

# The Legitimation of Purposive Decisions\*

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To make sense of a rule, we must often reflect on its purpose, or think of it as a link in some sort of means-ends chain. We ordinarily think this way when asked to explain a rule to persons unfamiliar with it. Frequently we turn to the purpose of a rule for guidance in delineating the contexts to which the rule applies, in determining what conduct will satisfy its requirements, or in resolving apparent conflicts between it and other relevant standards. Sometimes we invoke the purpose of a rule as a standard by which the rule itself may be evaluated: How adequate is it to the end it is intended to serve? How can it be made more effective? Purpose plays a similar role in the explanation, interpretation, and evaluation of complex sets of rules, such as the charter of an institution, the constitution of an office, a procedure of decision, or a framework of regulatory standards. Thus, we are invited to reflect on the intention of the legislature, the mandates of administrative agencies, the responsibilities attached to various offices, not to mention even larger topics such as the aims of punishment or the ends of law in general.

Despite its frequent use, the idea of purpose is as controversial as it seems indispensable. One could summarize the history of jurisprudence as a continuing (or constantly recurring) controversy on the proper place of purposes as grounds for various sorts of legal judgments.<sup>1</sup> On one side are all the descendents of Plato's Stranger,<sup>2</sup> who criticize law for not giving enough authority to the purposes of rules.

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1. Needless to say, not all arguments about "purpose in law" employ those words in the same sense. The "purpose" of a rule (such as "no smoking") may refer to rather precise and immediate or rather vague and distant ends (*e.g.*, "to reduce exposure to dangerous fumes," "to improve public health," or "to maximize utility"), and considerations of purpose enter into different sorts of "legal" judgments in different ways. One may without inconsistency criticize the bad faith of a person who subverts the purpose of a rule by strictly observing its "letter," and praise the court which defers to the "plain meaning" of the rule in judging that person's conduct. An administrator responsible for enforcing a statute will have to examine the purposes of the statute in order to develop a strategy, but his inquiry may not even begin to address the fine questions that a court will have on the "same" topic as it approaches a borderline case involving problems of statutory construction. Clearly, "purpose in law" is no simple subject, and complexity has fostered confusion as well as controversy.

Because strict adherence to the "letter" of the law interferes with intelligent action, they urge that legal thought strive to be purposive or they conclude that law is altogether unsuitable as an instrument of rational government. Variations on that theme recur in utilitarianism, marxist jurisprudence, and legal realism. On the other side are those who fear that too purposive a reading of rules may undermine the law's authority. If *cessante ratione cessat et ipsa lex*, there is a risk that rules will too often and too lightly be found wanting. To conservatives, like Edmund Burke and other defenders of "custom,"<sup>3</sup> the danger is diminished respect for the hidden wisdom of inherited institutions. With characteristic immodesty, reformers who *find* no reason for a rule will prematurely conclude that there *is* no reason for it. To liberals, inspired by Kant's vituperations against the utilitarians,<sup>4</sup> the danger is that an "instrumentalist" approach to law will undermine respect for individual rights—the Rule of Law is in jeopardy and persons are vulnerable to being "treated as means" when adherence to rules is qualified by considerations of social policy or purpose.<sup>5</sup>

Through most of this long history of debate, a major point appears to have remained beyond dispute: arguments on all sides have assumed that, in theory, the purposes of rules *can* be accurately identified, meaningfully stated, and effectively used as guides for interpretation and evaluation. Debate has revolved around other issues. How far should one inquire into purposes? Once they are found, how much authority should they be given? Today, that basic assumption seems to be under challenge. In contemporary discussions, especially in the social sciences, the idea that a purpose can be attributed to an institution is received with almost invariable skepticism.

The reasons for doubt are unfortunately quite numerous. Arguments from purpose are fraught with analytical difficulty. They presume, always questionably, that an institution can have purposes independent from the motives of institutional actors, that those purposes can be stated with sufficient precision, that evidence can be

2. PLATO, *Statesman*, in 2 THE DIALOGUES OF PLATO 321-24 (Random House ed. B. Jowett trans. 1937).

3. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE *passim* (Dolphin ed. 1961) (1st ed. n.p. 1790). See also H. MAINE, ANCIENT LAW 88 (10th ed. Beacon 1963) (1st ed. London 1861). On the same point in Blackstone, see D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 19-31 (1958). See also J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 191-93, 322-23, 327-34 (1910), quoted in H. HART & A. SACKS, THE LEGAL PROCESS 451-57 (tent. ed. 1958).

4. "Woe to him who creeps through the serpent windings of Utilitarianism." I. KANT, PHILOSOPHY OF LAW 195 (W. Hastie trans. 1887) (1st ed. n.p. 1796).

5. For a recent statement of this viewpoint, see R. DWORKIN, TAKING RIGHTS SERIOUSLY 82-100, 294-327 (1978). On the dangers of "instrumentalism," see also Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 4-6, 18-21, 37-39 (1972).

brought to bear on questions regarding the accuracy of those statements, that there are reasonable ways of testing the adequacy of decisions made to serve such purposes, and more. All these difficulties add up, and help mount a powerful case for the skeptic. Thus a radical doubt is cast upon the idea that social action can ever be guided by purpose, and hence upon the legitimacy of all decisions that claim to be justified by reference to a purpose. This Article is part of an effort to respond to that doubt.

Although arguments from purpose can fail at many points, not all sources of difficulty are equally serious, and only a few can be examined within the confines of an article. Part I briefly confronts two common and quite extreme objections to arguments from purpose. The first rests upon the fact that the attribution of purposes to institutions seems to involve an illegitimate hypostatization of social entities. The second points to the well-known and inescapable difficulties one encounters in drawing practical conclusions from general standards; it urges that, if conclusions drawn from purpose elude rigorous testing and justification, then purpose cannot be regarded as a meaningful guide for action.

The main body of the Article concentrates on another and somewhat narrower objection aimed at the use of arguments from purpose in the exercise of authority. Roughly, the claim is that empowering officials to draw conclusions from purpose permits them to make decisions that elude testing and justification and therefore allows them a measure of unaccountable or discretionary authority; if one wishes to reduce arbitrariness in the exercise of power, one should avoid conferring such authority. In Part II, we begin by showing that institutional arrangements designed to narrow official discretion themselves generate certain patterns of arbitrariness, even as they bring other patterns under control. Hence, before we choose to require strict accountability, we should compare different institutional arrangements premised on differentially stringent standards of accountability and justification, and assess the relative seriousness of the patterns of arbitrariness they produce. Part III sketches the outlines of such a comparison. Part IV examines the considerations that would guide choice among the compared institutional arrangements, insofar as there must indeed be a choice.

In most of the discussion that follows, the problem of purpose is taken out of the special context in which jurisprudential writings ordinarily approach it, that is, the adjudication of disputes concerning the interpretation of legal standards.<sup>6</sup> We shall be concerned with the

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6. See, e.g., the Hart-Fuller debate in Hart, *Positivism and the Separation of Law and*

larger class of institutional decisions in which appeals to purpose may occur; in that class, the decisions of administrators figure more prominently than those of judges. We shall also employ the word "law" in a sense that includes more than the set of standards courts or students of courts would normally recognize as "legal." This approach may at times seem to stretch unduly the meaning of familiar language and to diminish the relevance of the argument to historic jurisprudential concerns. On the other hand, it should be easy to recognize that the legal order is not only a framework for resolving disputes, but also a design for life in society; that this design includes all sorts of programs of concerted social action; and that responsible administration (the burden of which may sometimes fall upon courts<sup>7</sup>) is often the key to a successful execution of the design.<sup>8</sup>

## I

### PURPOSE AS LAW

The skepticism with which the contemporary mind responds to arguments grounded on institutional purpose draws some force from a pervasive aversion to statements that attribute intentions to social entities like states, legislatures, or corporations. Common doctrine insists that, just as different lawmakers harbor different aims in voting for the same statute, different citizens have different motives for complying with the same laws and different actors pursue different interests even as they participate in the same enterprise. Accordingly it makes no sense to speak of a political community, a legislature, or an institution

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*Morals*, 71 HARV. L. REV. 593 (1958), and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

7. As it does in some "public law" cases, *e.g.*, when a federal judge must fashion and enforce a school desegregation order. See Clayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CALIF. L. REV. 983 (1979).

8. In turning to institutional decisions we are not turning away from legal phenomena. In many and important ways, any administrative organization is a microcosm of the legal order. That organizations are to some extent made of the same stuff as the legal order—constitutions and by-laws, offices and jurisdictions, procedures for making and implementing rules, precedents, contracts, orders, and sanctions—is hardly a controversial observation. Many large administrative machines describe themselves and are commonly explained by their students in that legal language; this fact is among the reasons that prompted Max Weber to characterize bureaucratic authority as "rational-legal." M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATIONS* 328-36 (A. Henderson & T. Parsons eds. 1947); Weber, *The Three Types of Legitimate Rule*, in *A SOCIOLOGICAL READER ON COMPLEX ORGANIZATIONS* 7-8 (2d ed. A. Etzioni ed. 1969). Some modern management experts prefer using other words, such as systems, programs, participation, guidelines, and performance criteria, but this new jargon speaks more to style than to substance. Although the imperative mode of legal and bureaucratic language may have been driven out of fashion, no organization can do without having mastered the highly legal art of authoritative communication. As we shall see, many themes of jurisprudence are echoed in the debates of organization theory.

as having a purpose.<sup>9</sup> When attributing aims, interests, or values to a group, one may of course imply that the group itself is an entity capable of forming thoughts or feelings of this sort. But most of us will recognize that terms such as "state," "legislature," or "corporation," are conceptual abstractions meant only to designate certain classes of identifiable individuals. We shall agree to avoid reifying those abstractions, and to understand statements about the purposes of social entities as referring to the purposes of individuals composing those entities. It will then be apparent that individuals within such classes cannot be expected all to have the same hierarchy of preferences, and hence that they will never be found to pursue the same ends. At the most we shall observe that some members of a group happen at times to have a specific interest in common, though they differ from each other in other respects. We may then wish to speak of an "interest group" to designate a class of such individuals, so that we can describe in general terms how they pursue that interest, come into conflict with adverse interests, and use power to protect or improve their positions in a conflict. In sum, there is no group interest, but there are interest groups.

To understand and respond to this doctrine, we should see first that its nominalist account of why groups have no purpose must lead us also to deny that groups govern themselves by laws or norms of any sort. The doctrine requires rejecting the statement that a community has a certain rule if we find evidence that some members of the community do not know the rule or would prefer not to be subject to it or indeed choose to break it. By that test, of course, no legal or moral order could ever be said to exist in any human society. Common sense resists such a test because the norms of a community are conceived as grounds for praising or criticizing the beliefs, inclinations, or actions of its members, *not* as descriptive statements of what its members actually believe, want, or do. We need not here examine the considerations which might incline us to reject this common sense understanding and to prefer the nominalist approach. Suffice it to say that in adopting that approach we write out of existence the facts of social life that have been the main concern of legal and moral theory. These facts are that members of a group commonly criticize each other's conduct and respond to such criticism by offering reasons for their actions; that they do so not by describing their beliefs, motives, or actions, but by appealing to norms they regard as authoritative in the group; that they develop criteria for assessing the authority of norms invoked in that way; and that they seek to guide their conduct in the light of such norms.

Like norms, statements of social or institutional purposes do not

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9. A classic among the countless statements of that doctrine is D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1971).

mean to describe beliefs or patterns of conduct but rather to define certain obligations to which members of a group or participants in an institution may be held accountable. In other words, purpose is a kind of legal or moral phenomenon. The purposes of an institution are norms that determine the major premises by which persons *ought* to be governed in their decisions as participants in that institution (and standards by which their actions in that capacity may be judged). Purposes sort out the values which are appropriately pursued as ends of institutional action from the array of human concerns that might attract the attention and enlist the energies of institutional actors.<sup>10</sup> A group is informed by purpose precisely to the extent it manages to distinguish authoritatively between corporate ends and other interests of its members, or, in other words, to draw a line between official and personal concerns, between the public and the private domains. To that extent, it may be said to form an organization.

Authoritative *statements* of purpose are an important resource for identifying and communicating institutional ends. But obviously they cannot do all by themselves. Like all statements (even the clearest of rules), they draw meaning from a large set of implicit understandings. Their effectiveness depends upon a background of knowledge that must be formed, preserved, and taught. In specialized institutions this work is done largely by recruiting and training persons who will bring or can acquire needed competences; by assigning responsibility in such a way that the more important decisions will be made by those who have a fuller understanding of institutional ends; and by planning incentives so that rewards communicate what is good judgment (at the same time as they induce persons to commit adequate energies to their tasks). In other words, defining a purpose requires fashioning a community with a membership, a distribution of power, and a structure of interests that are capable of sustaining the appropriate set of understandings (or prejudices, as Burke would have said<sup>11</sup>). Thus an organization may have a clear sense of purpose, even though its statements on the matter, taken out of context, may appear exceedingly vague, obscure, or empty.<sup>12</sup>

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10. This account can be extended to the purposes of individual action. Thus one "sets a goal for oneself" in order to facilitate a concentration of energy and attention on some end which is to be the norm by which one's actions, at certain times and in certain contexts, will be guided and evaluated. In Freudian language, the definition of purpose is a function of the ego, not the id. Purposes, in that sense, are part of a normative order that governs an otherwise "amoral" or "lawless" multitude of conflicting motives.

11. E. BURKE, *supra* note 3, at 100-01.

12. Of course, empty or vague statements may well indicate an absence of purpose. Furthermore, not all institutions (or persons) who claim a purpose do have one. Institutions (and persons) are *variably* concerned with, and successful in developing a sense of purpose. Put another way, purposiveness—the quality of being informed by a purpose—is a *variable* attribute. It makes

Looking at such an organization, a behaviorist observer may claim that all he sees is a bundle of individuals, at times grouped in factions, all of whom strive with uneven power and uneven success to make the system serve their own interests and biases; that many rationalize their actions by invoking the hollow rhetoric of certain documents called statements of purpose; but that the "behavior" of the organization is adequately explained as the resultant of a set of political forces, vectors of power supporting divergent preferences. To reach that conclusion, however, our observer must have committed himself to the "external point of view"<sup>13</sup> of a person alien to the institution and thus unable or unwilling to grasp the *reasons* that institutional actors have for behaving the way they do. From that point of view the observer reads out of existence the system of norms by which persons guide, justify, and evaluate their actions.

There is indeed a reason for the observed patterns of prejudice, power, and motivation, and that reason is the norm of purpose. Of course, the purposes of an organization overlap with ends to which its more powerful members are personally committed by ideology or by self-interest. Indeed they should, unless the organization is to defeat its own purpose by not motivating its leadership or by giving power to members who do not understand what that responsibility means. It may be true that professors of philosophy pursue their own "bias" for or "interest" in good philosophy as they exercise their "power" to grade term papers, but the Board of Regents would be delinquent if it did not appoint persons with precisely that "bias" to the philosophy faculty.

Taking the "internal" point of view and thus recognizing how members of a community think in the light of norms, we should see that the preferences which prevail in institutional decisions are in principle fixed by a normative conception of purpose. The norms which define purpose derive their authority neither from the fact that they embody preferences of some institutional actors, nor from the power of those actors whose preferences are so consecrated. Rather, their authority derives from another set of norms—"secondary" norms, to quote again from H.L.A. Hart<sup>14</sup>—that establish the process by which institutional purposes may be determined authoritatively. These constitutional norms are the ultimate tests by which the relative authority of various communications about goals and policy is measured.

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more sense to ask *to what extent* an institution is governed by purpose, than *whether or not* it is so governed. That question can be distinguished from the question to what extent it is effective in realizing its purpose; people often recognize the authority of a norm, even as they disobey it.

13. H.L.A. HART, *THE CONCEPT OF LAW* 55-56, 86-88 (1961). Hart makes this point in criticizing an array of jurisprudential doctrines that fail to account for the element of obligation in law. The point is easily generalized and extended to the present discussion.

14. *Id.* at 89-96.

Thus, an institution is constituted by an array of arrangements that transfer authority from the will and power of particular persons or groups to official standards of decision defining a purpose. This depersonalization of authority is precisely the achievement that has been historically associated with the idea of law. In effect, a purposive institution establishes "a government of laws, not of men." Under it, "the person in authority . . . is subject to an impersonal order. . . . The person who obeys authority does so . . . only in his capacity as a 'member' of the corporate group and what he obeys is only 'the law' . . . . The members of the corporate group, insofar as they obey a person in authority, do not owe this obedience to him as an individual, but to the impersonal order."<sup>15</sup>

All we have done so far is to clarify what is generally meant by the assertion that an institution has a certain purpose. This assertion, we have argued, is of the same sort as any statement that a community is governed by a law or by a constitutional standard; its truth is contingent upon the same sort of institutional facts. To test the assertion, one must undertake a form of factual inquiry that is routinely practised in legal research. This inquiry aims at determining whether, given certain known institutional arrangements, an alleged or hypothesized norm satisfies the conditions under which norms have the authority of "being" laws or institutional purposes. Psychological or sociological research aimed at describing patterns of thought and conduct cannot speak to that question unless it also addresses the legal issue of what authority may be attributed to the modes of thought and conduct it uncovers. We should stress here that nothing we have argued so far prejudges what outcome such inquiry may have in any particular case. Research may show that an alleged norm does not in fact have the required authority, or that its authority is in doubt. Repeated inquiries may indeed reveal that no norms (or only very few, very ambiguous, or very doubtful ones) have any claim to such authority. It is therefore an open question, and a question of fact, whether any particular institution may be said to have a purpose.

We shall not here attempt to examine what general conditions, if any, must be met before an hypothesized norm may be regarded as the norm of a group or as a legal norm of that group, or what general standards of adequacy regulate inquiry into such matters. Issues of that sort are at the core of most jurisprudential writings concerned with defining the concept of law or explaining the sources of law, such as custom, precedent, or legislation. Those writings provide most of the

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15. M. WEBER, *supra* note 8, at 330.



light that can be thrown on the methodology for testing statements of purpose.<sup>16</sup>

If purpose is a species of law, then the *rationality* (the adequacy to purpose) of a decision may be conceived as a facet of its *legality* (its fidelity to law). To observe a legal requirement is to take it seriously as a premise of decision, that is, as a criterion of relevance in the search for possible courses of action, and as a standard for evaluating the options. Hence, the legality of a decision turns on the rationality with which the decision carries out a certain directive (or, as we might say, on whether it "reasonably" satisfies a requirement). Conversely, to be rational in the pursuit of an end is to recognize the legal authority of that end as a standard of choice and conduct. In other words, legality and rationality are two sides of the same coin. The fulfillment of both involves a process of reasoning from (a) an authoritative norm, and (b) factual knowledge of a particular context of action, to conclusions about the merits of alternative courses of action. Such an assessment may lead one to retrace old ways (conform to "law") or to break new paths (introduce "rational" innovation). But what makes an innovation rational is not its novelty but its conformity to purpose, and old ways may frustrate as well as fulfill the requirements of law.

Since reasoning from purpose is a kind of legal reasoning, we should expect it to exhibit all the problems and defects of justification to which we allude when we say with respect to judicial reasoning that "general propositions [of law] do not decide particular cases." The obstacles to justifying purposive decisions should indeed be considerably more severe than those ordinarily encountered in justifying the application of a rule. We shall not undertake here a detailed discussion of what features distinguish purposes from other sorts of norms (such as rules, principles, or values); suffice it to say that purposes stand somewhere between rules at one end and principles or values at the other end on a scale of increasingly abstract and decreasingly compelling standards. We speak of a purpose as providing a reason for rules or pointing to an end more general than the relatively specific requirements of rules, which are means to that end. The end is apt to be rather distant, complex, and elusive. At the same time, the idea of purpose denotes commitment to a relatively determinate plan of action. We make it a purpose to work for a certain end, whereas we may acknowledge a value or principle without saying how much weight, if any, we

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16. Two important sets of issues are thereby set aside. This Article assumes that the meaning of a statement of purpose can be specified enough that the accuracy of an attribution of purpose can be tested; it does not discuss the sort of evidence that would be needed to test the accuracy of such an attribution. These issues do not arise only in relation to purpose; they may be raised about any assertion that attributes a certain norm to a certain community. In other words, they are special, and especially difficult, instances of problems that occur in justifying any assertion that "rule *x* prevails in this jurisdiction."

are prepared to give it in action. The more we move away from rules toward more abstract norms, the more difficult it becomes to determine by reasoned inferences what the norms may require in a particular situation.

At this point, the skeptic who has conceded that purposes can meaningfully be attributed to institutions may rebound and assert that statements of purpose suffer from a dangerous lack of meaning. For if it is difficult to justify conclusions purportedly drawn from such statements, then it must also be true that the statements cannot effectively guide decisions and conduct. The problem is not that conclusions people draw may be mistaken, but rather that we shall be unable to tell mistaken from true conclusions, and to distinguish the deceptive and self-serving from the candid and objective arguments from purpose. In other words, there is a great risk that mistakes will remain uncorrected and fraudulent rationalizations will not be unmasked.

Suppose that we join the skeptic in recognizing that risk, as indeed we should. What further step will he then invite us to take on account of his fears? Surely he cannot propose that we stop reasoning from purpose. If he did, we should think his advice was, in an important sense, contrary to nature. An essential feature of human beings is that they can, and sometimes must, imagine their futures and form intentions regarding them. Thoughts of that kind may often be futile or misguided, but without them we could neither live nor live as humans. In any event, an enterprise that is risky, like living, may nevertheless be worth undertaking.

Perhaps then our skeptic means only that when we reason from purpose, we should attend to the possibility of mistakes or frauds. His point is to remind us that vigilance is needed to discern and correct our errors. He may move on to offer more pointed suggestions, such as rules of thumb that would help us guard ourselves from certain recurrent risks of lapse. He may, for example, urge us to espouse a principle of Burkean conservatism.<sup>17</sup> This principle recommends that we be especially cautious, and set an especially high standard of proof, when arguments from purpose are made to justify important changes in existing social arrangements. Rational plans for change are indeed known to err by failing to weigh the hidden advantages of existing practices and the unexplored costs of untried alternatives. Although we may not always follow such advice, clearly we should never refuse to welcome and appreciate it, for the skeptic who voices the counsel of prudence has, in effect, decided to help us draw more reasoned conclu-

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17. E. BURKE, *supra* note 3, *passim*.

sions from purpose. He must now think the enterprise worth pursuing, and we need his help.

## II

### ACCOUNTABILITY AND RESPONSIVENESS

Our skeptic may not be satisfied with our favorable reception of his rules of prudence. In addition to his general concern for the risk of undetected mistakes or fraud, he may harbor a special concern for the integrity of decisions made in the exercise of power. He may reason that persons are vulnerable to arbitrary uses of power, and that they gain some protection from abuse if they are able to require those in power to account for their actions. By empowering officials to reason from purpose, we deliberately permit decisions that elude criticism and justification and thus allow a large measure of unaccountable or discretionary authority. Accordingly, the skeptic will urge that in designing institutions we make it a principle to minimize occasions for the exercise of discretionary judgment by officials. This principle will commit us to choose institutional arrangements under which officials are pressed to ground their decisions upon relatively specific standards and are ordinarily denied the power to make purposive judgments unmediated by such standards. Of course those arrangements require a prior specification of purpose in the form of narrower standards. In that phase, unaccountable judgments cannot be avoided; we can only acknowledge the fact that their justification is inescapably weak.

In other words, we are invited to recognize that, for reasons of sound institutional design, the norm of purpose should not be counted as part of the standards by which the ordinary decisions of responsible officials must be guided and judged. In the normal conduct of an institution, we are told, our primary concern should be to assure that official decisions are "legal" (conform to rules); their "rationality" (conformity to purpose) is too elusive to be made a working criterion of judgment. Although purpose can be analyzed as a species of law, the requirements of accountability demand that we reject such an analysis (or any other suggestion that law includes what reason ordains<sup>18</sup>) as a premise of practical judgment. Perhaps we should hope for rationality, but we should not require more than legality.

Suppose we agree with our skeptical friend that the reduction of arbitrariness is an overriding concern in the design of good institutions. It does not follow that we should accept his single-minded plea for accountability. On reflection, we should see that every step in the direction of greater accountability will induce, as well as correct, misguided,

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18. See T. AQUINAS, *TREATISE ON LAW* 2-11 (Gateway ed. 1970).

deceptive, and self-serving uses of power. This unfortunate fact results from a basic problem of purposive social action: the tension between accountability and responsiveness.<sup>19</sup>

*A. Two Conflicting Demands of Purposive Action*

An institution may be conceived as a system of decisionmaking such that a large number of actions are informed at once by the same purpose and by knowledge of greatly varying factual conditions. In designing such a system, one encounters a major problem of communication. General statements of purpose are relatively ineffective in guiding conduct, because their meaning is complex and elusive and because their pursuit involves a multiplicity of participants whose understanding and commitment are normally shallow, partial, and uneven. For that reason, ends must be translated into more proximate goals to which there are more clearly delineated means, and to which participants can therefore more effectively be held accountable.<sup>20</sup> The authority of purpose is then transferred to subordinate rules or policies that embody a theory of what means are appropriate to purpose under determinate circumstances. The trouble is that these subordinate goals should also be adaptable enough to remain responsive to variations of context. In other words, their authority should in principle be conditional upon the empirical merits (always problematic) of the theory they embody. Rules and policies should be interpreted or modified so that they do not in fact frustrate their purpose. But their authority so qualified is rendered vulnerable. In effect, the burden of direction is returned precisely to those general ends whose impotence was to be cured by defining subordinate goals. Hence the dilemma. *Either* authority is given to proximate goals that ensure accountability but prevent flexible response *or* the source of authority is located in more general ends which call for adaptive problemsolving but undermine the steady and accountable implementation of policy.<sup>21</sup>

The tension between accountability and responsiveness is all the more serious that purpose is distant and complex (hence more in need of specification), enduring (so that specific interpretations are more vulnerable to obsolescence over time), or meant to be pursued in widely variable or unstable environments. In a temporary organization such as a task force whose responsibilities are exhausted with the accom-

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19. For an earlier discussion of this problem, see P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 76-77 (1978).

20. In another idiom, some speak of problems being "factored" so that decisions can be "programmed." J. MARCH & H. SIMON, *ORGANIZATIONS* 186-93 (1958).

21. An interesting example of this point is discussed in I.M. Destler's response to George, *The Case for Multiple Advocacy in Making Foreign Policy*, 66 AM. POL. SCI. REV. 751 (1972). Destler, *Comment: Multiple Advocacy: Some Limits and Costs*, 66 AM. POL. SCI. REV. 786 (1972).

plishment of some determinate short term objective, the dilemma may never be posed. But conflicts become acute when an institution is established to minister to some lasting value (for example, higher learning) or when a temporary national emergency (such as depression unemployment) calls for a program of action that can respond to widely variable local conditions.

Bureaucratic control and the delegation of subtasks to experts are the two most common administrative devices by which accountability is achieved. In the latter, technology (or more broadly speaking, a shared commitment to standards of professionalism) provides the discipline and the continuity of direction which, in the former, are achieved by rules and tight supervision of subordinate officials.

Bureaucracy relies upon highly specific rules (also called "blueprints" or "programs") that sharply reduce the discretion of officials charged with the execution of policy. These rules are the detailed specifications of a plan of action. Each one may be conceived as defining an immediate and easily reachable goal that must be realized to achieve another somewhat more distant and difficult purpose, itself part of a larger set of means to further ends, and so forth. Thus, rules define proximate goals at the bottom of a hierarchy of increasingly remote and abstract ends; they supply the premises of bottom-line decisions, but are themselves conclusions of rational judgments based on higher premises. Clearly the formation of such a hierarchy, more or less explicit, is an inescapable part of any effort to translate relatively distant purposes into practical guides for action. But bureaucracy goes further: it tries to deny the official charged with "applying" the rules any authority to assess their adequacy to purpose. That authority, and the corollary discretion to modify rules or to depart from them in a particular case, is vested in superior offices that have a monopoly of "rulemaking" authority. A highly probable outcome of this administrative arrangement is that decisions made in conformity with rules will frustrate the purpose of the rules.<sup>22</sup>

A similar outcome is produced when a distant purpose (for example, managing the water supply) is specified in the form of "operational" goals (such as building dams) for the pursuit of which technological expertise is employed. Within their special province, ex-

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22. In such cases it may be convenient to say that the decisions were "legal" but not "rational," or that they were correct as a matter of "law" (*de lege lata*, as they say in civil law) but wrong from the standpoint of "policy" (*de lege ferenda*). The apparent conflict stems from the fact that the same decisions are judged by two standards of different generality and at different levels in the hierarchy of decisions. "Legality" is shorthand for the rationality of low level decisions as measured by relevant subpurposes (rules), and "rationality" refers to the legality of higher decisions (about rules) as measured by their conformity to larger purposes. In other words, legality is the rationality of petty officials and rationality is the legality of high office.

perts are governed by their own code of scientific and professional standards. But their ethic also requires them to accept an ultimate subordination to goals they do not set.<sup>23</sup> Accountability and reliability are the cardinal values. Unfortunately the goal by which an expert must be guided has first been defined so as to suit the capabilities of his technology; its relation to institutional purpose is quite problematic. Like the elaboration of bureaucratic rules, the tailoring of goals to technology involves a drastic, though necessary, simplification of the problems at which action is aimed.<sup>24</sup> Focused attention to one aspect of the problems (for example, having reservoirs) is obtained at the risk of inducing systematic ignorance of other relevant aspects (such as reducing wasteful consumption). The risk can be costly.<sup>25</sup>

In contrast to accountability, responsiveness depends upon administrative arrangements that encourage consideration of alternatives to prevailing policy. In effect, those entail *debureaucratizing* and *despecializing*. Thus decentralization will enable "field" offices to adjust policy to local conditions from which "headquarters" are too removed. Or professional experts will be required to share authority with persons who can bring competing perspectives to bear on decisions. The creation of staff units for "advocacy" and procedures for "participation" in decisions are characteristic examples of that approach.

However they may be pursued, the virtues of accountability and responsiveness cannot simultaneously be practiced by the same office with the same degree of success. Normally, an institution manages the tension by attending to their requirements sequentially rather than simultaneously, or by having different offices or different levels of the hierarchy take special responsibility for one or the other. Hence it is that institutions move through periodic phases of reconstruction and consolidation, conflicts between "staff" and "line" are built into administrative structures to press in opposite but mutually corrective direc-

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23. Thus a rough approximation of the positivist logic of moral choice is embodied in the structure of administrative decisionmaking. See H. SIMON, ADMINISTRATIVE BEHAVIOR 45-60 (1957). Knowledge, *i.e.*, the service of experts, is employed to evaluate means to predetermined ends, the authority of which cannot be derived from scientific judgment alone and must depend upon an element of fiat, *i.e.*, a command from those in power. From the perspective of an incipient technocrat it may therefore seem that "rationality" diminishes as one ascends the hierarchy of decisions and offices, because the authority of decisions depends increasingly less upon the strength of the knowledge by which they are informed and correspondingly more upon the power conferred by law to the offices by which they are made. It may then be said that lacking "rationality," the decisions of high office must lean on the crutch of their "legality."

24. This is the main theme of the work of Herbert A. Simon. See J. MARCH & H. SIMON, *supra* note 20, at 137-71; H. SIMON, MODELS OF MAN *passim* (1957). A convenient restatement can be found in G. ALLISON, THE ESSENCE OF DECISION 70-95 (1971).

25. A striking example to this point is discussed in B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER, & D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY 1-161 (1974).

tions, and responsiveness is often discouraged everywhere but in the governing offices that are trusted with interpreting basic institutional ends.

### B. Formalism and Opportunism

The reason why accountability and responsiveness are normally combined, albeit imperfectly, is that despite their contrary administrative exigencies neither can truly be achieved without the other. Accountability loses its value when it assures only continued adherence to policies that are out of touch with context and hence irrelevant to purpose. Conversely, the quest for responsive adaptation becomes destructive when the authority of rules or policy, new or old, is in such doubt that action is left unguided. In other words, each virtue brings a specific risk of error which the other is designed to correct. Borrowing some familiar language from statistics, we may speak of two types of error in systems of rational decision. Type I error consists in uncritically *departing from* authoritative policy. Type II error lies in uncritically *adhering to* authoritative policy.<sup>26</sup> Either way, purpose is frustrated. Every single decision may err in one way or the other. More important, a system of decisionmaking may have a *propensity* to err in one or the other direction. Accountability protects from the risk of Type I error by biasing the system in favor of Type II errors. Responsiveness does exactly the opposite.

When a system of decisions becomes prone to committing Type II errors, it is commonly criticized as exhibiting the vice of "formalism," that is, as being so preoccupied with fidelity to received policy that it disregards evidence of its failure to reach the intended outcomes of policy. One kind of formalism is better known as "legalism."<sup>27</sup> It is the plague of rule-centered law, in bureaucracy and other contexts where officials seem to take the posture that *fiat lex, pereat mundus*. The "purism" of experts is just another form of the same basic disease. In this case, problems are artificially moulded to suit the requirements of treatment by a given technology, with the similar result that the system ac-

26. Needless to say, this distinction collapses if we think of "adhering to a rule or policy" as "intelligently applying that rule or policy in the light of its purpose." But people often say that they are "adhering to a rule" when what they do cannot be characterized as an intelligent application of the rule; some institutional arrangements, such as bureaucracy, press people to "adhere to rules" in that way by discouraging the exercise of autonomous judgment in the determination of what rules require. We may then describe such people as obeying the "letter" of a rule but violating its "spirit." One may question the analytical accuracy of that description, *see, e.g.,* Hart, *supra* note 6, at 610-11, without denying that the description roughly conveys a familiar set of facts pertaining to the pathology of rules.

27. For an indictment of legalism in American political thought, see J. SHKLAR, *LEGALISM* 1-28 (1964). For more sympathetic accounts, see R. KAGAN, *REGULATORY JUSTICE: IMPLEMENTING A WAGE-PRICE FREEZE passim* (1978), and P. NONET & P. SELZNICK, *supra* note 19, at 60-65.

quires a "trained incapacity"<sup>28</sup> to grasp recalcitrant realities.

Whereas accountability uncorrected breeds formalism, responsiveness uncontrolled degenerates into "opportunism," which may be defined as a propensity to commit Type I errors.<sup>29</sup> Preoccupied with the cues it receives from the environment, the system loses the capacity to sustain policy. Drift takes the place of purposive direction. Opportunism also can take several forms. It may manifest itself in "retreat," the avoidance of risky problems and responsibilities, as well as in "aggrandizement," the assumption of larger responsibilities that dilute resources. It may foster waves of "initiatives" and "innovations" as well as passive accommodations to the status quo. It is equally compatible with abuses of power and with tinny compromise. For present purposes, these symptomatic variations disguise a common disease: a vulnerability to the environment such that the line of least resistance, rather than the requirements of policy, determines the course of action. The cure involves restoring effective direction where unguided discretion prevailed.

Just as accountability and responsiveness depend upon one another to correct the risks of error inherent in each, their degenerate forms also tend to coexist. In spite of their apparent antinomy, formalism and opportunism involve each other. An indiscriminately rule-centered institution will resist pressure to bend authoritative policy, but it will also be inattentive to problems that happen to fall out of the scope of its rules, though they may be crucial to its larger mission. On such matters it will yield to the environment as indiscriminately as it resists in other contexts where its rules are at stake. Conversely, a highly legalistic approach to the interpretation of policy may help stage an opportunistic retreat from risky problems.<sup>30</sup> Rules shield as well as bolster weak authority. The paradoxical affinity of formalism and opportunism makes sense on closer analysis, for neither disease could occur without an attenuation of the capacity to detect and correct a systemic propensity to error. When such an attenuation occurs, we should expect it to manifest itself in more than a single type of error.

### III

#### THREE MODELS OF LEGITIMATION

Let us now return to the doctrine that, although purposes are insti-

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28. This phrase would seem to bear the signature of Thorstein Veblen.

29. For a discussion of opportunism, see C. BARNARD, *FUNCTIONS OF THE EXECUTIVE* 200-11 (1938), and P. NONET & P. SELZNICK, *supra* note 19, at 76-77.

30. Relevant cases are discussed in Blumrosen, *Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study*, 19 *RUTGERS L. REV.* 189 (1965), and P. NONET, *ADMINISTRATIVE JUSTICE* 234-40 (1969).



tutional norms, they should not count as part of the "laws" by which official conduct is to be guided and judged. So far we have argued only that this doctrine cannot be justified on the simple theory that close accountability (which would be secured by designing institutions in accordance with the doctrine) will reduce the risk of official arbitrariness. We should rather expect accountability to generate its own patterns of arbitrariness even as it brings some other patterns under control.

Nevertheless, there may be conditions under which compliance with the doctrine would on balance produce fewer or less serious instances of arbitrariness than would its rejection. The skeptic may then have ground for objecting to the proposition that purpose is law, insofar as the proposition suggests that officials are *always* obliged to make purposive judgements and always empowered to exercise discretion to that effect. However, to justify espousing his policy of strict accountability, he must now be prepared first, to compare institutional arrangements premised on differentially stringent standards of justification, and second, to formulate a criterion by which we can assess the relative seriousness of the patterns of arbitrariness produced by those different arrangements. In that inquiry, he must remain open to the possibility that under certain conditions a low standard of accountability will be found preferable.

This section will begin to sketch out the logic of such a comparative assessment; the following section will examine what considerations would guide our eventual choice, insofar as there must be a choice. Three common types of institutional arrangements premised on increasingly loose standards of justification will be discussed. They may be thought of as embodying model approaches to the legitimation of purposive decisions, for each one attempts in its own way to bolster the relatively precarious legitimacy of decisions that are inescapably defective in justification. Needless to say, the choice of a purpose may pose even greater problems of legitimacy than do conclusions drawn from an accepted purpose. But our concern here is only with institutional arrangements regulating the subordinate decisions that carry out an established mandate.

Many scholarly disciplines, including jurisprudence, administrative law, and social science studies of organization, have sought to describe and assess our three typical arrangements. These disciplines speak in different languages, but to the same set of points. We shall draw from all, and move rather freely across their linguistic borders.

### *A. The Positivist Model*

If we opt for a policy of strict accountability, we should design an institutional structure the model for which may be found in a familiar

conception of law, best known under the names of "the Rule of Law doctrine"<sup>31</sup> and "legal positivism,"<sup>32</sup> and often celebrated for its democratic inspiration.<sup>33</sup> The logic of the model may be outlined as follows.

Suppose the issues that arise in legal or administrative decision-making are classified in two groups: one consists of factual questions that are amenable to rigorous inquiry; the second consists of all other questions, including policy issues and matters of fact that elude inquiry. Answers to questions of the second sort must at least in part be dictated by the arbitrary preferences or prejudices of decisionmakers.<sup>34</sup> It is apparent that questions of the first sort become the core of problemsolving only at the bottom end of the long chain of reasoning that relates distant goals to action; that is, when specific rules or operational objectives have been so fixed that bottom-line decisions await only the gathering of some determinate and available factual information. In other words, as one moves from rule-application to rulemaking, or from technological decisions to the choice of operational ends, normative judgments and untestable factual assumptions come to occupy an ever larger place in reasoning. Decisionmakers may still purport rationally to relate means to ends, but their decisions contain a large element of fiat. The legitimacy of those decisions—in the limited sense of their persuasive force, an especially salient concern when obedience must be secured by winning consent—cannot rest upon their factual justification. Truth and legitimacy may be roughly coterminous in low-level decisions. At higher levels, legitimacy depends upon a congruence between the arbitrary preferences and beliefs embodied in rules and the arbitrary preferences and beliefs of those whose consent must be won. That problem is resolved by entrusting the determination of rules (or other operational goals) to "political" offices that specialize

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31. A classic statement of the Rule of Law doctrine is A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 183-203 (1961). For more critical accounts, see M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 40-45, 194-201 (1973); P. NONET & P. SELZNICK, *supra* note 19, at 53-72; and *THE RULE OF LAW* (R.P. Wolff ed. 1971).

32. See H.L.A. Hart, *Legal Positivism*, in 4 *THE ENCYCLOPEDIA OF PHILOSOPHY* 418 (P. Edwards ed. 1967). As Hart shows, the phrase "legal positivism" has been used to designate an array of legal and philosophical doctrines that are logically separable from one another. On the other hand, many of those doctrines can be and have been integrated into a single coherent perspective. The following account involves a partial integration, but avoids associating "legal" positivism with the doctrine of "logical" positivism, as one might be tempted to do following Herbert Simon. See note 23 *supra*.

33. See, e.g., Finer, *Administrative Responsibility in Democratic Government*, 1 *PUB. AD. REV.* 335, 344-50 (1941), and, more recently, T. LOWI, *THE END OF LIBERALISM* 287-314 (1969).

34. This way of stating the premises of legal positivism avoids relating that perspective to logical positivism. Problems of inquiry and justification may affect factual as well as normative statements, and arbitrariness can enter both sorts of judgments. Legal positivism may be interpreted as concerned with the reduction of arbitrariness in both factual and normative judgments. It may, of course, reasonably suspect that normative judgments are likely (though not necessarily) more vulnerable to arbitrariness than factual ones.

in registering the preferences of subjects and settling conflicts among them, with proper regard for the variable power of subjects to withhold obedience. Democratic theory specifies such a solution for conditions under which power is relatively widely distributed among "subjects" who have relatively widely varying preferences.

Legally, these arrangements are embodied in "secondary" or "power-conferring" rules<sup>35</sup> that sharply separate the authority to make rules (which is reserved to "political" offices) from the authority to apply rules (which is delegated to "legal" officials, such as judges or civil servants). Because legal officials must, in order to apply rules, be able to "find" or "recognize" what rules have authority (are legitimate), their delegation includes an instruction to abide by a simplified formal test of legitimacy: officials must presume that a rule is legitimate if it was made by an office legally empowered to make it. Under this test a *factual* inquiry into the history of a rule can settle any question that a legal official may have about the rule's authority. The legitimacy of rulemaking decisions is thereby made to depend on the legitimacy of the rulemaking *office*, whereas the legitimacy of rule-applying decisions is contingent upon the factual justification of the *decisions* themselves. In the logic of the system it is of course unthinkable that legal officials might probe what purposes may justify a rule, or might bend the rule to avoid unintended outcomes in a particular case. If they did so, they would be led to reassess the rule by their own arbitrary preferences and prejudices—a judgment which they have no authority to make.<sup>36</sup>

In jurisprudence, the positivist model is most often discussed as a theory of judicial authority,<sup>37</sup> but it has also been extended to govern administrative decisions. In a recent restatement, the doctrine is summarized in the following four "essential" propositions:

- (1) The imposition of administratively determined sanctions on private individuals must be authorized by the legislature through rules which control agency action. . . .
- (2) The decisional procedures followed by the agency must be such as will tend to ensure the agency's compliance with requirement (1). . . .
- (3) The decisional procedures of the agency must facilitate judicial review to ensure agency compliance with requirements (1) and (2). . . .

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35. See note 14 *supra*.

36. Hart argues along this line. Hart, *supra* note 6, at 606-15, 627-29.

37. See Fuller, *supra* note 6; Hart, *supra* note 6; Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411 (1968). See also Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624 (1963); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). Earlier critical discussions include Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908), and virtually all the writings of the legal realists.

(4) Judicial review must be available to ensure compliance with requirements (1) and (2).<sup>38</sup>

In the words of an early student, "the most important point in the development of administrative law is the reduction of discretion."<sup>39</sup> Therefore, issues of policy should be settled in the legislative process, and delegated authority "ought to be confined to non-controversial matters of a technical character."<sup>40</sup>

This model is premised on a standard of justification so stringent that all but the most routine decisions will necessarily be found incurably defective. Some have criticized it for requiring "demonstrative" proof in a domain where we cannot reasonably aspire to more than "argumentative" proof.<sup>41</sup> Should one reason from a standard at once looser in that it can more often be approximated, and more demanding in that it can govern a wider range of decisions, one would have to conclude that the positivist model combines the worst risks of both types of errors affecting systems of rational decisionmaking. By demanding utmost rigor in the pursuit of arbitrarily determined objectives, it condones at once a propensity among those who apply rules to adhere indiscriminately to governing policy, and a propensity among rulemakers to tamper indiscriminately with governing policy. Designed in that manner, institutions would be overly receptive to the demands of their environment as interpreted by "political" offices and at the same time unable to adjust "legal" decisions to variable contexts. They would exhibit both formalism and opportunism, and in both ways their decisions would fail to be guided by legitimate criteria of choice.<sup>42</sup>

### B. *The Pragmatic Model*

The limits of the positivist model readily suggest a corrective that, by a single administrative stroke, promises to cure the twin diseases of formalism and opportunism. If legal norms are generalized—formulated as ends more abstract than strictly operational objectives, or as principles rather than rules—a portion of the discretionary power formerly concentrated in rulemaking offices is devolved to the "legal" officials who apply the law. The effect is to blur the distinction between "applying" and "making" rules. The task of legal officials may still be characterized as "interpreting," not making law, but willy-milly it now

38. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1672-74 (1975).

39. E. FREUND, R. FLETCHER, J. DAVIES, C. POUND, J. KURTZ, & C. NAGEL, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 24 (1923).

40. E. FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 221 (1928).

41. C. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 98-108 (J. Petric trans. 1963).

42. See text accompanying notes 26-30 *supra*.

requires elaborating the specific policies necessary to make a general mandate effective, a problem to which "pure" factual inquiry seldom offers clear-cut answers. But that ambiguity turns out to have considerable administrative worth. Its function is dual. First, an expectation is established that the ideals of rational justification that govern the application of rules will, insofar as possible, be brought to bear on the determination of subordinate policies implementing a mandate. Second, there is a corollary expectation that policies will remain flexible, since officials are empowered to correct them in the light of a higher purpose as particular cases may require.

This second point underlies a commonly observed reluctance of administrators to concede that their operating policies constitute rules or generate entitlements. Those officials seek to reserve some discretion to invoke their larger mandate in support of ad hoc departures from standard policy as particular situations may warrant. Insofar as complex human experience resists categorization, no finite set of rules, however corrected, can ever exhaust the requirements of a mandate. The fact that such ad hoc judgments are discretionary does not necessarily render them arbitrary. They pose problems of justification that are essentially similar to, and no more incurable than, the problems posed by decisions deriving a rule or policy from a general mandate.<sup>43</sup>

Although factual inquiry alone seldom can give clear-cut answers to policy questions, and a "balancing" of sub-ends must ordinarily take place, considerations of fact nonetheless play a critical role in decisions, for example by eliminating options that frustrate most relevant ends, or by adding precision to the measure of trade-offs. Hence, even when a specific conclusion is not fully justifiable on factual grounds, the decision will gain some authority from the relative thoroughness of the inquiry that informed it. An implicit standard of procedure, which may be called the *principle of maximum feasible inquiry*, partly takes the place of rigorous factual justification as the guardian of accountability.<sup>44</sup> This procedural standard does not make policy decisions less discretionary. If anything, thoroughness must enlarge discretion since it ordinarily widens the range of options, costs, and benefits that must be

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43. Special problems may arise when such decisions must be qualified to take account of a claim of right or other "trump card" argument, and problems of that sort may be more salient in adjudication than in other types of decision. A close analysis of those problems cannot be undertaken here. For a critical treatment of these problems, see R. DWORKIN, *supra* note 5, at 81-205, 294-327.

44. The retreat to procedure is a familiar pattern in administrative and legal reform. In the absence of convincing alternatives to policies that have "failed," reformers place their hopes in mechanisms, such as the market, new methods of data collection, "environmental impact reports," hearings, or "citizen participation," that will increase the "input" of relevant information.

considered.<sup>45</sup> Therefore it has its own costs, including the risk of inducing indecision or vacillation under pressure. Up to a point, however, procedure can strengthen confidence that avoidable errors have likely been avoided.

If, notwithstanding procedural safeguards (perhaps indeed because of them), the policy *decisions* of a legal office remain defective in justification, their lack of legitimacy must ultimately be cured by invoking the authority of the *office* from which they emanate. Under the pragmatic model, however, the mere fact that an office is legally empowered to make a rule (the simplified formal test of legitimacy proposed by positivism<sup>46</sup>) cannot suffice as a warrant of rulemaking authority. We should recall that, in the positivist model, this simplified test is no more than a condition attached to the delegation of rule-applying authority: it instructs legal officials to confine themselves to that limited test when they must inquire into the legitimacy of rules. The model recognizes that, to those in rulemaking offices and to their subjects, the sources of legitimacy are far more complex and elusive. They include all the "political" processes that sustain adequate trust in the capacity of rulemaking institutions to register and reconcile the preferences of the governed. The trouble is that when rulemaking authority is delegated to legal officials, it is also removed from those processes. Indeed a chief function of that delegation is to reduce the risk that policy will indiscriminately accommodate preferences according to the power with which they are voiced. Therefore, although legal offices must also have legitimacy, they cannot draw that trust from the same source as political offices do. A legal office can, however, invoke its *competence* as a warrant of trust.

"Competence," as understood here, need not be an empty, naive, or self-serving word of praise. The competence of an office defines a limited range of decisions, on the merits of which other institutional actors undertake to suspend judgment, thereby deliberately accepting a certain risk of error. That commitment is made with a corollary expectation that the cost of errors will be tolerable and that the office will learn from its mistakes. The quality of the procedures by which an office informs its decisions may establish a tentative initial ground for such an expectation. But the expectation is ultimately contingent upon what record of performance the office will build. Persistent error, however well researched, is bound to be damning in the long run. Evaluation will then shift back from procedure to substance, but it will focus on a *record of decisions about which experience has accumulated*. That

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45. It subverts the simplification of problems, without which, as Herbert Simon repeatedly points out, rational judgment cannot proceed. See note 24 *supra*.

46. See text accompanying notes 35-36 *supra*.

record can be searched for evidence of patterned outcomes which may reveal propensities of the office to err in determinate directions, recurrent failures of the office to correct retrospectively discoverable errors, or other implicit lines of improper conduct. Factual judgments, using the benefit of hindsight and the logic of probability, can then outline what may be expected of the office and justify a conclusion about its (lack of) competence or about what measure of discretion it may be trusted to exercise.<sup>47</sup>

The preceding paragraphs have sketched the logic of a pragmatic approach to the legitimation of purposive decisions. To summarize, the model espouses a relaxed standard of justification which tolerates some loosely grounded discretionary judgments, accepts the attendant risks of mistake, and awaits hindsight to identify and correct patterns of error. This standard makes it possible to extend the reach of rational-legal legitimation to the decisions by which general ends are translated into rules and operational goals. An extreme form of the pragmatic model is embodied in the strategy of "broad delegation"<sup>48</sup> that has fashioned much of American administrative law. That strategy presumes that administration can be more rational if an agency is granted a full range of governmental powers, from rulemaking through enforcement to adjudication, over the problem area for which it is responsible. An administrative mandate may say little more than "take this problem [for example, air transportation or water quality] and regulate it in the public interest." There is a trust that rational policies will be fashioned as issues arise, options are tested, and experience accumulates. Administrative law has no monopoly of pragmatism, however. A moderate version of the same approach is sometimes implicit in theories of adjudication that depart from "mechanical jurisprudence,"<sup>49</sup> but continue to stress the importance of rationality in judicial decision. If the judge's authority extends beyond finding the facts necessary to the application of predetermined rules, he may have to invoke a special "competence," or the warrant of "experience," to tie the loose ends of his reasoning in matters of policy.<sup>50</sup>

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47. Such is the logic of the judgments by which formalism or opportunism are diagnosed. Properly understood those pathologies are attributes of offices, not of policies or other decisions; their occurrence should influence how the question of confidence is resolved. Obviously, judgments about the competence of an office need not be either/or conclusious; they may indicate a degree of trust or specify certain respects in which trust is (un)warranted.

48. See Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1183-88 (1973).

49. See Pound, *supra* note 37.

50. The Constitution has in this manner created for courts and legislators areas of primary responsibility which are essentially congruent to their areas of special competence. Courts are thus obliged both by constitutional command and by their distinctive functions to bear particular responsibility for the measurement of procedural due process. These factors in combination suggest that legislatures may properly expect only a cau-

By its own logic, the pragmatic model is of limited applicability. It presumes that empirically grounded expectations warrant continuing trust in the competence of an office. But studying the record of that office may lead to a contrary conclusion. Perhaps steps can then be taken to restore grounds for favorable expectations, for example by improving the cognitive resources of the office, or by correcting aspects of its structure to which its past failures may be traced. However, it is equally possible that inquiry will not yield any plausible suggestion for such a line of reform. What then?

### *C. The Pluralist Model*

If legitimacy cannot be derived from the competence of the office, it must be sought again from more "political" sources. Those can be found by returning to the positivist approach—the delegation of policymaking authority to legal offices may be rescinded so that political offices reassume a monopoly of the power to make rules and set goals. But there is an alternative: to continue delegating discretion to legal offices but compensate for their incompetence by providing them with their own "political" means of legitimation. Procedures assuring the representation of "affected interests" are built into the exercise of delegated powers. In effect, the legal or administrative process is politicized so that it can win confidence that its decisions will be sufficiently congruent with the preferences of subjects. Legal and administrative institutions become subordinate governments whose responsibility is to open a forum and manage conflicts within a defined jurisdiction.

Opting for this arrangement would seem to entail a judgment, itself politically legitimated, that the higher political office must or may parcel out shares of its rulemaking power, thereby creating a "pluralist" instead of a "monist" structure of authority. By this account, the pluralist reconstruction follows a deliberate decision made at the top within the framework of a positivist approach to legitimation. Of course such a judgment presupposes acceptance of a risk that the goals set by subordinate governments will be determined by the preferences of a restricted and selective group of subjects.<sup>51</sup> In other words, some "interests" more strongly represented above than below must give up some of their power to countervail the "interests" advantaged below. But the critical step in the transition to pluralism is not the decentralization of political authority; rather, it is the injection of politics in

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tious deference for their procedural judgments, but that, conversely, courts must exercise their special responsibility for procedural guarantees with care to permit ample scope for achieving the purposes of legislative programs.

*In re Gault*, 387 U.S. 1, 71 (1966).

51: Despite Madison's contrary advice. *THE FEDERALIST* No. 10 at 63-65 (J. Cooke ed. 1961).



offices that combine responsibilities for rulemaking and for the application of rules. Decentralization per se may be consistent with the basic premises of the positivist model;<sup>52</sup> pluralism is not, because it allows arbitrary judgment to invade the one and only realm in which positivism seeks to uphold the ideal of rationality. The restraints of rigorous objectivity and adherence to rules are seriously undermined when "legal" offices exercise discretionary powers that are legitimated by "political" criteria. To be consistent, the pluralist model must deny the moral or practical worth of rigorous factual justification in the application of rules; it may also deny the possibility of this sort of rigor, as did some legal realists in moments of extreme "rule-skepticism."<sup>53</sup>

A smoother route to pluralism is through degeneration of the pragmatic approach. The viability of the pragmatic model depends upon a vigilant care for the competence of legal offices. When care lapses (and perhaps it always does, as complacency sets in), the symbols and rhetoric of "competence" may survive only to mask unexamined patterns of accommodation to the political environment. Demystification will then unveil offices that have owed their legitimacy not to the "myth" of expertise but to the congruence of their policy with their clients' wishes.<sup>54</sup> The procedural features of the pragmatic model are conducive to such a degeneration. In deference to the principle of maximum feasible inquiry, an office must open all kinds of opportunities for consultation, advocacy, and participation; these are powerful amplifiers for the voices of "affected interests." Thus inquiry may disguise, as it sets in motion, a process by which the office drifts into opportunism.

This dynamic has been noticed by observers of the pragmatic model in American administrative law.<sup>55</sup> An "interest representation model"<sup>56</sup> is seen taking hold in that field. According to this new doctrine, the law's chief concern should be to protect the rights of "affected interests" to participate in the making of administrative decisions, and by other means to impose "on administrators the duty to consider ade-

52. There may indeed be a natural drift to decentralization in formally centralized institutions modeled in the positivist way. Of all "interests" represented in a legislature, only a few participate actively in any decision, even though all contribute by their assent to the decision's legitimacy. Participation is always selective, and always the work of committed minorities.

53. See, e.g., F. RODELL, *WOE UNTO YOU LAWYERS* 107-22 (2d ed. 1957).

54. So argue those who criticize regulatory agencies for having become "captive" of regulated industries. See, e.g., Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973). More moderate versions of the argument are reviewed in Stewart, *supra* note 38, at 1682-88, 1713-15. See also Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954). Another relevant pattern is discussed in A. MAASS, *THE KINGS RIVER PROJECT* (1952), and Maass, *Congress and Water Resources*, 44 AM. POL. SCI. REV. 576 (1950).

55. See, e.g., T. LOWI, *supra* note 33; G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); Stewart, *supra* note 38.

56. Stewart, *supra* note 38.

quately all participating interests in decisions on agency policy."<sup>57</sup> However,

the expansion of participation rights to promote interest representation will accentuate the polycentric and unique qualities of each proceeding, rendering it more difficult for agencies or courts to establish rules of decision to govern large numbers of cases. Each decision will tend to be responsive to the particular field of forces represented by the parties, and the attainment of formal justice and realization of its attendant virtues may therefore be gravely impaired.<sup>58</sup>

This argument echoes those that criticized legal realism for encouraging a pragmatic exercise of judicial discretion "with an eye to social results";<sup>59</sup> when they follow that advice, judges come to "vote less regularly for doctrine than for interests."<sup>60</sup> Thus a degenerate pragmatism will foster a "basic cynicism about the possibility of an objective judiciary,"<sup>61</sup> and undermine the idea that there "can be any substance to the distinction between law and politics."<sup>62</sup> From the standpoint of a rigorous positivist, of course, such an outcome is fully to be expected. The only difference there can be between the pluralist and the pragmatic model is the latter's deceptive appeal to reason; at least pluralism has the virtue of recognizing how discretion erodes rules and invites reliance on political criteria of judgment.<sup>63</sup>

Perhaps this virtue accounts for the way pluralism has captured the imagination of contemporary political science. To students of government, the administrator is a politician, versed in the arts of compromise:

The administrator is called upon to resolve the difficulties that were too thorny for the legislature to solve, and he must do so in the face of the very forces that were acting in the legislature, though their relative strength may have changed. . . . If the administrator holds out for an interpretation of these controverted ambiguous provisions that is not itself a compromise, he invites the affected groups either to denounce his "dictatorial" methods and his "unscrupulous assumption of powers not granted to him" or to expose his "sell-out" of the "public interest."<sup>64</sup>

Thus the rational interpretation of legal ends turns out to be the successful negotiation of conflicting group demands. The test of the public interest becomes "the acceptance of administrative decisions and poli-

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57. *Id.* at 1756.

58. *Id.* at 1789.

59. Schlesinger, *The Supreme Court: 1947*, FORTUNE, January 1947, at 73, 201.

60. *Id.* at 202.

61. *Id.*

62. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, December 1968, at 138.

63. An argument along these lines is made in Hart, *supra* note 6, at 606-15.

64. D. TRUMAN, *supra* note 9, at 443. For an earlier statement of this view, see E. HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 23-24 (1936).

cies by the group interests affected by or concerned with them.”<sup>65</sup> The same analysis can also be extended to decisionmaking within an agency—bureaus with vested “interests” in conflicting policies vie for influence by an array of power games that transform administration into “bureaucratic politics.”<sup>66</sup>

#### IV

##### JUSTIFICATION AND SELF-CORRECTION

Suppose that after having compared (in much greater detail than possible here) the institutional arrangements proposed by our three models, we gain a deeper sense of what inspires them and a sharper understanding of their strengths and weaknesses. By what criteria should we then determine what type of arrangement—what measure of official accountability, or what standard of justification in official decisions—we should prefer? Before we attempt to answer that question, let us reflect again on what is at stake in the choice we must make.

Each of our three models captures some general ideas that have at one time or another served as the foundations of rather sweeping and apparently rival accounts of legal or administrative systems of decision-making. Versions of positivism, pragmatism, and pluralism can be found in all disciplines (from legal philosophy through the social sciences to business administration) that have been concerned with purposive social action. It is seldom clear what sort of an account these “theories” propose; characteristically they consist of ambiguous mixes of descriptive and normative claims, shifting from generalizations about how decisionmaking is structured to propositions about how it ought to be structured. Factual assertions about the relative frequency of a certain arrangement are used to build a *prima facie* case for a normative claim that the arrangement must be preferred. There is an intimation that good reasons must exist for what prevails in fact. More important, each theory is presented as if it offered a comprehensive and self-sustaining set of principles of institutional design.

Thus understood, our three models do indeed seem to make radically conflicting claims. One, pluralism, invites us to regard purposive decisions of all sorts as disguised political choices that have (or require?) no justification beyond their admittedly problematic congruence with the will and power of institutional actors. Accordingly, the theory of legal-rational decision is best conceived as part of a larger theory of political phenomena; it may be called “political jurispru-

65. A. LEISERSON, *ADMINISTRATIVE REGULATION* 14 (1942).

66. G. ALLISON, *supra* note 24, at 162-81, provides a convenient summary of that perspective. See also A. DOWNS, *INSIDE BUREAUCRACY* (1967).

dence."<sup>67</sup> To another, positivism, genuinely rational decision is possible only in the implementation of relatively specific and proximate goals or rules. Hence there is a place for an autonomous theory of such decisions, which may be called "analytical jurisprudence."<sup>68</sup> But positivism joins pluralism in discounting the role of purpose in the making and justification of rules; those decisions are (or should be?) matters for political choice. Only the third model, pragmatism, asserts that all purposes other than the most abstract and distant ends can (or should?) effectively guide decisions; it calls for some general theory of "practical reason," destined to absorb both "political" and "analytical" jurisprudence.

The characterizations outlined above make some caricatural sense of familiar intellectual debates. But there is another way of understanding our three models, one that limits their import but helps integrate the divergent strands of thought out of which they are woven.

#### *A. Theory and Institutional Design*

Narrowly understood, each model outlines the internal logic of a common type of institutional arrangement designed to regulate the delegation of authority from higher to lower levels in a hierarchy of offices. One type controls delegated authority by detailed instructions; another does so by defining a pointed mission, the performance of which calls for autonomous judgment; the third directs the subordinate office to take its guidance from the concerns of persons who have a stake in its decisions. A detailed account of any such arrangement would consist of a complex set of rules constituting various offices, defining their powers and the procedures by which those powers may be exercised, and spelling out the criteria by which the performance of lower offices will be evaluated. Those rules might be accompanied by a statement of the reasons for allocating authority in that manner, for delegating more or less power, for insisting on more or less rigorous accountability, for allowing more or less autonomy of judgment, and for expecting more or less participation by affected parties. Few concrete instances of such arrangements would perfectly fit the specifications of any of our three types; most would mix elements of more than one type; perhaps many would approximate one type more closely than either of the other two.

However, we do know that institutional experience is varied enough to offer countless examples of all three types in pure, approxi-

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67. See Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1964). See also G. SCHUBERT, *HUMAN JURISPRUDENCE* (1975).

68. See Feinberg, *Analytic Jurisprudence*, in I THE ENCYCLOPEDIA OF PHILOSOPHY 109-11 (P. Edwards ed. 1967).

mate, or mixed forms. Virtually all complex institutions contain some elements of the positivist, pragmatic, and pluralist models; all expect adherence to rules and operational objectives, delegate discretion to competent offices, and rely upon participation to produce consensus. Now suppose that a naive but curious observer of this complex world inquired *whether* instances of one of our three types, say the pluralist model, do in fact occur. Surely he would find that they do. His report might conclude that evidence supports a "theory" of the sort found in political jurisprudence. But another observer might then wish to compensate for this one-sided account by showing that arrangements of the positivist type occur also; he should be able easily to argue that much evidence supports the claims of analytical jurisprudence better than those of political jurisprudence. And so on. Such observers would talk as if they were divided by profound theoretical disagreements, but they would only be pointing to different facets of the same world. False disagreements of this sort are unfortunately the stuff of much social science polemic about the descriptive merits of positivism, pragmatism, and pluralism.

For example, a restatement of the social science of organizations, based mainly on studies of business and industry, proposed an influential distinction between two modes of resolving organizational "conflicts," which reproduces point for point the positivist contrast of "rational" rule-application and "political" rulemaking.<sup>69</sup> According to the theory, "analytic" processes of conflict resolution rely upon knowledge and rational argument to reach agreeable outcomes, whereas "bargaining" processes are marked by their "parapliernalia of acknowledged conflict of interest, threats, falsification of position, and (in general) gamesmanship."<sup>70</sup> Each type has its own sphere:

Where a choice of a course of action requires comparison of several operational goals, which are not themselves subgoals to a common operational goal, the decision-making will be characterized by bargaining. Where the alternatives under consideration are all directed to the same operational goals, analytic decision-making processes will predominate.<sup>71</sup>

But another strand of literature, also concerned with private enterprise, finds the key to rational organization in those very decisions where positivism sees only political games:

Only a clear definition of the mission and purpose of business makes possible clear and realistic business objectives. It is the foundation for priorities, strategies, plans, and work assignments. It is the starting

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69. J. MARCH & H. SIMON, *supra* note 20, at 112-35.

70. *Id.* at 130.

71. *Id.* at 196. Some implications of this "theory" are elaborated in R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 26-43 (1963).

point for the design of managerial jobs and, above all, for the design of managerial structures. Structure follows strategy. Strategy determines what the key activities are in a given business. And strategy requires knowing "what our business is and what it should be."<sup>72</sup>

However difficult these decisions may be, it is nevertheless presumed that "the function of formulating grand purposes and providing for their redefinition is one which needs sensitive systems of communication, experience in interpretation, imagination"<sup>73</sup>—capacities about which objective assessments can be reached. Judging from such conflicting accounts, one can conclude only that each finds what he looks for.

Similarly, a common argument in the sociology of organizations is that, notwithstanding Max Weber,<sup>74</sup> the "formal structure" of bureaucracy (the explicit rules and procedures that govern its operations) does not accurately describe organizational life. Instead, much is determined by an "informal structure" of friendships, loyalties, rivalries, and other social phenomena.<sup>75</sup> In other words, pluralist arrangements are found to exist where Weber saw positivist ones. But in another corner of sociology, sometimes called the "institutional school,"<sup>76</sup> the pragmatic model seems to make more sense. The "institutionalists" resist identifying rationality with bureaucratic regularity or technological calculation:

Efficiency as an operating ideal presumes that goals are settled and that the main resources and methods for achieving them are available. The problem is then one of joining available means to known ends. This order of decision-making we have called *routine*, distinguishing it from the realm of *critical* decision. The latter, because it involves choices that affect the basic character of the enterprise, is the true province of leadership as distinct from administrative management. Such choices are of course often made unconsciously, without awareness of their larger significance, but then the enterprise evolves more or less blindly. Leadership provides guidance to minimize this blindness.<sup>77</sup>

"Critical" decisions are not ones "to which narrow criteria of organizational engineering could be applied."<sup>78</sup> But it does not follow that they cannot be guided by purpose, for they can be informed by "an assess-

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72. P. DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 75 (1973).

73. C. BARNARD, *supra* note 29, at 233.

74. M. WEBER, *supra* note 8.

75. A classic example is M. DALTON, *MEN WHO MANAGE* (1959). The tendency in sociology to counterpose "formal" and "informal" structures is discussed in Gouldner, *Organizational Analysis*, in *SOCIOLOGY TODAY* 400-28 (R. Merton, L. Broom, & L. Cottreao, Jr. 1959).

76. See C. PERROW, *COMPLEX ORGANIZATIONS* 177-204 (1972). The "institutional school" has a pedigree older than Perrow seems to think. See *THE FRENCH INSTITUTIONALISTS* (A. Broderick ed. M. Welling trans. 1970).

77. P. SELZNICK, *LEADERSHIP IN ADMINISTRATION* 135 (1957).

78. *Id.* at 54.

ment of the built-in capabilities and limitations of the organization,"<sup>79</sup> which manifest themselves in its past experience.<sup>80</sup>

Now suppose observers of our institutional life finally came to agree that there occur instances of each of our three typical systems of rules for delegating authority, and hence that there is empirical room for each of all three corresponding theories of decision. Perhaps those observers would then move on to inquire about the *extent* to which, and the *conditions* under which, each type occurs; theoretical disputes would then give way to empirical questions about the boundaries of the domains within which each theory may claim to prevail.

Suppose also that our observers remembered Hart's advice that institutions must be seen from the "internal point of view."<sup>81</sup> They would soon discover that among the "conditions" under which each typical system of delegation occurs are some reasons institutional actors have for choosing that system. In due course, their study would stumble on the fact that the reasoning underlying each type appeals to certain philosophical ideas (the distinction between *is* and *ought*, or Dewey's account of intelligent problemsolving,<sup>82</sup> or statements about the indeterminacy of meaning in ordinary language) that are either ignored or dismissed in the reasoning that underlies other types. Our observers could confine themselves to noting the fact that the philosophical perspectives of institutional actors seem to vary according to the type of delegation rules that actors happen to practice. But suppose they understood their intellectual responsibilities to be somewhat larger, and decided to assess the merits of the reasoning of institutional actors. Then their next question might be: Which one of those three philosophical perspectives is most persuasive? If our observers divided on that question, all the "theoretical" disagreements they had resolved at the empirical level would then reopen at the level of normative judgment: What system of delegation does good philosophy recommend most?

The trouble with that question is that philosophy does not recommend systems of delegation—managers do. Philosophy sharpens our consciousness of what errors may follow from ignoring various principles of reasoning. But in action, if not in theory, it happens that some principles cannot be followed without departing from others. For example, the institutional arrangements (such as systems of delegation)

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79. *Id.*

80. The case studies that have emerged from the "institutional school" can themselves be read as examples of how such assessments are conducted. See, e.g., B. CLARK, *THE OPEN DOOR COLLEGE* (1960); R. KAGAN, *REGULATORY JUSTICE* (1978); L. MAYHEW, *LAW AND EQUAL OPPORTUNITY* (1968); P. SELZNICK, *THE ORGANIZATIONAL WEAPON* (1952).

81. See note 13 and accompanying text *supra*.

82. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

that encourage close factual justification of decisions will discourage intelligent reconsideration of the normative premises of decisions, so that no complex system of decision can be designed to avoid both Type I and Type II errors to the same extent at the same time. A responsible institutional actor must then determine what relative *weights* he should give to the conflicting principles. He does so by comparing the costs that would attach to the different errors from which each principle would guard him, and by deliberately choosing what risk of error should be taken under the circumstances. Then he designs his system of delegation in accordance with that choice.

If our observers understood this point, they would see that the philosophical differences separating observed actors reflect the different weights various actors attach to different principles of reasoning; and that these weights may vary because the costs of any sort of error vary from context to context, a *fact* about which all actors may well agree. Our observers should then conclude that the jurisprudential debates they had entered did not air any true disagreement.

Such is the case of many jurisprudential debates indeed. Though they are fought with philosophical arguments, they often turn on relatively narrow factual questions about how costly certain patterns of error have become at a certain phase of the history of a particular legal order. They make best sense when read in their polemical context, as dramatizing the urgency of certain problems that require changes in the control of delegation. Legal realism is a particularly apt example. Viewed as a reaction against "mechanical jurisprudence," it is a display of practical intelligence; removed from that context and judged on abstract grounds, its call for a "result-oriented" jurisprudence is little more than hollow rhetoric.<sup>83</sup> Similarly, legal positivism can be understood as a sobering note of caution meant to protect us from indiscriminate trust in official discretion; we should not think of it as a program to facilitate intelligent problemsolving.

### *B. Setting the Standard of Justification*

Reinterpreted in this light, our three models of legitimation cannot be treated as full-fledged and competing theories of legal-rational decision. Each model has its own selective focus on a specific sort of error, offers a specific set of institutional devices for correcting errors of that sort, and assumes that the cost of those errors outweighs the cost of other sorts of error, which it is not suited to correct. It does not deny but deliberately neglects the problems addressed by other models. In

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83. Or a nightmarish fantasy. Taken out of context, Rodell's rule-skepticism is an argument that no language is possible. See note 53 *supra*.



effect, it constitutes a contingency plan for correcting the design of an institution *if* a certain sort of error is salient enough to warrant such a correction. For example, the pragmatic model recommends that when the costs of formalism become too heavy, the remedy is for the institution to move away from the system of narrow delegation prescribed by the positivist model, and to allow legal officials greater discretion to adapt rules in the light of purpose.

If each of our models takes for granted that a system of decision is vulnerable to different sorts of error requiring different corrective devices, then they call for some general criteria to determine the relative significance of different sorts of error. Positivism, pragmatism, and pluralism must then be read as postulating a larger theory of legal-rational decision, within which each can find its own relatively small place. The significance of the special problems addressed by each model will be derived from such a theory. In other words, no model can by itself justify a claim that it should be preferred. For example, in order rationally to justify its preoccupation with official discretion, the positivist model would have to offer some account of how abuses of discretion frustrate institutional ends; but this sort of account can hardly be offered within the logic of a model that purports to deny the rationality of judgments based upon distant ends. The justification must be found in a theory that allows room for a reasoned determination of what such ends may require.

In fact, taken together, our three models draw the outlines of a larger theory. This will become apparent if, instead of focusing upon how positivism, pragmatism, and pluralism differ, we turn our attention to how they complement one another. A striking characteristic of our models is that each builds upon criticism of another's weaknesses. Thus, pragmatism is a reaction to the rigid formalism that follows from strict adherence to the positivist model. Pluralism, in turn, unmasks the fraudulent appeal to reason in degenerate forms of the pragmatic model. Positivism brings us full circle by denouncing the rampant opportunism of pluralist regimes and urging restoration of legal regularity. Put less rhetorically, each model specifies that the errors it will correct are probable outcomes of reliance upon one of the other two models. Together, the three models constitute an interlocking set of *mutually summoning* contingency plans for correcting the design of an institution. Each plan is called forth to redress a specific pattern of error, but induces other errors that eventually require activating another plan. All three depend upon one another to form an adequate and self-correcting system of decision.

By this account all purposive institutions should contain elements of positivism, pragmatism, and pluralism, but they should vary in their

reliance upon each model as self-correction may require. Looking across different institutions, or at the same institution over a long period, we may see wide differences of emphasis, because considerable variations of context will substantially change the relative costs of different sorts of error. Each model may then appear close to accounting for the central tendencies of a *type* of organization or legal system, which nevertheless exhibits attenuated features of the other models. In any single institution, and over short periods, we should ordinarily observe only rather small shifts of emphasis. The models may then be used to describe successive reorganizations resulting in differences of degree rather than kind, in stricter or looser adherence to rules, in greater or lesser confidence in offices, or in extended or constricted participation. Such reorganizations are like corrections of course in navigation: all are informed at once by a constant destination and by frequently changing conditions of weather, current, position, and speed.

Now let us remember that each model appears to ground the institutional arrangements it proposes upon a general theory of how legal decisions can (or cannot) and must (or must not) be rationally justified; and that this theory should be seen as an integral part of the proposed arrangements, rather than as an abstract philosophical reason for choosing them. The relevance of the theory, like that of the arrangements themselves, is contingent upon what sort of error an institution most needs to avoid. Roughly speaking, the positivist model imposes a strict standard of justification that has rather limited applicability; pragmatism allows a looser but more widely attainable standard; pluralism sets the least demanding standard and relies most upon political modes of legitimation. Taken together, our three models outline a theory of how standards of justification should be set to take account of what institutional self-correction may require. Under that theory, the burden of justification imposed on legal officials should vary according to the sort of error that the system of decision must correct. The proper standard is chosen by assessing the costs and benefits of increments of rigor that marginally reduce the risk of arbitrary departure from authoritative rules and policies (Type I errors). Crude assessments of that sort manifest themselves in postures of trust (or distrust) toward the benign (or malign) character of various legal institutions. Such postures affect how much official discretion is tolerated, and they change over time as experience reveals the noxious effects of an enterprise initially thought benign, or warrants reduced estimates of the harms initially feared.

For example, it is administrative wisdom to reduce the burdens of strict justification of *decisions* insofar as there is reason to trust the

competence of the responsible *office*, or to believe that the probable cost of unwarranted exercises of official discretion (Type I errors) is small compared to the cost of indiscriminate adherence to prevailing rules (Type II errors). This calculation would warrant a move away from positivism in the direction of pragmatism, that is, toward retrospective evaluation of the office's performance. Now suppose that we have lost confidence in the competence of an office. In order to restore tighter accountability (stricter justification of decisions), we must formulate a set of rules compliance with which will reduce the cost of unguided exercises of official discretion. It is possible, however, that no adequate set of rules can be found, so that the positivist option is ruled out. In that case, we have the option of "muddling through"<sup>84</sup>—letting the office be guided not by its own lights (in which we have no confidence) but by the concerns of persons who have a stake in its decisions. A principle of deference to consensus will temporarily take the place of any sustained effort to rationalize decisions and policies. In effect, consensus will serve as a substitute test of rationality until a viable set of policies emerges.<sup>85</sup> Hence there is a place for the apparently radical skepticism of the pluralist model even within a system of decision that strives for rationality.<sup>86</sup> We should return to the positivist model when it makes sense to reinstitute a policy of "close supervision," that is, when we have gained confidence in some tested policies, but doubt that responsible offices can execute them with enough intelligence or dedication. Perhaps the sustained practice of rigorous fidelity to rules can eventually restore in those offices the discipline and skills that will warrant renewed confidence in their capacity to exercise autonomous judgment. Thus, the positivist model may be a phase of the formation of competent offices, just as the pluralist model may be a phase of the discovery of viable policies.<sup>87</sup>

84. See Lindblom, *The Science of Muddling Through*, 19 PUB. AD. REV. 79-88 (1959).

85. A few authors recognize the important part rational argument plays in negotiation. See Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rule Making*, 89 HARV. L. REV. 637 (1976). See also P. UTZ, *SETTLING THE FACTS* 129-48 (1978). Others note the possibility, but do not allow it to modify their theoretical statements. Thus, although March and Simon acknowledge in passing that "[o]ne of the major questions in current bargaining theory is the extent to which bargaining 'solutions' represent appeals to shared values of 'fairness' or 'obviousness' (and thus—in our terms—persuasion) rather than a struggle in terms of persistence, strength, etc.," they move on to discuss bargaining on the assumption that in it "agreement without persuasion is sought." J. MARCH & H. SIMON, *supra* note 20, at 130.

86. This is a main theme of the work of Charles Lindblom. See note 84 *supra*; D. BRAYBROOKE & C. LINDBLOM, *A STRATEGY OF DECISION* (1963); C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* (1965).

87. For example, it has been observed that decentralization must ordinarily be prepared by a stage of centralized direction, during which officials are trained to understand and honor the purposes of policy. See P. SELZNICK, *supra* note 77, at 112-19.

## V

## CLOSING THE CIRCLE

By our account, institutional actors determine what, if any, correction their system of decision may require by weighing the costs of different risks of error. So far we have assumed that in principle they do this weighing with appropriate objectivity. Their judgment is governed by factual evidence of past and probable patterns of error, the significance of which is evaluated in the light of a normative conception of institutional purpose. The conclusions they reach are not expressions of their personal interests or beliefs, but objective accounts of their legal responsibilities as institutional actors. In theory, the accuracy of such accounts can be tested by an independent legal and factual assessment. Needless to say, the extent to which decisions concerning institutional design approximate this ideal objectivity is highly problematic. Perhaps the ideal presumes Herculean powers of mind and character not ordinarily possessed by mortals.

Now the skeptic may return and argue that in fact institutions cannot be governed by standards of objective inquiry. But if he does, he will succeed only in bringing us back to the point at which our discussion began. A circle will be closed. For example, the skeptic may point to considerable evidence that interests or ideologies determine how people choose between positivist, pragmatist, or pluralist plans of reform. He may invoke the authority of some tentative sociological generalizations about what inclines people to opt for one or another sort of plan. Sociology might suggest that believers in democracy will agree with the positivist model of institutional design, that governing elites are apt to see more sense in pragmatism, and that pluralism will suit best the perspective of "operators" who specialize in manipulating institutions to their private advantage. Be that as it may, we should have to recognize that the abstract versions of positivism, pragmatism, and pluralism may appeal to different mentalities, and that practical applications of our models may affect different interests in different ways. Therefore, our skeptic would argue, which model prevails in an institution must depend upon the relative power of the persons or groups disposed in its favor, not upon any objective requirement of institutional purpose.

Unfortunately, this argument is just another form of the thesis that groups or institutions have no purpose. It cannot be sustained on this sort of factual grounds. There would be no sense in asserting that a purpose governed a certain institution if we did not think that institutional actors were under an obligation to strive for maximum objectivity when they draw practical conclusions from purpose. When we have

doubts about the authority of norms of objectivity, we question whether purpose has authority. To resolve our doubts, we should study not the power and motives of institutional actors, but the standards by which the integrity of their judgments is evaluated. In other words, we should persist in adopting the internal point of view, the only standpoint from which we can probe the reasons why institutional actors, especially those who bear the responsibilities of power, may think they have a duty to opt for a certain model of institutional design.<sup>88</sup>

Perhaps then the doubts of our skeptic are not about the authority, but about the effectiveness of norms of objectivity. Institutional actors may more or less frequently violate their obligations; in that case, their decisions will be criticized for lacking authority, even though they may have enough power to prevail in fact. More important, actors may find themselves unable to determine with confidence which of several plans of institutional reform rests upon the most objective assessment of relevant risks. They will then consider what rules of prudence may guide them in resolving their doubts. Perhaps they will also have to examine what standards of accountability and justification are appropriate to decisions regarding institutional design.

Now imagine we had before us a sample of debates about institutional design, picked from some large and fairly heterogeneous set of institutions, and in which protagonists are divided in factions of positivists, pragmatists, and pluralists. A study of those debates would undoubtedly reveal that they vary considerably in length, depth, intelligence, seriousness, honesty, and other qualities that are distinctive of a truth-seeking enterprise. We should probably find a few cases in which participants reason from shared institutional norms, assumed by all to determine the force of legal considerations and the range of relevant facts, so that arguments from opposite sides are mutually responsive and help narrow the issues to be decided. At the opposite extreme, there would be cases in which debate is only a preface to voting or some other show of force; the range of alleged "norms" from which participants reason, and hence the range of relevant "facts," are virtually unrestricted. There it appears doubtful whether opponents are truly speaking to one another; no one seems to care for the persuasiveness of his speech, and the distinction between truth and untruth has collapsed. Of course, most cases would fall between those extremes.

From those observations, we should conclude easily that norms of objectivity have neither equal authority nor equal effectiveness in all institutions, or in all debates within any single institution. Accordingly

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88. See note 13 and accompanying text *supra*.

we should dismiss any claim that these norms are always and incurably impotent. Their authority and their effectiveness vary from context to context. We may then be prepared to consider another and more important suggestion latent in those observations: the objectivity of protagonists in institutional debates is a function of their sharing a special purpose that determines the relevance and fixes the relative authority of different criteria by which risks of error may be identified and evaluated. Insofar as purpose is diluted, or the set of acceptable premises of decision is loosened and expanded, institutional debates begin to resemble conversations around the Tower of Babel. Affirmatively we may conclude that, just as norms of objectivity are essential to purposive decision, so the law of purpose is what enables institutional actors to strive for objectivity and sustain a genuine public discourse.

In sum, if talk of social or institutional purpose need neither mystify nor be naive; if it is both an essential ingredient of living human lives and a necessary condition of civil relations among human beings; then there is warrant enough for us to continue practicing it, even against the fashion of contemporary skepticism. We can allow for the concerns of the skeptic without thereby indulging the cynical mood that his message unexamined would induce.