THE WEALTH OF NATIONS* (1776).

62. A. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* (rev. ed. 1988).

63. Again, there are a number of works that use law and economics to analyze other topics, see, e.g., Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Scott, *Rethinking The Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730 (1989). What is striking, given the discipline from which it draws its inspiration, is law and economics' continued emphasis on judicial decisions.

Other themes, of course, arise in law and economics, critical legal studies, and even traditional scholarship. All these fields are complex and they include hundreds, thousands, and, in the case of traditional scholarship, tens of thousands of separate works. The point is not to caricature the literature, but to identify its major theme or project — the intellectual inquiry that serves as an organizing principle, and to which scholars in the field devote their attention. This central theme is judicial decisionmaking. Despite all the methodological innovations of recent decades, legal scholarship still defines its primary area of concern, its concept of what really counts as law, in relation to the judiciary. Given the scholarship's prescriptive aspirations, the changes in our legal structure demand a new approach.

## VI. THE NEW SCHOLARSHIP

This brings us to the New Public Law. At present, the effort is indeed quite new, but it is also too diffuse to possess established boundaries. Many of the best examples of this scholarship were written without conscious recognition that they represented a qualitative break with the past, and certainly without any sense that they were part of a movement. What follows is an effort to define the distinctive features of this work and provide a framework for its further development.<sup>64</sup>

To create a public law scholarship that is truly new, scholars must address themselves to the legislators and administrators who make the law, not to the judiciary. Law means something different to these decisionmakers, and this is the conceptual change to which legal scholars must adjust. The purpose of the reorientation is not only to influence legislators and administrators, but to think differently about the law itself. For a prescriptive discipline like law, the intended audience serves as a structuring principle for the discourse; thus, the test of a scholarly work is whether it presents a well-reasoned prescription, not whether its recommendations are followed. The main reason to

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64. Given the volume of legal scholarship, developing an exhaustive list of works in a particular field, even a newly emerging one, would be a daunting task. A few exemplary works of New Public Law scholarship which will provide concrete examples of the general category, are as follows: B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR, OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION DOLLAR BAIL-OUT FOR HIGH SULPHUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT* (1981); S. BREYER, *REGULATION AND ITS REFORM* (1982); Meidinger, *The Development of Emissions Trading in U.S. Air Pollution Regulation*, in *MAKING REGULATORY POLICY* 153 (K. Hawkins & J. Thomas eds. 1989); Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Lehman, *Social Irresponsibility, Actuarial Assumptions and Wealth Redistribution: Lessons About Public Policy From a Prepaid Tuition Program*, 88 MICH. L. REV. 1035 (1990); Rabin, *EPA Regulation of Chlorofluorocarbons: A View of the Policy Formation Process*, in *MAKING REGULATORY POLICY*, *supra*, at 133; Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990).

shift the audience from judges to legislators is to produce a new set of questions and a new mode of analysis that enables one to deal with the realities of our modern legal system in a way that is conceptually impossible if one thinks of oneself as addressing a judge. By making this shift, one changes each of the features of the law from its judicial to its legislative and administrative version, and thereby generates a new way of thinking about law itself.

First, legislators and administrators do not see law as an embodiment of general principles, but as an instrumentality for achieving policy goals. The task of the New Public Law is to identify these instrumentalities, to develop a theory for translating policy into law. Law, a term which must be taken to include administrative regulations, is the medium in which policy directives are expressed. It is not the only medium, to be sure: many less formal devices are employed, including memoranda, verbal orders, negotiations, legislative hearings, and sub rosa threats. But most major legislative or administrative initiatives are embodied in a set of formally enacted rules.

The New Public Law scholarship attempts to answer a new set of questions: Which rules work best in general? Which work best for particular purposes? Under what circumstances is specificity desirable, and under what circumstances is it counterproductive? What is the best mechanism for enforcing various provisions? How important is public participation for achieving the purpose and how can such participation be secured? These inquiries suggest an approach to law whose components are not doctrinal arguments, nor translations of public policy into doctrine, but legislative and administrative techniques, and the translation of policy into those instrumentalities.

Perhaps the largest part of this inquiry involves the question of enforcement. This is one aspect of a statute or regulation, but it requires a perspective on the whole of modern governance. At the outset, one must choose between alternative enforcement mechanisms, that is, between courts and agencies.<sup>65</sup> The old scholarship's concern with courts has yielded some writing on this topic, but a consistent analysis of the relative virtues of the two institutions, as means of implementing public policy, is still needed. The issue must be analyzed

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65. The question is often framed in terms of whether we ought to regulate a particular area or leave it unregulated, which of course means it would be regulated by the courts. See, e.g., S. BREYER, *supra* note 64, at 156-83; B. MITNICK, THE POLITICAL ECONOMY OF REGULATION: CREATING, DESIGNING AND REMOVING REGULATORY FORMS (1980); A. STONE, REGULATION AND ITS ALTERNATIVES (1982). This elides the choice of substantive standards with the choice of enforcement mechanisms, particularly because there are a variety of substantive standards that can only be enforced by agencies in our system. The somewhat narrower question that focuses directly on the enforcement issue is whether we should choose a court or an agency to enforce a rule that could, in constitutional and practical terms, be assigned to either one.

from the legislature's perspective — an analysis that incorporates Kelsen's basic insight that in a regime of positive law, all judicial authority results from a grant of jurisdiction by the legislature.<sup>66</sup>

If the courts are chosen as the means of enforcement, the discussion will tend to converge with existing scholarship. Nonetheless, the questions will be asked from a different perspective. How should the legislature allocate the burden of proof in order to achieve certain goals? Should it authorize attorneys' fees or punitive damages? Should it create per se violations? These questions are reasonably familiar, but they are being viewed from the opposite side. The scholar would be addressing the legislator, and recommending ways to implement its goals, rather than addressing the judge, and recommending ways to understand the legislature.

This bears directly on the question of statutory interpretation. In prescriptive scholarship, the scholar must generally address one decisionmaker, as a rational or quasi-rational audience, and treat other decisionmakers as external forces. The legal literature on statutory interpretation, like most other legal literature, speaks to the judge and treats the legislature as an outside force whose goals and meaning must be guessed at, assumed, or counterfactually constructed.<sup>67</sup> The new approach addresses the legislature and treats the judiciary as an outside force. The question in that case is how to draft a statute that will be interpreted by the courts in the manner one desires.<sup>68</sup> This is

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66. See H. KELSEN, *supra* note 41, at 274-78; see also J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (2d ed. 1980). Whether there is a higher law is not directly relevant, in part because we have codified our higher law in a positive albeit general form, but mainly because that higher law would not preclude the legislature from deciding whether to preserve or displace common law. In other words, Kelsen accurately describes the structure of a modern state, even if he fails to provide a satisfactory theory of law.

67. For example, Cass Sunstein's recent discussion begins with the modern approach to interpretation:

The meaning of a statute inevitably depends on the precepts with which interpreters approach its text. Statutes do not have pre-interpretive meanings, and the process of interpretation requires courts to draw on background principles. These principles are usually not "in" any authoritative enactment but instead are drawn from the particular context and, more generally, from the legal culture. Disagreements about meaning often turn not on statutory terms "themselves," but instead on the appropriate interpretive principles.

Sunstein, *supra* note 29, at 411-12 (footnote omitted). This approach was originally developed with respect to literary or religious texts whose origins lie in the remote and, at some level, incomprehensible past. See R. PALMER, HERMENEUTICS 33-40, 75-83 (1969). That is not a defect of Sunstein's analysis; it is an inevitable attribute of any work that addresses the interpreter, whether judge, reader, or stage director, rather than the creator.

68. From this perspective, Sunstein's insight in the previous note might be restated as follows:

The effect of a statute inevitably depends on the precepts with which subsequent interpreters approach its text. Statutes do not have inevitable effects, because the process of interpretation permits courts to draw on background principles. These principles cannot be prescribed by the legislature but instead will unavoidably be drawn from the particular context of the interpreter, and more generally, from the legal culture of a future time. The interpret-

not an easy question, because of the inherent uncertainty of language, the political differences between courts and legislatures, the need for flexibility as circumstances change, and a variety of other factors. But a responsible legislator must address this question, and it merits a developed theory.

If the legislature chooses an administrative agency as the means of enforcement — a situation that is increasingly the norm — the issues multiply in their complexity and their unfamiliarity. Unlike courts, which are generally just given instructions by the legislature, agencies are frequently created or restructured by a regulatory statute. Even if the existing administrative structure is retained, the legislature has many more options when it assigns enforcement to an agency, the most notable being reliance on the agency's rulemaking power. The legislature can choose to rely heavily on this power by drafting a statute that consists of a few hortatory declarations, or it can choose to preclude this power, either directly or by drafting rules of crushing specificity, or it can choose any intermediate position. Legal scholarship contains a number of articles discussing whether courts should hold the first type of enactment void,<sup>69</sup> but it offers little guidance about which type is the best means of implementing social policy. This is a major task for the New Public Law.<sup>70</sup>

Another set of questions involves administrative strategies. When agencies issue regulations, they are also creating law as a means of implementing social policies. Many of the questions that apply to legislation apply to these regulations as well. But agencies combine enforcement activities with rulemaking, so another range of questions arises. For example, should the agency strive for full compliance, should it single out the worst offenders, or should it select examples at

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ers will disagree about the meaning of the statutory terms themselves because of differences in their interpretive principles.

The term "effect" has been substituted for "meaning" in the first and second sentences because texts almost always have meaning for their creators; the problem is that the creators cannot control the reader's construction of meanings, although the construction is based upon the text, and determines the effect of the text's creation.

69. See, e.g., Farina, *Statutory Interpretation and the Balance of Power in the Administration State*, 89 COLUM. L. REV. 452, 476-88 (1989); Merrill, *Standards — A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 MICH. L. REV. 1223 (1985); Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 NW. U. L. REV. 443 (1977).

70. For some rare examples, see Diver, *supra* note 64; Ehrlich & Posner, *supra* note 63.

random?<sup>71</sup> Should it mediate, educate, or punish?<sup>72</sup> Should it rely on an hierarchical or decentralized structure? These decisions may not seem like law, but they can be prescribed by administrative rules, or even by legislation. Presently, they count as law only from the conceptual perspective of legislators and administrators. They do not embody general, transcultural principles, but simply implement a policy goal. If scholars are to address these decisionmakers, they need to conceptualize law in these terms.

A second feature of the New Public Law scholarship is a comprehensive or global approach, derived from the frequency of a similar approach in the legislative and administrative realm. Because legislators and administrators are not limited to case-by-case adjudication, they can adopt as broad a perspective as they choose, dealing with an entire area, or with a series of related (or even unrelated) areas. Legal scholars can begin by discussing how broad such perspectives should be. But more importantly, they must adopt a similar perspective and speak to the concerns of legislators or administrators. From the higher altitudes at which these decisionmakers sometimes operate, scholars can survey an entire subject area, not on a case-by-case basis, but in terms of general, long range plans. They can anticipate issues, telling decisionmakers which are likely to arise, instead of responding to those that have arisen and have been addressed by a decided case. They can attempt to develop comprehensive plans, rather than discerning general patterns from preexisting legal events. In short, they can adopt the legislature's basic temporal orientation toward the future, in place of the judiciary's orientation toward the past.

Underlying this is a basic institutional difference between the two groups of decisionmakers. Judges do not initiate the cases they decide; where they have some flexibility, they are generally in the position of responding to the issues brought to them by adversary parties. Legislators and administrators are subject to no such constraint. While they sometimes act in response to the importuning of interest groups,

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71. The pathbreaking work in identifying these issues, within the context of legal scholarship, was K. DAVIS, *DISCRETIONARY JUSTICE* (1969). Davis's view is that the legislature should constrain discretion in the enforcement process, in the interest of justice and political accountability. His moral outrage at an inevitable situation, however, obscures most of the interesting questions. The inquiry has been continued by political scientists. See, e.g., E. BARDACH & R. KAGAN, *GOING BY THE BOOK, THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); M. BROWN, *WORKING THE STREET* 21-36 (1988); Scholz, *Discretion and Enforcement Efficiency: Problems of Complexity, Contingency, and Corruption*, in *ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION* 145 (D. Shumavon & H. Hibbeln eds. 1986).

72. The use of mediation as a tool has received some attention. See Koch & Martin, *FTC Rulemaking Through Negotiation*, 61 N.C. L. REV. 275 (1983); Comment, *Negotiated Rulemaking: An Analysis of the Administrative Issues and Concerns Associated with Congressional Attempts to Codify a Negotiated Rulemaking Statute*, 4 ADMIN. L.J. 227 (1990).

they must necessarily choose among a vast array of such importunings. They cannot possibly respond to every claim that is cognizable in their terms, as the judiciary does. Moreover, legislators and administrators often show considerable initiative, the President's legislative program being the obvious example. The New Public Law scholarship must display similar initiative, because of its need to frame prescriptions and because of the conceptual model of its audience. It must anticipate issues, and propose statutory or administrative solutions, rather than responding to events and recommending alternative judicial reasoning.

The thinking process, the mode of reasoning, of the New Public Law scholarship is different as well. In framing recommendations, scholars are not searching for solutions which are intellectually coherent with a pattern of previous decisions, but for solutions that effectively achieved specific goals. This reorientation is generated by the shift from analogical to instrumental thinking that characterizes modern legislative and administrative decisionmakers. When addressing these decisionmakers, scholars should not treat prior enactments as authority, but rather as a source of data. The crucial question is to determine what worked in the past, why it worked, and whether it can be improved; or alternatively, what failed in the past, why it failed, and whether it can be avoided.

Legislators and administrators, after all, are decisionmakers who are explicitly authorized to change the law. In fact, the ideal way for them to fulfill their responsibilities may be to review regularly the enactments of their predecessors, and determine which ones should be altered or abolished. Sunsetting provisions certainly have this goal in mind.<sup>73</sup> Whether or not they are an effective device, and how methodical and comprehensive the review should be, are themselves important questions for legal scholars. At a less general level, these questions indicate a general attitude toward substantive law. The scholar's task, in large measure, is to carry out this review of existing legislation. Government decisionmakers must respond to crises, their operational responsibilities, the complex dynamics of their institutional setting and the blizzard of political demands in which they live; they therefore are rarely able to review existing legislation in a precise and thoughtful manner. But scholars can do so, and they can then

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73. For discussions in legal literature, see G. CALABRESI, *supra* note 29, at 59-65; Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511 (1976); Note, *Zero-Base Sunset Review*, 14 HARV. J. ON LEGIS. 505 (1977). A much more extensive discussion appears in *Sunset Act of 1977, Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (1977).

bring significant problems or possibilities to the decisionmakers' attention. This review is necessarily structured by a search for effective social policy, not for an intellectually coherent legal structure.

A somewhat deeper way the New Public Law scholarship involves a different mode of argument is the shift from process justification to cause-and-result justification. Process justification has been central to legal scholarship for so long that it seems like the essence of the discipline, the sinews of any legal argument. In fact, it soon appears rather quaint when one is addressing a legislator or administrator. These decisionmakers respond to perceived problems in the operation of existing law, not to the lack of coherence in these laws, or their failure to reflect a general principle. They judge their efforts by the effects produced. To speak to them, legal scholars need to employ the same mode of analysis. This not only means discussing causes and results, but arguing in terms of these phenomena.

All of the foregoing attributes of the New Public Law scholarship are derived from the structure of that scholarship, that is, its choice of audience and topic. A further question is whether this scholarship requires or implies any particular methodology. While this question must in some sense be answered by time, the approach is general enough to include a number of existing methodologies, such as critical legal studies and law and economics. In fact, one might argue that these methodologies are intrinsically more congenial to the New Public Law, and have been applied to judicial decisions at the expense of their true analytic capabilities. Hence, the new legal scholarship is at least as capacious as the old one, and probably more so. The only methodology that would be excluded would be the one that was peculiar to traditional scholarship, that is, the doctrinal analysis of legal cases. In its place would be a new vocabulary of government planning and strategy on which the varied insights of existing intellectual movements could be brought to bear.

## VII. THE NEW PUBLIC LAW SCHOLARSHIP: AN EXAMPLE

In 1989, Congress enacted and the President approved the Financial Institutions Reform, Recovery and Enforcement Act, or FIRREA.<sup>74</sup> The purpose of this legislation is to resolve the savings-and-loan crisis, a social debacle consisting of the failure of 500 banking institutions, the insolvency of a federal insurance fund (the FSLIC), and a remaining exposure that is variously estimated at \$100 to \$500

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<sup>74</sup>. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 & 15 U.S.C.).

billion.<sup>75</sup> FIRREA is a complex statute, which is not easily summarized. In essence, it reorganizes the entire regulatory structure of the savings-and-loan, or thrift, industry, establishes an independently funded agency to administer failed institutions (the Resolution Trust Corporation), places primary regulation of surviving savings and loans in an office within the Treasury Department (the Office of Thrift Supervision), confers extensive new enforcement powers on these agencies, including cease and desist orders, civil penalties, and criminal penalties, and imposes a range of substantive regulations on the surviving savings-and-loan institutions.

Prior to the enactment of FIRREA, virtually nothing about the statute had appeared in legal literature, although the issue had been brewing for at least a decade.<sup>76</sup> Since then, a few pieces have been published in practitioner-oriented journals, like the *Business Lawyer*, but little else has appeared.<sup>77</sup> This apparent lack of interest clearly does not stem from FIRREA's unimportance. The Act represents a major reorganization of the financial services industry, involves sums of Department of Defense proportions, and may well determine whether we reach the end of this millennium without a fiscal Armageddon. In the most pragmatic terms, FIRREA will occupy a great deal of the time of a great many lawyers. A significant proportion of the attorneys in major and midsize firms will have some contact with it, and a sizable number will be devoting their lives to it for the next five or ten years. In all likelihood, the graduates of leading law schools will spend more time on FIRREA in the near future than they will spend on the entirety of tort law.

The lack of legal literature about this statute and its attendant is-

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75. See generally H.R. REP. No. 54, 101st Cong., 1st Sess., reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS 86; E. KANE, THE S & L INSURANCE MESS: HOW DID IT HAPPEN? 1-22 (1989).

76. The thrift problem has been extensively discussed in the business and economic literatures. See, e.g., F. BALDERSTON, *THRIFTS IN CRISIS* (1985); R. BRUMBAUGH, *THRIFTS UNDER SIEGE* (1988); A. CARRON, *THE PLIGHT OF THRIFT INSTITUTIONS* (1981); N. EICHLER, *THE THRIFT DEBACLE* (1989); E. KANE, *supra* note 75; E. KANE, *THE GATHERING CRISIS IN FEDERAL DEPOSIT INSURANCE* (1985); P. PILZER, *OTHER PEOPLE'S MONEY: THE INSIDE STORY OF THE S & L MESS* (1989).

77. Clark, Murtagh & Corcoran, *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 45 BUS. LAW. 1013 (1990); Gail & Norton, *A Decade's Journey from "Deregulation" to "Supervisory Reregulation": The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1103 (1990); Gail, *Highlights of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA): What Foreign Banks Should Know*, 24 INT'L. LAW. 225 (1990). One piece appears in a university-sponsored journal: Malloy, *Nothing to Fear but FIRREA Itself: Revising and Reshaping the Enforcement Process of Federal Bank Regulation*, 50 OHIO ST. L.J. 1117 (1989). Professor Malloy teaches at Fordham, Professor Norton at Southern Methodist University; the other authors are practicing attorneys.

sues can more reasonably be explained by legal scholars' belief that it lacks intellectual interest. FIRREA does not embody any general principles of law, nor does it contain any well-structured legal arguments. It is a law, in common parlance, but it does not involve any of the characteristics that most legal scholars recognize as law. This will change, of course, once the statute is construed by the courts; while statutory interpretation does not partake of common law's transcendental imagery, it at least displays the mode of reasoning that is familiar, significant, and interesting to legal scholars. And should any portion of the statute — even a small, insignificant portion — be declared unconstitutional, an ecstatic outpouring of scholarly attention is certain to occur.

From the perspective of the New Public Law scholarship, however, FIRREA is a fascinating and immensely significant study, as significant to legal scholarship as it is to the nation in general. The statute can be seen as an instrumentality for implementing public policy, in particular, the policy of resolving the savings-and-loan crisis and avoiding economic catastrophe. This raises a number of major questions. For example, is an independent and independently funded agency like the Reconstruction Trust Company the best way to administer failed savings and loans? This points to a theory about the kind of governmental organizations that most effectively carry out specific types of tasks. More generally, should administration of this statute have been divided up among a series of new agencies, new units, and preexisting agencies, as opposed to being unified in one of the three (and, if so, which one)? Another major question is whether the panoply of enforcement mechanisms in the statutes will provide effective supervision of the industry. The previous regime has been criticized as overly timid,<sup>78</sup> but the source of this timidity is uncertain, so we do not know whether FIRREA simply presses a few more weapons into the trembling hands of an inveterate poltroon. Alternatively, perhaps the previous regime was too aggressive and scared away good managers and good money with its intemperance. FIRREA also suggests a variety of more substantive questions: for example, are capital adequacy standards the best way to avoid risk, or should we rely on some market mechanism by reducing deposit insurance? All these questions emerge from shifting the perspective to view law as a means of implementing public policy.

The New Public Law would also shift the temporal horizon of the scholarship. For the past ten years, at the very least, everyone in-

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78. See, e.g., E. KANE, *supra* note 75, at 63-120.

volved in the financial services industry has anticipated a crisis of some sort.<sup>79</sup> If legal scholars had abandoned the incremental approach that characterizes judicial reasoning, they might have focused on the problem as it developed, and proposed legislative or administrative solutions at that time. These proposals would then have been available to both public decisionmakers and the scholarly community when FIRREA was being debated, just as scholars' proposals about judicial decisionmaking are available to judges when the next related case is being decided. Instead, legal scholars said virtually nothing about FIRREA when all the major decisions were being made, and their contributions will necessarily be limited to secondary adjustments and interpretations of the statute now that it has been enacted.

The change involved is conceptual, as well as temporal. FIRREA, like most modern lawmaking, is social planning; it looks toward the future, and attempts to structure and control a part of our society in a coordinated way. Congress is not declaring a right and establishing a passive enforcement mechanism that will adjudicate people's claim to that right. It is empowering an administrative agency — actually a group of agencies — and instructing them to implement a plan. For legal scholars to participate in this process of modern lawmaking, either by advancing new proposals or by criticizing existing ones, they must think in terms of social planning. Any number of important legal articles could have been written about the way to design a savings-and-loan statute, and the way to capture specific plans in legal language, but the whole issue lies beyond the conceptual horizon of most existing legal scholarship.

In discussing and analyzing these plans, scholars could make use of prior law, not as analogy or precedent, but as a source of data. Congress has been regulating parts of the financial services industry for over a century,<sup>80</sup> and regulating the thrift industry in a comprehensive fashion for nearly half a century.<sup>81</sup> As a result of these efforts, a vast amount of information is available about the effectiveness of various statutory provisions, from their general concept to their specific language. To make use of this information, prior statutes must be re-

79. The financial issues were all fully canvassed by Carron in 1981, see A. CARRON, *supra* note 76; indeed, they were already quite familiar to policymakers at that time. See S. Rep. No 378, 96th Cong., 2d Sess. 3-5, reprinted in 1980 U.S. CONG. & ADMIN. NEWS 238-40 (committee report accompanying the Depository Institutions Deregulation and Monetary Control Act of 1980, P.L. 96-221, 94 Stat. 732).

80. The oldest of the existing regulatory statutes is the National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified as amended at 12 U.S.C. § 1-216).

81. Federal Home Loan Bank Act, ch. 522, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449); National Housing Act, ch. 847, 48 Stat. 1246 (1934) (codified as amended in scattered sections of 12 U.S.C.).

garded as a source of data, not as a source of authority. Congress has plenary authority to replace these statutes; indeed, given the seriousness of the crisis, it probably has a responsibility to do so. But it has an equal responsibility to learn from past experience; we should not make the same mistakes in 1989 that we made in 1980, 1965, or 1933.

Had legal scholars found the savings-and-loan crisis to present important issues, had they addressed it in planning terms, and had they used prior law as a source of data, they would have been in a position to advance the kinds of recommendations to which prescriptive scholarship aspires. To justify these recommendations, in a way that would make sense to the decisionmakers who are being addressed, at least in theory, these proposals would need to be justified in terms of their results.

The arguments that legal scholars would advance to justify their recommendations are reasonably apparent. If they recommend a particular regulatory structure, they must argue for it in terms of its ability to manage failed savings and loans, while avoiding further failures. An argument for a comprehensive agency or for the subordination of all the different agencies to the Treasury Department or the President would need to be justified in these terms; a traditional approach, arguing that these solutions could be derived from our theory of government, would seem chimerical to public policymakers. The same is true for the recommendation of various enforcement mechanisms. While familiar question about constitutional and moral constraints undoubtedly limit what a government agency can do, those constraints only establish outer boundaries. The choices made within those boundaries must be justified by their real world effects.

### VIII. CAN LEGAL SCHOLARS DO IT?

The major objection raised in law schools to the claim that legal scholarship must change is not conceptual, but pragmatic. One component of this objection involves the training and background of legal scholars: "Other academics are trained to do *X*; we would just be amateurs, dabbling in areas that possess a sophisticated theory of their own, and that demand specialized, rigorous training."<sup>82</sup> Legal scholars also assert they lack the institutional resources needed for this new approach to law, such as grants, graduate students, and access to data processing faculties.<sup>83</sup> Finally, if legal scholars develop a new ap-

82. See, e.g., Friedman, *The Future of Law and Social Sciences Research*, 52 N.C. L. REV. 1068 (1974); Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

83. See, e.g., Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 774-79

proach directed to legislators and administrators, its intended audience may not pay attention and the entire effort will be fruitless.

The first two of these concerns reflect a misunderstanding of the New Public Law. As existing examples of New Public Law scholarship suggest, the idea is not to transform legal scholarship into public policy or social science, but to develop a new approach based on a new conception of law. Although the relationship between law and other disciplines would change, the structure of legal academics — the training and institutional organization — would remain.<sup>84</sup> In other words, the New Public Law is not an abandonment of the field, but a reinterpretation of it to enable it to fulfill its self-declared purposes.

This can be seen most clearly by examining the relationship of the New Public Law scholarship to other fields, most notably public policy and social science. This scholarship, which focuses on planning and treats law as an instrumentality for achieving defined purposes, certainly overlaps substantially with public policy research.<sup>85</sup> But even if one insists on maintaining the distinction between law and policy, a vast field remains for legal scholars to occupy. Once the policy analysis is complete, a means must be found to implement the choice that the analysis has generated. In the regulatory area, legislatures act largely by passing laws, and administrators often act by passing regulations. This means more than simply stating the policy in legal language. It involves what might be called the fine structure of the statute or regulation, the myriad of decisions that must be made below the level of the basic policy choice. Many of the questions discussed above would be included in this category — the choice of enforcement

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(1986); Schuck, *supra* note 82; Trubek, *A Strategy for Legal Studies: Getting Bok to Work*, 33 J. LEGAL EDUC. 586, 587-89 (1983); Trubek, *The Place of Law and Social Science in the Structure of Legal Education*, 35 J. LEGAL EDUC. 483, 484 (1985) [hereinafter Trubek, *The Place of Law and Social Science*].

84. Undoubtedly, the number of applicants with advanced degrees in other fields, and the attractiveness of such applicants to law school admissions committees, will increase. This is an incremental change, however, and affects the tone of the law school, rather than altering its structure.

85. In fact, there is probably no intellectually meaningful argument for distinguishing between these fields in the first place. The first law schools to appear on university campuses were pure trade schools staffed by practicing lawyers, and functioned as a substitute for apprenticeship. See R. STEVENS, *supra* note 1, at 7-10. The theoretical study of law and the incorporation of public policy perspectives was far removed from these institutions. When law schools developed as true university departments, with a faculty consisting of full-time academics, there were several attempts to integrate professional training for private practice with policy analysis. See *id.* at 39-42; W. CHASE, *supra* note 1, at 46-59. These efforts seemed to have foundered on a variety of institutional realities, but also on a formalist conception of law that excluded public policy. That conception was persuasive at the time but no one believes it any more. See B. ACKERMAN, *supra* note 25, at 6-22.

mechanisms, the design of new mechanisms, the nature of the instructions given to those entities, and so forth.

These problems are preeminently legal questions; to the extent that legal scholars do not address them, virtually no one will. To be sure, a public policy and political science literature on implementation is developing,<sup>86</sup> but it tends to focus on the administrative level only. More significantly, it represents only one small area within the general scope of these disciplines, whereas it is one of the central questions for the legal field. In general, one might distinguish the elements of a statute or regulation on the basis of its discourse. The policy choice emerges from internal discussions among members of the decisionmaking body; this can reasonably be regarded as the realm of public policy research, if one chooses to preserve that distinction. But once that choice is made, it must be implemented by instructions issued to an enforcement mechanism, whether court or agency. This is legal scholarship's domain, a fact which no one doubts when the enforcement mechanism is a court, as it necessarily was in most premodern statutes. The emphasis on judicial decisionmaking obscured the statute's character as a legislative instruction. In the modern administrative state, the instruction is generally issued to an agency,<sup>87</sup> but it remains a declaration of the law and a subject that legal scholars should address.

The skills we associate with legal training are the ones needed for this purpose. These include a close attention to language, an understanding of the relationship between linguistically stated rules and institutional behaviors, an ability to translate fact situations and other data into a legal framework, an understanding of the relationship between normative or political choices and systems of rules, and an ability to apply general principles to specific situations. Of course, all these skills must be adapted to a new environment. New skills must be acquired, such as a deeper understanding of power relationships and nonjudicial institutions, while some existing skills, such as reasoning from precedent, are no longer needed. But the general range of techniques that would be needed are recognizable as "legal" ones.<sup>88</sup>

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86. See *supra* note 35.

87. See F. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 124-44 (1973); T. LOWI, THE END OF LIBERALISM 105-07 (2d ed. 1979); Diver, *supra* note 64, at 76-77; Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 375-80 (1989).

88. These skills, it should be noted, are not those associated with "skills training," but those involved in the study and practice of law as a totality. Skills training involves what Habermas refers to as strategic action, that is, action designed to affect people's behavior (to get them to do what the actor wants), 1 J. HABERMAS, *supra* note 38 at 273-337. For a general description of skills training, see Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974); see also Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC.

In fact, the New Public Law could aspire to the heroic stance that legal academics adopted in the formalist era. As the field develops, scholars should be able to articulate general theories covering large segments of their subject area. One can imagine a theory about when private causes of action are effective, what kinds of agencies can implement specific programs, how statutory language can be used to control adjudicatory behavior, or which enforcement strategies an agency should use in particular circumstances. We might even see a revival of the treatise, with its comprehensive treatment of recognizable divisions within the general area of study. Part of the reason treatises flourished was that legal scholars were occupying and organizing new territory — new in the sense that it had not been previously discussed within the framework of their formalist theory. The New Public Law might serve as the impetus for similarly comprehensive efforts.

The same can be said about the relationship of legal scholarship to social science. Clearly, many of the tasks involved in New Public Law scholarship call for insights and techniques from social science disciplines. The structure of enforcement mechanisms, for example, must be informed by political science analysis of these institutions. Other aspects of this scholarship would depend even more heavily on social science. To use prior law as a source of data, one must rely on studies of the law's effects; while such studies sometimes appear in legal literature, they are more commonly performed by political scientists, economists, and sociologists, using techniques that are characteristic of those fields. Similarly, the cause-and-result justification of recommendations would depend upon these fields. Because the prediction of results requires extrapolation from existing data, using models, controlled experiments, attitude surveys, and the like, the methodological component of this effort is likely to be fairly complex.

While all this social science can appear to be a daunting prospect to academics whose training consisted of reading appellate decisions, law professors, in theory, are able to perform social science studies. Some have,<sup>87</sup> and most probably could with a combination of self-training, collaborative efforts, and the collegial assistance generally available on a university campus.<sup>88</sup> But the essential task of legal

87 (1981). Legal skills are those involved in any legal activity including policymaking (instrumental action in Habermas' terminology) and the general effort to understand a legal system (hermeneutic action).

88. For a few examples, see D. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979); G. HAWKINS & F. ZIMRING, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973); M. LAWRENCE, J. SNORTUM & F. ZIMRING, *SOCIAL CONTROL OF THE DRINKING DRIVER* (1988).

90. In addition, empirical research need not consist of technical studies and statistical analysis. Simply getting out of the law school and talking to the folks about whom one is generalizing

scholars is not to generate data; rather, it is to make use of data in framing recommendations.<sup>91</sup> Public decisionmakers, many of whom have only legal training, and many of whom have even less, do this all the time in designing laws and regulations. It could thus be considered an inherently legal task, at least in the context of the modern state. Certainly, it is not duplicative of other disciplines. While social scientists are often willing to advance prescriptions based upon their research, they do not often engage in a sustained application of research results to the problem of drafting statutes or regulations.<sup>92</sup> If legal scholars do not pursue this inquiry, it will not be done, which is often the case at present. Such an assignment of responsibility makes sense, for if generating research data is the work of social scientists, determining the meaning of that data for our problems of governance is the work of the legal community.<sup>93</sup>

The legal scholar, moreover, need not passively receive other people's studies. Legislatures and administrative agencies commission research, and legal scholars could generate needed research as well by suggesting useful lines of inquiry to social scientists. This requires planning — the scholar must identify a problem, sketch a long-term solution, and decide what research is needed to indicate the advisability of that solution. Judicially oriented scholarship is unlikely to frame questions that seem meaningful to social scientists, but New Public Law scholarship would be a different matter. There are also possibilities for collaborative work between social scientists and legal scholars; this would make more sense to both scholars if the temporal structure of their approach were roughly congruent. In the end, legal scholars need to learn to work with social scientists and make use of

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can be a valuable source of information and can serve as the basis of important empirical studies. See, e.g., Getman, *Contributions of Empirical Data to Legal Research*, 35 J. LEGAL EDUC. 489 (1985); Trubek, *The Place of Law and Social Science*, *supra* note 83, at 483-84.

91. The failure of prior efforts to incorporate empirical research into legal scholarship is certainly chastening. See R. STEVENS, *supra* note 1, at 131-41; Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980). But one problem seems to have been that legal scholars were committed to generating empirical research, rather than to using it. Of course, gathering data without a clear sense of purpose is a quagmire, as Schlegel indicates. But even gathering data with that sense of purpose can be a quagmire for legal scholars, given the institutional realities. See Getman, *supra* note 90. The starting point, rather, is to perceive the relevance of empirical research, to use what is available, and to confess ignorance as to the rest (rather than speculating about it, as legal scholars tend to do). Once that point is reached, the legal scholar can consider whether she should undertake the effort to gather the missing data herself.

92. Drafting exemplary statutory or regulatory language is simply not part of social science methodology, even when the work would lead logically to this result from a legal scholar's point of view.

93. See M. Galanter, Presentation, "The Future of Law and Social Sciences Research," at Assessment Conference: Developments in Law & Social Sciences Research, 52 N.C. L. REV. 969, 1060 (1974) (real problem with empirical study of law is conceptual, not institutional).

their results, not to transform themselves into members of a different discipline.

The third pragmatic objection to the New Public Law scholarship is that legislators and administrators will not listen to it. We are persuaded that judges listen, that they possess the quality of responsiveness to scholarship that Eisenberg describes. This is partially because the scholars' mode of reasoning is so precisely attuned to their own, but also because we view judges as public-oriented decisionmakers. Legislators and administrators seem more political and less intellectual; more important perhaps, their staffs consist of people other than recent law school graduates. A New Public Law scholarship directing recommendations to them might seem — despite all its modernity and intellectual significance — to be a voice crying in the wilderness.

But just as the first two objections represent a misunderstanding of the New Public Law scholarship, this objection represents a misunderstanding of prescriptive scholarship in general. Of course legislators and administrators will not always, or even often, follow the recommendations of legal scholars. In some cases, they have their own ideas; in others, their actions may well be determined by political considerations. But as stated above, the test of prescriptive scholarship is not whether decisionmakers embrace it as a complete solution to the issues they confront. The test, rather, is whether its orientation serves as a structuring principle for scholarly evaluations of each others' work and thereby provides a framework for the cumulative development of a prescriptive discipline.

Both prescriptive and descriptive scholarship represent efforts to achieve understanding; according to our rules of scholarly discourse, description is an effort to understand the present condition of the subject, and prescription is an effort to understand its potentialities.<sup>94</sup> Because prescription is phrased in terms of concrete recommendations, it may seem purposeless unless those recommendations are acted upon. Yet description is even more remote from action, and we recognize its value in terms of our goal of understanding. Prescription contributes to understanding as well, particularly when we are studying a dynamic

94. This appears to run counter to Habermas' distinction between strategic (or instrumental) discourse and hermeneutic discourse. See 1 J. HABERMAS, *supra* note 38, at 284-95. But the crucial question is one of intentionality. Statements framed as a prescription can be hermeneutic (*i.e.*, directed toward understanding) if they are intended and structured to achieve an understanding of the proper course of action, that is, an autonomous agreement by the other party that the recommended course of action is desirable. In fact, given the phenomenological perspective that lies at the base of Habermas' approach, the inherent intentionality of all thought would tend to efface any normative distinction between prescription and description, provided that both are intended to reach an autonomous, mutual agreement, rather than using the recipient of the communication as a means to an end.

subject that is shaped by social action. Thus, a scholarly discourse that enables us to frame prescriptions for ordinary governmental action is not only a means of improving the specific actions discussed, but a means of understanding government in general. This general understanding may in turn enable us to improve the governmental process, in ways that are quite distinct from the adoption of specific scholarly prescriptions.

Real-world influence is satisfying, however, and most legal scholars would probably be loath to abandon it as a potential reward or validation of their work. But they do not need to do so; the idea that legislators or administrators are deaf to scholarly arguments, while judges attend to them, misconceives the way in which scholarly ideas exercise practical effects. To expect that the scholar will frame a recommendation and some government official, whether judge or legislator, will then implement it in the precise form in which it was advanced is a chimera spawned by a conception of authority, not influence. That sort of immediate and complete response is what superiors expect from their subordinates, or better still, what parents expect from their children: "When I say that the market is the best mechanism for setting utility rates, I expect you to deregulate at once, and I don't want you fooling around with political considerations or alternative policies!" Even superiors and parents often find their expectations frustrated; anyone who defines scholarly influence in terms of an equivalent level of obedience will be more frustrated still and will probably conclude that no such influence exists. In fact, the mechanism of influence is more varied and less determinate. In some cases recommendations create general moods, from which decisionmakers distill approaches to specific problems. Or these recommendations insinuate themselves into the decisionmaker's world view, to reappear in forms that neither the decisionmaker nor the scholar could predict. They may act as catalysts, clarifying and mobilizing thoughts that the decisionmakers have long possessed, but never acted on. Or they may shape decisions that have already been made, providing direction and detail.

Because of the complexity and subtlety of this process, scholarly influence can readily coexist with political motivation. To be influenced by scholars, legislators need not be Platonic guardians. If they give some thought to the public interest, if they sometimes base their actions on their sense of what is best for the nation rather than for themselves, they will be open to the variety of channels through which

scholars can address them.<sup>95</sup> Moreover, scholarly influence may not even require this dilute form of explicit public interest. The way decisionmakers construct their conceptions of political advantage may itself provide a channel for prescriptive discourse. Decisionmakers may believe that they can maximize their chance for reelection or reappointment by simply following the express commands of special interest groups, but they may also believe that they will obtain political advantage by achieving the results those groups desire. Once political advantage is constructed in this way, policy-based scholarship will seem relevant, however indirectly. Going further, once a body of prescriptive scholarship exists, it may influence the legislators' estimation of political advantage.

## IX. IS IT LAW?

One further aspect of the New Public Law scholarship that produces a lurking sense of unease is whether or not such scholarship really involves "law." The depth of legal scholars' commitment to a judicial orientation suggests that there is something definitional about that orientation, something that goes beyond a conscious choice of topic to one's self-image as an academic. The reason biologists ignore nature poetry in their scholarly work is not because they regard poetry as invalid; if asked, they would answer that poetry is simply not "biology." The scholarly aversion to addressing legislators and administrators may spring from similar sources. It is not easy to respond to this concern, because it relies on a somewhat elusive conception of law. For present purposes, an answer can be provided by distinguishing three possible meanings of the term: that law is a system for controlling people, specifically officials who wield state power; that law is a conceptual system with an inherent logic; and that law is a moral system, embodying widely held or transcendental values. This article will conclude by briefly considering whether the New Public Law qualifies as "law" according to each of these three meanings.

One of the great benefits of law is the rule of law, and a principal virtue of a rule of law is the control it exercises over government officials. When we speak of our society as one of laws, we are not thinking of its ability to manage the economy or to preserve public order,

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95. Public choice theory asserts that legislators and administrators never adopt this perspective, *see, e.g.*, M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976). But most observers take the view that these officials respond to a variety of motivations. *See, e.g.*, R. FENNO, CONGRESSMEN IN COMMITTEES (1973); J. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (1984); A. MAASS, CONGRESS AND THE COMMON GOOD (1983); W. MUIR, LEGISLATURE (1982).

but of the controls that are imposed on power-holding individuals.<sup>96</sup> This is an instrumental concept of law; the argument is that law serves as the best means for achieving equity or justice.

This view of law explains legal scholars' concern with the judiciary for two different reasons. First, the judiciary is assigned the task of imposing law on other branches of government. If an agency oversteps its jurisdiction, if an administrator cancels peoples' benefits because he thinks they are ugly, if a legislature curries electoral favor by infringing on constitutional rights, the courts are supposed to intercede and say: "We forbid you to do this because it violates the law." Second, the judiciary, in this supervisory role, and in the other roles such as adjudicating between private parties, is itself constrained by law. Judges (have no popular mandate and no supervisors besides other judges; their actions are constrained only by the law itself and it is only through fealty to law that they avoid the charge of uncontrolled discretion. These two legal roles are related, of course; judges are the chosen agent to impose the law on others because they themselves are bound by it in an immediate and unalloyed manner.

Legislators and administrators, one might argue, are of less concern to legal scholars because they are supervised by judges, and because their own actions, while they remain within judicially established boundaries of lawfulness, are controlled by popular mandates, not by law. This was a persuasive argument in 1840, but, as a practical matter, it ignores the reality of the administrative state. The vast bureaucratic apparatus of our modern state has obliterated Montesquieu's neat categories of governmental functions. Judicial supervision remains important, but it is no longer adequate to ensure that powerful government officials obey the law. These officials are too numerous, their tasks are too technical and their ongoing responsibilities too comprehensive to be controlled by a few hundred law-trained judges. Under FIRREA, for example, small armies of administrators, in at least four major administrative agencies, will wield extensive power over savings-and-loan institutions, including the power to restructure or eradicate these institutions within relatively brief periods of time. The federal judiciary will not be able to ensure the lawfulness of this enterprise in any realistic sense. In addition, the multiple layers of the bureaucratic system are too thick to be controlled by elected officials. FIRREA mandates that the ongoing administration of savings-and-loan institutions be moved from an independent agency to the Treasury Department. This is congruent with formalist views

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96. See F. HAYEK, *supra* note 87, at 3-5, 24-31; T. LOWI, *supra* note 87, at 92-129.

that independent agencies are unconstitutional, but the practical difference it makes in terms of popular control is questionable; the only elected official with direct authority over the numerous operations-level administrators under the new organization will be the President of the United States.

The use of law as a means of controlling government officials thus becomes an argument for a New Public Law, not against it. If we want the rule of law, we must secure it through recommendations to legislators and administrators. We must ensure equity and justice by the way we design statutes and the way we structure our administrative system, not through eighteenth-century bromides about judges and elections. Law is to be found in the administrative mechanisms that control the discretion of operations-level personnel, in the resolution of turf battles between administrative agencies, in the heavy, three-ring binders that contain the operations manuals for a veritable infinity of governmental functions, and in the day-to-day practices of several million federal and state employees sitting at metal desks behind shoulder-high acoustic partitions. Unless scholars have a legal theory that articulates controls at this mundane level, they cannot contribute fully to establishing the rule of law.

As a conceptual system, the appeal of judicial lawmaking is its intellectual coherence. Common law fits together in a fashion which permits deductive arguments at a preempirical level. Other areas, including constitutional law, at least aspire to this same coherence and thus encourage and respond to similarly theoretical arguments. Assessing this perceived coherence is a complex task, but one cannot deny its appeal.

The response here is fairly obvious however. Legal scholarship cannot choose its topics on the basis of their aesthetic qualities unless it is willing to be condemned to a subsidiary role. There are undoubtedly regularities in the legislative and administrative realm, but they are approximate, empirically grounded ones, not the celestial music of the formalist's dreams. That may make the field less entrancing, but it does not make it any less important. Our society is too pragmatic, and the demands of modern governance are too insistent, for us to abandon intellectual inquiry into a field because of the unappetizing quality of the results.

Going further, our society's dominant intellectual system is heavily empirical in its designation of value. We have an independent, empirically based set of criteria for assigning significance to particular inquiries or fields, and we then seek whatever regularities or truths (as we define them) we can discover about each field, on the basis of our oper-

ative methodologies. We do not begin with a methodological definition of value, which then confers significance on those fields to which it can be applied. Thus, it is intellectually indefensible for legal scholars to begin with an a priori definition of truth, and then restrict their inquiries to fields where those truths can be observed. Undoubtedly, our judgments of significance are theory-laden, but the theory is self-consciously different from our systems of evaluation. We can say, quite definitively, that the administrative system is important because of its impact on society. It is then incumbent upon scholars to develop the best theories, both descriptive and prescriptive, for that system, even if those theories seem less satisfactory than those in other fields.

Finally, there is the moral component of law. Common law and other judicially developed areas seem to express a normative perspective which statutes and administrative regulations lack.<sup>97</sup> To the extent that legal scholarship constitutes an exploration of those norms, a New Public Law would lie beyond its boundaries.<sup>98</sup> Of course, we would want to impose our norms on the administrative state, but that process could only be implemented by morally cognizant actors, in other words, the judiciary. This sensibility is probably one reason why legal scholars tend to regard the administrative system through judicial eyes.

One difficulty here involves the status of the norms that purportedly inform judicial decisionmaking. If these norms are regarded as deontological, one would need some moral theory that would generate

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97. The most forceful modern exponent of this view is Ronald Dworkin. As a consequence, he develops a normatively based theory of law derived almost exclusively from judicial decision-making. See Dworkin, *supra* note 42. In R. DWORKIN, *LAW'S EMPIRE* (1986), he does discuss legislation, but he seems to view it as a secondary illustration of his judicially based model.

98. In discussing the law-and-society movement, Lawrence Friedman argues that one can readily adopt a "scientific" or social science approach to an inherently "nonscientific" topic, that is, the legal scholar can study normative systems, just as sociologists of religion study religious beliefs. Friedman, *supra* note 83, at 764-66. Epistemologically, the point is certainly true, if only because there is probably no area, including astronomy, particle physics, or animal behavior that is inherently "scientific." The term refers to our attitude toward the subject matter, not some inherent trait that the subject possesses. But at the more specific level, Friedman raises a major problem about the disjunction of methodology and subject matter. If one is studying a normative system, it is possible, of course, to employ social science methods, as Friedman suggests. But the use of these methods distances the scholar from her subject matter. If one regards the subjects as equals, one will tend to join their normative debates, rather than just studying them from afar. This tendency is validated by current thinking about social science methodology. See, e.g., H. GADAMER, *supra* note 17, at 235-74; C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); I. A. SCHUTZ, *COLLECTED PAPERS* 48-66 (1962); C. TAYLOR, *THE EXPLANATION OF BEHAVIOR* (1964); P. WINCH, *THE IDEA OF A SOCIAL SCIENCE* 72-109 (1958); Winch, *Understanding a Primitive Society*, 1 AM. PHIL. Q. 307 (1964). The social science approach, although theoretically applicable to normative behavior, is much more comfortable when applied to instrumental behavior, that is, when the subjects themselves recognize the methodological relevance of social science to their own activities because they are trying to achieve a goal, rather than express a norm.

them. But the norms implicit in the common law, or other judicially established fields, are too specific to be intrinsic elements of any moral theory our society would regard as persuasive.<sup>99</sup> In general, we tend to justify common law norms by instrumental arguments,<sup>100</sup> which raises the possibility that these norms, however homologous in structure with true deontological propositions, are no better at achieving our true, deontological norms such as equality and justice than are a variety of purely instrumental mechanisms. To redeem the deontological status of common law norms, one would need to invoke a second-level norm, to the effect that instrumentalities achieve a preferred status when they are stated in normative discourse. But this too must be related to a general moral theory, or it is nothing more than a bald assertion that common law is superior to statutory law. It is doubtful that we have such a moral theory.

Indeed, the reverse may be the case. Habermas' argument,<sup>101</sup> echoed by critical legal studies scholarship,<sup>102</sup> is that the claim to deontological moral status, like the claim to objective truth, is a form of oppression unless that claim is an aspirational one which explicitly opens itself to hermeneutic evaluation. To be sure, common law has a hermeneutic structure because it abjures unmediated access to its guiding principles in favor of contextualized expression. But that structure does not apply to any second-order claim to the superiority of normative discourse. Indeed, the discourse of social theory and public policy enables us to evaluate the ability of normatively stated propositions to achieve our underlying values. The common law's claim to independent moral status is little more than an assertion of unjustified authority.

In fact, the whole notion that judicial decisionmaking necessarily produces justice, or is more likely to produce justice than some other

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99. See Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978). Summers provides a list of deontological norms or "rightness reasons" in common law; it includes conscientability, punitive desert, justified reliance, restitution for unjust enrichment, comparative blame, due care, and relational duty. *Id.* at 718-19. These are highly specific legal standards; while Summers may be correct in claiming them as a basis for judicial decisions, it would be hard to view them as a justification for the common law itself.

100. For example, one might justify the norm of "conscientability" by arguing that it achieves equality, or autonomy; it would be hard to claim that we have a moral position that supports conscientability per se. This makes conscientability an instrumentality for achieving some deeper norm, even if Summers is correct in doubting that it can be reduced to a purely instrumental social policy. See Summers, *supra* note 99, at 778-82. In fact, many observers feel that there is a fairly strong tendency to justify all judicial decisionmaking in policy terms. See Farber & Frickey, *supra* note 24, at 876-77; Strauss, *supra* note 24, at 917.

101. See J. HABERMAS, *supra* note 54, at 87-90; J. HABERMAS, *Technical Progress and the Social Life World*, in TOWARD A RATIONAL SOCIETY 50 (1971).

102. M. HOROWITZ, *supra* note 54; R. UNGER, *supra* note 54, at 5-14.

mechanism, is a myth. This is not to say that it is false. It is a myth in the sense that it encapsulated a world-view, and provided a system of meaning through which we could live and, in this case, govern ourselves. Whether this system was desirable or undesirable remains an open question; the point is simply that the judicial approach is not law, but a particular concept of law that was engendered by a particular worldview. It no longer represents a comprehensive worldview, but continues to thrive as a more particularized claim. Some scholars may find this claim to be an adequate justification for focusing their efforts on judicial decisionmaking. For most scholars, however, that focus is a product of habit and conceptual orientation, not a well-developed normative position.

The modern, administrative state has its own myth, its own normative system of meaning. This myth is that the welfare of our society, and the essential, deontological norms in which we believe, are achievable by governmental action. It further claims that the performance of our government can be improved, that there are techniques of governance that can be discovered, adopted, and applied. The New Public Law enables legal scholarship to participate in this enterprise, and indeed, to play an essential role that is not available to any other academic discipline. One can, of course, reject the New Public Law by rejecting this myth. But as the administrative state continues and expands, this rejection will increasingly condemn legal scholars to fatalistic irrelevance or dyspeptic reaction.