Seventh, instrument choice is not constant. It changes over time as a result of the invention of new instruments, national and international developments, and the interventions of the supranational institutions. Some instruments become popular; others fall in disgrace. Fashion plays a role, as do policy routines. Thus instrument selection is far from a matter of simplistic rational choice.

Eighth, depending on the perspectives of policy makers concerning government instruments, differences in policy design will result. The choices of a policy analyst or policy maker asking whether a certain instrument might work or not will differ from those of the policy maker asking whether a certain instrument is normatively defendable. A policy analyst thinking in terms of what is politically feasible will make choices different from those of an analyst asking what is legally permitted. These policy analysts see different policy problems. The way they approach policy instruments influences their policy designs.

Ninth, in design, policy analysts and policy makers should not only ask whether a certain instrument works. They should also ask themselves three other questions: whether their instruments fit within a specific political–administrative context, whether the choice of a certain instrument can be defended normatively, and whether it is legally permitted to use a specific instrument. When they supplement their design with these other questions, they can reach a higher quality of policy making.

My tenth and last conclusion is that the different questions with regard to policy instruments should not be asked in isolation or in a manner excluding the other questions. In combination, the different approaches lead to a broader perspective on the choice and the application of policy instruments.

P. Eliadis et al, ed., Designing Government: From Instruments to Governance, (Montreal: McGill-Queens, 2005)

# 9

# The Swiss Army Knife Of Governance[1]

RODERICK A. MACDONALD

## A SELF-REFLEXIVE PROLOGUE: INSTRUMENT CHOICE AND DISCIPLINARY CHOICE

The organizers of the conference giving rise to this volume embarked on an audacious endeavour that might reasonably be characterized as a *beau risque* – a risk that those who have engaged in transdisciplinary research know all too well.[2] The risk is nicely framed by the metaphor of Babel: a failure of communication. Bringing together scholars and policy makers from different political states and from different disciplinary perspectives to address complex problems immediately engages two epistemological inquiries about integrating the various contributions: (1) Is there an Archimedean point from which the different texts may be judged, or must all disciplines be judged only through the lens of the others? And (2) is the object of the endeavour to recreate a single form of knowledge (a new discipline), or is it to provide a multidisciplinary conspectus for translation (a grammar, syntax, and dictionary) through which new knowledge may be generated and shared?

I raise these two questions not to argue that one approach rather than the other is to be preferred in all circumstances. What I wish to signal is that the design, organization, and execution of this volume presents exactly the same types of issues that confront scholars and policy makers on a daily basis. How does one design, organize, and execute a policy response to a complex problem?

Admittedly, in this prologue (indeed, by the very fact that I am choosing to write a prologue in order to address the concerns of

coherence and integration attending to transdisciplinarity) I make clear my own answers to these questions. But let me first present the options. Integration can be achieved in several ways: by establishing a common set of themes; by framing a common set of concepts and definitions; by posing a common set of questions; by imposing a common set of analytical tools; by insisting on a common methodology; by requiring authors to attend to a common literature set; by implicitly adopting one disciplinary perspective (say, political science) as the default regime for all contributors; and so on.

Consistent with my general understanding of the intellectual endeavour at hand, I have chosen to address the issue of integration by adopting the same epistemology that informs my substantive arguments about instrument choice. My prologue develops this epistemology in two dimensions. To begin, I make several observations about transdisciplinary knowledge in a collection such as this. Then I provide an overview of the claims I make and how they may be read as against the other chapters herein.

Before embarking on this task, however, I should like to signal a key point. The editors of this collection have presented a masterful introduction to and summary of the overarching themes presented in this volume. They have drawn out the transversal ideas and clarified assumptions and future challenges, providing a rich orientation to the text.

### *Integrated Knowledge or Disciplinary Choice?*

In assembling this collection, the editors were confronted with a number of classical instrument-choice questions. I shall set these out (and answer them) as five theses.

First, what should be the driving objective? Is this a collection that has a particular instrumental purpose? Or is it meant primarily to increase our knowledge by opening up multiple lines of inquiry? *Thesis:* To assume that the collection has an a priori instrumental purpose is to assume (wrongly) that ends can be established in advance without attending to available means for their accomplishment.

Second, what should be the structuring framework? Is this a collection organized around the idea that it should focus on exploring a particular goal or end – say, what is better governance? Or a collection organized in a manner that focuses on means – say, what do different disciplines have to say about the means to achieve this? *Thesis:* The collection's working title – *From Instrument Choice to Governance: Future Directions for the Choice of Governing Instrument* (since compressed to *Designing Government: From Instruments to Governance*) – correctly intimates that both frameworks are in play.



Third, what should be the temporal focus? Is this a collection about what can be done now (or in the near future)? Or is it a collection about trajectories of knowledge: how and why ideas like instrument choice and governance have come to frame public policy debate today? *Thesis:* Human institutions and processes are culturally rooted, such that it is impossible to discern where one is and why certain options appear more plausible than others without knowing where one has been and why certain options (and certain ways of describing these options) seemed more plausible than others in the past.

Fourth, what should be the theoretical approach and research methodology? Is this a collection of empirical studies, analytical studies, conceptual studies, field studies, prescriptive studies? *Thesis:* Every type of research and every mode of scholarly inquiry can be understood as a tool of intellectual engagement – a governing instrument – and the choice of instrument cannot be fixed in advance by a metric that presumes a specified outcome.

Fifth, what are the sites of analysis? Is this a collection about processes and institutions? Or is it a collection about particular policy in defined fields? *Thesis:* Whether one seeks to understand the play of different policy instruments in different institutional settings (the state, the voluntary sector, the neighbourhood, the international community) or in different fields of endeavour (the environment, social welfare, consumer law, public health, education), the central question is how one stipulates the centripetal forces within these sites and locates the frontier between endogenous and exogenous variables.

Each of these questions (and their correlative thesis) is intimately connected to the others. Each would not have been posed in quite this manner at the outset of the project. Indeed, the initial letters that potential contributors received from the editors did not raise any of them in exactly this manner. Hence the fundamental epistemological point: What questions ultimately are raised, what disciplinary perspectives ultimately are engaged, what policy questions are put on the table for consideration cannot be decided in advance. The editors could not possibly have known what the title or the theme of the book would be until all the contributions had been received; nor could the editors have known how the various contributions could speak to each other or how they could be arranged in a table of contents until they were all submitted; and finally, the editors could not possibly have known what the lessons learned might be until the various disciplines, time frames, aims, modes, and sites were explored.

This, to my mind, is the most important feature and outcome of this collection. The process of imagining and realizing the work is a self-reflexive endeavour in which the enterprise of "instrument choice," "governance," and "policy formation" is pursued. So I

conclude my reflections on the alternatives posed in the title to this subsection as follows. No discipline – be it law, political science, public administration, economics, sociology – has a monopoly on the vocabulary, concepts, and inquiries appropriate to studies of governance. Not only is their no Archimedean point outside disciplinary knowledge, but no discipline is entitled to claim ownership of the endeavour. If jurists are puzzled by the jargon of economics and political scientists, their task is to educate themselves; and the converse proposition is true as well. What is true of the various tools of governance is equally true of disciplinary perspectives.

### *Instrument Choice and Governance*

I turn now to my own contribution. Here, I should like to consider three main issues. What is the relationship of this contribution to the other contributions in the collection? What is the understanding of governance that underpins the analysis? What are the particular literature sets in law that can profitably inform discussions of governance? It should be apparent that this chapter lies at the frontiers of three fields of law and that it reaches across multiple literatures even within law. These I attempt to situate at the end of this preface.

Before embarking on this exercise, however, one point bears emphasis. As much as this chapter focuses on law and legal perspectives on instrument choice, it is also an examination of epistemology. The concern is not only to ask what the logic and limits of instrument-choice thinking in law might be, but also to ask what it means to frame inquiry into problems of governance in the language of "choice of governing instrument."

#### INTELLECTUAL CONTEXTS

This chapter was conceived to address two presuppositions in the "instrument choice" literature that are, at best, dubious.

First, the standard account (whether in law, economics, political science, or sociology) is ahistorical. Scholars implicitly assume that the concerns at hand have always been expressed in the language of instrument choice. This chapter examines the broad sweep of public policy in liberal democracies over the past 150 years (with a focus on Canada since its Confederation in 1867). It aims to suggest that the conception one has of citizens and their capacities, of society and social differentiation, and of government (i.e., its role and place in society) shapes not only the policies one pursues, but also the means by which one pursues these policies and the vocabulary and conceptual structure by which the choices are described and characterized. "Instrument choice" and "choice of governing instrument" are historically contingent terms for expressing these concerns.



I have chosen examples from Canada for a very simple reason. One of my claims being that means cannot be divorced from ends, it follows that one cannot adequately understand how choices about means are made without grounding the question in particular contexts and particular times. Analytical tools and conceptual devices are culturally determined. It is simply inappropriate to assume that they can be projected in some idealized form through time and space. Surely the lessons of comparative law and colonialism are eloquent testimony to the point.

Second, the standard account of instrument choice rests on assumptions about the state that are strongly contested by non-mainstream theorists in many intellectual domains – most notably, sociology, anthropology, and law. The post-1789 preoccupation with the state as governing institution is beginning to subside. Nonstate actors and multilevel governance through overlapping legal and normative orders at both the substate and suprastate levels are emerging as appropriate objects of study. As such, they and their processes, institutions, and actors are being subjected to analysis through the lens of law in the same manner as state instruments.

And there is a further point. Newer theoretical approaches reject the primacy of the state as a governing institution; scholars in these traditions reject the phrases "nonstate," "substate," and "suprastate" as describing the object of their investigations. These other normative and regulatory sites are "informal" or "inchoate" alternatives to the state. Indeed, the normative order of the state is simply one among many regulatory sites. Hence to assume that the regulatory endeavours of the state are qualitatively different from those of other sites of governance is to misunderstand the special role of law as a process of social ordering and to conflate the idea of law with one of its instantiations: state law.

#### A HYPOTHESIS OF GOVERNANCE

This chapter also adopts a particular understanding of governance. It argues that governance is *the endeavour of identifying and managing both aspiration and action in a manner that affirms and promotes human agency.* Let me make a number of observations about this understanding of governance.

To begin, no definition is true or false. The hypothesis of governance that grounds this chapter derives from a particular philosophy of law, and it is meant to foreground a particular set of questions. It is not, and cannot, be true. More than this: Every author in this collection has at least implicitly a working definition of what governance means.

There is a further point. The choice of a definition of governance is like the choice of governing instrument itself. Some definitions do some things better than others by highlighting some aspects of human experience better than others. To assume that there is one "best view" of governance is to assume that we can fix our goals in advance and in the abstract and that we can thus select our means to achieve those goals. In my view, it is the very divergence of conceptions of governance – contrast, for example, the views advanced in the chapters by Peters and Hoornbeeck, Toope and Rehaag, Trebilcock, and Webb – that make the central point about the inseverability of means and ends.

This said, I should like to set out the assumptions about human beings and their capacities that underlie the view of governance I take here, for these assumptions have clear policy implications. I assume that human beings are agents. Governance is not simply about telling them what to do. I assume that human beings are constantly discovering, pursuing, and modifying their ambitions and aspirations. Governance is not simply about telling human beings what their aims and aspirations should be. I assume that human beings act in concert with others in turning these ambitions into accomplishments. Governance is about providing facilities, processes, and institutions by which these common endeavours may be realized.

I acknowledge that this is an optimistic perspective. Others writing in this collection have a more pessimistic, even more deterministic, view of human beings. Many of them would have government act as concert master, organizing and orchestrating a range of policy instruments to frame the minutia of human action. It follows that the conception one adopts of what governance might mean is closely connected to the conception one has about what human beings are like and about what the project of the state entails. A definition of governance and its instruments cannot be decided in abstraction from an understanding of what goals one is seeking to achieve, and the goals one seeks to achieve cannot be decided in abstraction from the possibilities opened up by the range of instruments available for their achievement.

## LITERATURE SETS AS GOVERNING INSTRUMENTS

This chapter is obviously located in a specific disciplinary field: law. Consequently, its primary conceptual referents (and the literature that it typically cites) are those most familiar to jurists. But within law, the chapter sits at the intersection of three subfields: public and administrative law; legal-process thinking; and jurisprudence (or legal theory). I should, therefore, like to place these concepts and this literature in larger context. To do so properly, however, a caveat is in order.



As is the case with many disciplines familiar to faculties of arts, the universe of legal literature is highly fractured. Legal scholars in the US, for example, rarely read (let alone engage with) the domestic legal literature of other countries. For reasons relating to the general theory of "legal positivism" (about which I say more below) that pervades law faculties in Western democracies, conceptions of law and its concepts tend to be anchored in the politics of the nation state.

A primary consequence of this parochialism is that an international literature of law (as opposed to a literature of international law) has not really developed outside the domain of legal theory. A secondary consequence is that the conceptions of law that are held by scholars elsewhere in the academy (for example, in public administration, in political science, in economics) tend to be closely related to the perspectives of a national legal literature. In brief, the view that political scientists in the UK have of law is shaped by the dominant national legal literature of the UK., and so on. As it happens, some of the most catholic legal writing – incorporating ideas and theoretical approaches from France, Germany, the UK, and the US – is written and published in Canada. This inoculation from the curse of an exclusionary nationalistic legal literature has occurred, I believe, because of the coexistence of civil-law and common-law intellectual traditions.

Hence situating the literatures referred to in this chapter requires two developments. First, I try to identify and unpack the assumptions about law that are being contested in this chapter. Second, I attempt to locate some of the key sources referred to in the larger context of legal theory.

As to the first point, it is important to note that most non-North American legal thinking is grounded in the theory of legal positivism. On this view, law is nothing more than the explicit product of the political state and its institutions. Only the state makes law, and the paradigm form of law is legislation (or a code). Law is seen as a top-down projection of state authority, and there is a clear distinction between that which is law and that which is not law. Not surprisingly, public-choice theories in political-science and welfare-economics approaches implicitly adopt this state-centric conception of law.

"Legal positivism" is, however, more contested in North America, especially by scholars working in the "law and society" tradition. Non-state normative orders are conceived as legal systems; the enterprise of law is seen not as a top-down affair but as a joint project of law subject (in the state legal order, the citizen) and law maker (in the state legal order, Parliament), and the relationship between morals or values (the "ought") and legal rules (the "is") is seen as less sharp than in Europe. Broadly speaking, the "law and society" approach has been adopted in this chapter. As a consequence, many references and many assumptions

about law will not necessarily be familiar to a European audience or even to an audience of economists and political scientists in North America. Of course, I should note that things are changing and that at least within "law and economics" circles a richer understanding of law – drawing on insights from sociology, psychology, and anthropology – is being advanced by scholars like Robert Ellickson and Eric Posner.[3]

My second point is to draw attention to developments in the legal literature that have largely escaped the notice of scholars in other disciplines. Indeed, I claim here that the concerns that burst onto the scene in the economics and political science literature only in the 1970s have been preoccupations in certain legal circles – largely by derivation from and elaboration upon the ideas of Max Weber and Talcott Parsons – since the Second World War.[4] For at least fifty years, a significant number of legal theorists have attempted to explore the forms and limits of different legal instruments and also to trace out the appropriate uses of institutions like legislation, adjudication, contract, voting, and so on. This tendency – the legal-process school – has not had much impact outside North America or outside the legal academy. It is a special burden of this chapter to show how "legal process" thinking of the type undertaken by Henry Hart and Albert Sacks in *The Legal Process: Basic Problems in the Making and Application of Law* (1958) has much to teach about problems of instrument choice.

Another literature set, again lasting about a half-century, can be described as the *eunomics* perspective on jurisprudence (or legal theory). Most legal philosophers follow the legal positivism of H.L.A. Hart or Hans Kelsen in elaborating their understanding of law.[5] This chapter takes as its organizing frame the work of Lon Fuller, a principal intellectual adversary of H.L.A. Hart. Fuller's major work is collected in a posthumous publication, *The Principles of Social Order* (1983), in which he carefully examines how different legal devices can be deployed to "subject human conduct to the governance of rules."[6]

So to conclude: This chapter draws its inspiration from two sets of legal literature not well known outside North America and not well known outside the legal academy. Yet these two literature sets are those that speak most eloquently to the themes and problems of governance addressed in this collection. It is a central goal of this chapter to introduce this literature (and its implications) to scholars in public administration and in economics and political science and also to legal scholars who have previously understood administrative law to embrace only the jurisdictional control of governmental activity by the courts. I believe that, more than any other frame of inquiry currently being pursued in the legal academy, these two perspectives reach across disciplinary boundaries, thereby challenging legal scholars to engage with the problems of instrument choice and governance that animate this collection.



## INTRODUCTION: SITUATING GOVERNANCE IN HISTORICAL CONTEXT

Governance is not simply about the instruments and tools of government. It is also about the substantive goals that states and other institutions pursue. For this reason, it is impossible to write about governance without anchoring the discussion in real problems experienced by real states at real moments in their histories. Given my own education and background, and in view of the context within which the conference occasioning this chapter was organized, I have quite naturally selected Canada as the primary empirical field in which to ground my comments. I have no doubt, however, that similar stories could be told about governance – about policy options and the means for their achievement – in other countries. Nonetheless, I leave it to the reader to make the necessary transpositions.

I should like to begin with a brief reflection on the idea of the polis. The polis (or political state) is not a natural necessity. The political state is a human creation. The modern, democratic, territorial political state is a relatively recent creation. The modern, democratic, territorial, social-welfare political state in its present form dates only from the middle of the twentieth century.

Of course, the polis has in some measure always been concerned with general issues of social welfare. Of course, the polis has always been territorial. Of course, the polis has always had elements of democratic enfranchisement. And, of course, while not a natural necessity, the polis has been a feature of human society almost from the moment human beings came to recognize the concept of society itself.

Modern political states sometimes claim their territorial and affective boundaries on the basis of language, culture, and ethnicity. Sometimes they claim boundaries for ideological reasons, such as "manifest destiny." Sometimes they do so for geographic and historical reasons and sometimes for economic reasons. None of these rationales has ever adequately explained Canada. Canada has been characterized as the "triumph of hope over experience."

This triumph has most assuredly been promoted by political institutions advancing political goals – in the guise of a governance agenda framed as a "national policy." Ever since the Rowell-Sirois Royal Commission of the 1930s, these governance concerns have actually been front and centre of policy debate in Canada.[7] This is not to say

that matters of governance had not earlier been present in British North American politics. Twice previously there had been discrete national policies in Canada derived from the interweaving of a particular constellation of economic and social forces with political ideology. Specifically, the conflicts between Prime Ministers Sir John A. Macdonald and Alexander Mackenzie in the 1870s and 1880s about the first National Policy and about the building of the Pacific Railway were in large measure disagreements about the forms and limits of governance.[8] But there is something more intriguing about policy debate that explicitly frames itself as instrumental or technical and that is intensive rather than extensive.[9]

If the period from the 1940s through the 1980s was marked by a particular form of national policy known as "welfare-statism," one should recall that this was not unique to Canada. In this endeavour Canada was tracking developments (just as it tracked developments in the 1860s and 1870s) almost everywhere else in the North Atlantic world. Even in the United States, postwar welfare-statism existed, but it was primarily expressed through the indirect mechanism of massive defence spending by that country's federal government. Still the second National Policy in Canada, like policies pursued following the Beveridge Report in the UK or during the Fourth Republic in France, had substantive characteristics that privileged certain forms of government action, forms we recognize today in the epithet "the administrative state."

For the past fifty years, scholars in law and public administration have sought to understand the relationship between these substantive policies and the forms of government action they seem to call forth. Driven by the twin impulses of government programming to stave off the socialist threat[10] and the discovery by the US legal academy following Roosevelt's 1930s New Deal that practical politics could be theorized as expertise, the political ends pursued by democratic states have been taken as relatively unproblematic.[11] What is now known as the "legal process" approach to jurisprudence and legal theory was symptomatic of the idea that law could be cast as a mere instrument to be deployed to achieve predetermined social ends. The clarion call of the legal-process approach was to promote law as the enterprise of discovering and deploying processes of social ordering to promote ends accepted as valid by society.[12]

The architects of the process conception of law were professors at the Harvard Law School. For thirty years after the Second World War, one of these, Lon Fuller, pursued the idea of *eunomics*: the theory of "good and workable social arrangements."[13] In several essays – notably on contract, adjudication, mediation, custom, managerial direction, and legislation – he sought to explore the forms and limits, as well as the potential and perversions, of each of the key processes of social ordering found in democratic societies.[14] Fuller was not the only legal scholar at Harvard to puzzle about the principles and processes of social ordering. In 1958 Henry M. Hart and Albert Sacks published a set of teaching materials elaborating their belief that each legal institution – courts, legislatures, agencies – had a special competence for handling problems of social organization.[15] They argued that because institutional arrangements for the management of social tasks were not infinitely pliable, the task of the jurist was to ensure the appropriate allocation of tasks to these institutions in order to best achieve desired social purposes.[16]



Two decades later, driven by the challenge of the 1965 Civil Rights Act and by efficiency concerns arising from the "war on poverty," scholars of civil disputing at Harvard and elsewhere began to puzzle through problems of "access to justice" and institutional design. Their aim was to explore sites other than courts and modes other than adjudication for resolving conflict – that is, conciliation, negotiation, mediation, arbitration, etc. For enthusiasts of alternative dispute resolution (ADR), the central idea was that finding and deploying the right disputing process to manage conflict will inevitably produce socially preferred outcomes.[17]

In a similar vein, the criminal-law regime came under critical scrutiny. New procedural models, like "sentencing circles," and substantive conceptualizations, like "restorative justice," took their place beside traditional adversarial hearings and repressive sanctions.[18] At about the same time, public-law scholars took up the challenge of theorizing procedural fairness across a wide range of legal and social administrative settings.[19] Achieving effective and just governance in diverse agency processes and, more broadly, in diverse forms of business organization and diverse contexts of associational life emerged as a central concern of scholars in almost all public- and private-law domains.

This convergence of academic reconceptualizations of public regulatory law and the theoretical work on institutional design was paralleled in the late 1970s and early 1980s by a flourishing literature (inspired by "law and economics") that focused on the "choice of governing instrument."[20] In like manner, for thirty years students of public administration have been pursuing numerous new paradigms of governance as they puzzle over how best to organize collective action to address public problems.[21] More recently, this reflection has been reoriented and reinvigorated by the burgeoning set of institutions, procedures, and norms of international legal regulation.[22]

Yet this renewed interest in regulatory matters remains captured by the logic and the preoccupations of governance as developed during the

period when countries were building the social-welfare state through intensive governmental programs.[23] Governments are still seeking to deploy traditional instruments in a universe increasingly constrained by globalization and new trade agreements and increasingly dominated by knowledge and intellectual property rather than by wealth in the form of tangibles (land and goods) and discrete services.

I shall add a final thought to this introduction. If there is to be a continuation of the national state as we have known it for 200 years, the animating logic will be found more in identity and symbol than in communications and transportation infrastructure (as in the late nineteenth century) or in social-welfare programs (as in the late twentieth century). To illustrate the point, I return to the Canadian example. If Canada is to survive as a "triumph of hope over experience," the programs needed to accomplish this will be found more in knowledge and culture – that is, in virtual citizens negotiating their way through multiple virtual communities of belief and belonging[24] – than in either renewed investment in communications and transportation infrastructure (the Information Superhighway, the twinning of the Trans-Canada Highway) or a reinvention of social-welfare programs (Medicare, pensions, millennium scholarships).

At the same time, human beings express their agency through their acts of self-governance and through their voluntary or coerced participation in governance structures that they share with others and that channel the occasions for exercising this human agency. Prescriptively, therefore, governance is taken to be the endeavour of identifying and managing both aspiration and action in a manner that affirms and promotes human agency. The shape and meaning of thinking about the "choice of governing instrument" as well as the mistakes to be avoided as Canada pursues this new symbolic state – its third National Policy – are the focus of this chapter.

## AN INSTRUMENT CHOICE RETROSPECTIVE (1977–2002): EFFICIENCY AND OTHER RECIPES

The above reflections bring me directly to the theme of "instrument choice." I begin with an obvious, but rarely expressly acknowledged, point. The whole idea of instrument choice is a historically contingent motif that reflects a certain conception of public policy. No one in the 1930s would have used such language to describe governmental actions of the previous half-century (in Canada, for example, the programs of Prime Ministers Macdonald, Sir Wilfrid Laurier, and Sir Robert Borden in pursuit of the first National Policy). By contrast, the expression does nicely capture the meaning and methods of welfare-statism.



The ideological challenge to welfare-statism (in Canada, the second national policy of the post-Second World War period) mounted by certain sectors of economic thinking beginning in the late 1970s had three key features. First, it was American, not indigenous to Canada. The colonization of Canadian universities in the 1960s figured prominently in legitimating the endeavour. Second, it was directed at particular forms of state building, not at state building as a political project itself. The role of government in creating national markets and the deployment of the state to sustain a capitalist economy were never targets of the "deregulatory agenda." Third, it presumed that there was a natural hierarchy of social-political values and a social-ordering process, within which welfare economics and markets stood on top. Efficiency became the trump value.

Reflection about "choice of governing instruments" as a particular, economically oriented subset of social-ordering theory may be periodized roughly into three time frames.[25] A first iteration (1977–85) – which is perhaps best reflected in the analysis set out in the important volume by Michael Trebilcock et al., *The Choice of Governing Instrument* (1982), on the one hand, and in several of the critical research studies published for the Macdonald Royal Commission on Canada's Economic Prospects,[26] on the other – was framed in terms of the meaning of regulation and the usefulness of an efficiency criterion in assessing different forms of governance.

During a second period (1988–95), these initial positions were developed and nuanced. The dimensions of legal scholarship during this period are best exemplified in the series of studies published in the *University of Toronto Law Journal* in 1990, prepared for the symposium "Law and Leviathan," sponsored by the Law Reform Commission of Canada. Much of the instrument-choice discussion at this conference focused on the idea of "smarter government" and the normative critique of such positions.[27] During this period the Canadian Institute for Advanced Research funded an interdisciplinary Law and Society Program that generated two collections of essays[28] meant to explore the legal challenges of contemporary regulatory management.

A third periodization (since 1995) may be understood as both more subtle and more overtly ideological in that its participants can recognize and articulate the theoretical underpinnings of positions being taken. Four central characteristics of this contemporary reflection are that (1) it purports to understand governance as a collaborative endeavour between state, citizen, and intermediaries; (2) it acknowledges that governance is not self-executing; (3) it recognizes that government often works best by indirection; and (4) it recognizes the large place that "social norms" play in effective regulatory governance.[29] Citizens,

governments, and third-party intermediaries collaborate through different means, at different times, and in different sites to render democratically decided purposes into legitimated policy outcomes.[30]

It is the burden of this chapter's first part to provide a brief (intellectual?) history of "instrument choice" thinking, especially as this mode of thought engages fundamental concerns in legal theory and jurisprudence. My argument has two strands, the first being a claim that finds its origins in considerations about means. Here, I focus mostly on how legal theorists have understood the forms and limits of diverse processes of social ordering; my point is that "choice of governing instrument" rhetoric is at once an impoverished reflection of Hart and Sacks' "legal process" inquiries and an instrumentalized rendition of Fuller's *eunomics* insights.[31] The second strand is a claim that invokes ends. Only now, I believe, are theorists of government coming to see that the role of the state in creating and maintaining the conditions of citizenship through the development and application of public policy is contingent and that consequently the means available to pursue these goals are also contingent. Put otherwise, and again using Canada as the referent, only now are the substantive implications of Harold Innis and William Fowke's analyses of the second National Policy (that of the 1930s) being fully appreciated.[32] In developing the dialectic of means and ends in instrument-choice thinking, I rely on standard sources, using several superb texts, particularly by Michael Trebilcock, as touchstones.[33]

## *First Thoughts (1977–85)*

In retrospect, while trying to account for the pitfalls of historical revisionism, it would seem that the initial framing of "instrument choice" concerns involved a transposition of the jurisprudential insights of the "legal process" school about institutional design to the realm of public regulation. That is, the economic orientation seen in "instrument choice" literature is a rather late development in academic reflection about institutional design. That public administration and public-policy scholars were unaware of these earlier developments in legal theory says much about the way that a particular ideology of law had come to dominate other intellectual disciplines.[34] Whatever the cause, in the disciplinary transposition, three main ideas were engaged: (1) the relationship of means to ends in the elaboration of legal structures and institutions; (2) the meaning and scope of the regulatory-governance endeavour; and (3) the central purposes of regulation. Along all three of these dimensions, I believe, the "choice of governing instruments" perspective did not fully grasp the theoretical richness of the "principles of social ordering" thesis previously elaborated by legal scholars.



### MEANS AND ENDS

From the beginning, it was acknowledged that means are inextricably bound with ends. This entails, contrary to early conceptions of instrument choice in the US administrative-law literature of the 1930s,[35] that there can never be, in any purely mechanical sense, a "best" regulatory instrument in any given situation. This is not an easy point for those bent on reform to grasp. Many of those who are proponents of alternative dispute resolution as an approach to organizing institutions of civil disputing adopt the slogan "make the forum fit the fuss."[36] But this is to misapprehend the extent to which the fuss is defined by the forum.[37] Social situations (including civil disputes) do not present themselves with ready-made labels.

The more elastic that ends are taken to be – that is, the more that they can be redefined and shaped – the less meaningful do rankings of instruments seem to become. Neither ends (the definition of the problem) nor means (the tool chosen to solve the problem) are necessary. A slight redefinition of either (i.e., reconceiving the problem or applying a different regulatory instrument) will change the rules of the game.[38]

This is the case because means shape the end, thereby making the end a moving target rather than simply a question of choosing the appropriate means for a given end. In describing his *eunomics* project, Fuller often spoke of "circles of interaction" between means and ends, holding that "a social end takes its 'character and colour' from the means by which it is realized."[39] More recently, even "law and economics scholars" have noted that goals are meaningless without institutions.[40]

### THE SCOPE OF REGULATION

Initially, reflection on instrument choice was connected with two prior postulates about law. The first is that law is an official product of the political state as expressed in the rules (e.g., legislation, regulations, by-laws) and institutions (e.g., central agencies, administrative boards, regulatory tribunals) of government. The second is that regulation involves conscious policy intervention by imposing constraints upon markets. In other words, in this conception of things, problems of regulation or choice of governing instrument are centred on how the political sphere reacts to markets.

These postulates, of course, reflect a top-down paradigm, in which the entire process is an outgrowth of the state (whether the process is seen as a political one or as a working out of market forces). Of course, even in 1982 it was acknowledged that the model of political rationality does not fully capture what is at stake and that there is more behind

choice of governing instrument than efficiency issues alone. Yet the paradigm persisted as a way of evaluating regulatory activity.[41]

By contrast, some critics of instrument-choice rhetoric contested both of these initial postulates. First of all, the problem of regulation was seen as much more broadly based, with a multiplicity of sites of governance, none necessarily privileged over the others.[42] Top-down views of regulation not only ignore a great deal of actual (although informal) regulatory behaviour, but also privilege and thus legitimate regulatory activity that looks like it is public action.

The second issue has to do with the modes of regulation. Regulation must be understood to embrace more than visible institutions. It includes tacit and implicit processes of social ordering, such as custom, practice, education, and "condign" power.[43] In this sense, once the regulatory endeavour is seen as a problem of social ordering, there is never any such thing as deregulation. Deregulation is simply the regulatory strategy chosen by the constructed markets of the "common law.". Like alternative dispute resolution, deregulation substitutes a different locus for the exercise of discretion and a different modality of social organization.

While "instrument choice" theorists today adopt a broader perspective and acknowledge public-private partnerships, franchises, operating agreements, product branding, and so on as regulatory strategies, they still have not abandoned the views that law is the product of the state and that all government regulation is an interference with a "naturally occurring market."

## *Second Opinions (1988–95)*

Following the initial conceptualization of the ambitions and strategies of "choice of governing instrument" analysis in the late 1970s and early 1980s, the next decade saw the development and nuancing of these positions. Again, two themes can be seen to have emerged in the literature. First, those who initially proposed instrument-choice analysis as a means of assessing state action solely on efficiency grounds began to incorporate into their perspectives the notion of public values. Second, the dynamic and shifting character of the policy process came to be recognized.

### PUBLIC VALUES AND GOVERNANCE

One of the catch phrases of the second generation of instrument-choice thinking was the notion of "smarter government," which holds that it is not enough to seek raw efficiency alone; rather, one must choose/design instruments in such a way that wider public values are promoted as well.[44] In this conception of the endeavour, economic incentives must be specifically deployed to promote these "community values" objectives. Efficiency still governs, but in certain cases a more costly alternative must be chosen in the name of higher good. The notion of "smarter government" thus responds to one of the initial critiques of instrument-choice analysis.



Here is a standard example of how public values can be accounted for within a "choice of governing instrument" framework. Private actors operating within markets may well optimize efficiency, but this can be deceiving because private actors are not subject to the same constraints as government – be these constraints imposed by obligations to human-rights and antidiscrimination, to bilingualism, to the promotion of cultural identity, and so on. As a consequence, there is a hidden community cost to privatization. During the late 1980s, the idea of public values as part of the regulatory calculus came to be a recurring theme, especially in the public-management literature.[45]

Yet once again, the attempt to recapture the problems with instrument-choice analysis by adopting a broader logic of efficiency missed the central challenge. Critics pointed out that this refinement nonetheless continued to rest on relatively controversial distinctions that legal scholars had essentially rejected. That is, even while some administrative law scholars continued to assert these dichotomies, in most other legal domains – property law, family law, contract law, tort law, criminal law, labour law, commercial law, corporate governance – they had been abandoned. Most notable among these contested dichotomies are the distinctions between state (i.e., public) and voluntary (i.e., private) associations; between law and politics; between legal rationality and political arbitrariness; between explicit (propositional) knowledge and tacit (inchoate) knowledge; and between external regulatory activity and internal agency management.[46]

### THE STRUCTURAL LOGIC OF THE POLICY PROCESS: WHERE LIES THE DEFAULT POSITION?

A second development in the literature flows from the recognition that all these factors interact and that they are changed in this interaction. A simple one-to-one mapping is not possible. Much of the literature on choice of governing instruments assumes that regulation is an activity that governments do for instrumental purposes. Law is perceived as a lever of action, its object being to change or control specific behaviour with prescriptions. On such a view, all social action is hypothesized as a market commodity. That is, the market metaphor is not deployed simply in relation to economic markets because the wealth that one seeks to maximize can embrace nonmonetary interests as well as money.

Once one adopts the market metaphor as a dominant logic, whatever content one gives to the market in question, the legitimate grounds for explicitly regulating human conduct are quite few. These could involve regulation to correct for market failures, regulation to ensure that a market can function according to its presumed postulates (for example, in the case of economic markets, providing for a stable currency, the enforcement of contracts, the protection of property, and so on), and possibly regulation to ensure that human beings have the capacity to function as market actors (for example, ensuring minimum levels of literacy and numeracy).[47] The problem is, of course, that once it is accepted that all human activity – from marriage, to reproduction, to religion – can be understood in terms of the market metaphor, then there is a second-order market for markets. At some point, it is necessary to make allocational decisions about which market shall predominate. Following the logic of instrument choice, one is driven to acknowledge not only that the very ideas of the state and government are just instruments, but also that there should be a market for government.

A contrasting response to the dynamic nature of the policy process is to adopt a contrasting default position. In recent memory the most sustained effort to extirpate the market from human interaction (and especially to extirpate the market from human economic interaction) was the failed project of Marxism. It is not necessary, however, to consign markets to the "dustbin of history" in order to combat the perverse consequences that flow from second-generation "instrument choice" thinking. Politics is meant to provide the forum by which collective decisions about the realm of markets are made, and regulatory governance is the vehicle by which these decisions are symbolized. In this conception, regulation (and deregulation) are not tools by which instrumental efficiency may be promoted over redistributional, social, or cultural goals; rather, regulatory governance is the symbolic construction of social solidarity through institutions recognizing and legitimating the identities by which people come to express who they are.

## *Contemporary Trends (since 1995)*

Over the past six years, as theorizing about neoliberalism and its impacts on the capacities of governments to govern has heightened, two other trends have emerged in the instrument-choice literature. It is now explicitly recognized that much in this field depends on one's perspective as either an optimist or a pessimist about the perfectibility of society. Moreover, all now see instrument choice and governance as dynamic.



### OPTIMISM VS PESSIMISM ABOUT HUMAN SELF-REGULATION

The question of regulatory governance can often be reduced to perspectives about the perfectibility of people and society: To what extent can (or should) people be trusted and left to their own devices? Conversely, to what extent should (or can) the state actively seek to manage the details of everyday life?

Many who explore "instrument choice" issues using the lens of public-choice theory have a moderately pessimistic view of human nature.[48] In the coauthored 1982 volume noted above, Michael Trebilcock also aligned himself with the pessimists, although in a 1990 essay with Prichard and Howse, Professor Trebilcock's position seems to have moderated.[49] Not surprisingly, therefore, in this most recent work, he arrives almost at a position of optimism on this score and thus assumes that indirect and third-party governance can be viable regulatory strategies.[50]

These perspectives translate into views about the capacity of people to conceive novel and self-directed solutions to social problems and to imagine the possibilities of social organization. Again, most "instrument choice" scholars adopt a "static pie" view of social life: Regulation is about distribution and redistribution of finite resources; as there is a closed class of instruments, each of which has associated costs, an "optimal" choice should be discoverable in any situation. By contrast, others who locate themselves as adherents to the "processes of social order" approach to governance believe that there is an almost infinite variety of instruments and social-ordering processes to choose from and that a more dynamic view of choice is called for: The end depends on how one chooses to get there, and how one chooses to get there depends on the end one has selected.[51]

### INSTRUMENT CHOICE AND GOVERNANCE AS DYNAMIC

Viewing governance as dynamic raises two lines of inquiry. The first leads to an exploration of the continuity of law and social life. The second emphasizes the importance of feedback loops in regulatory governance.

The modern literature of legal pluralism presents the strongest theoretical challenge to "instrument choice" thinking, for it hypothesizes the various modes and sites of regulatory governance as mutually constitutive and interdependent.[52] Consider the following. If one posits a particular governmental policy as deregulation, this is to assume that the primary site of regulation of human activity is the state and its instruments. Modern legal scholarship reverses this perspective. The state is a choice that people make as to the instrument they seek to deploy in

their everyday regulatory endeavours. There is no disjuncture between law and social life nor between "legally binding" instruments (associated by public-choice theorists with the state alone) and other instruments that are believed not to have coercive outcomes. There is, in other words, no best or most efficient instrument that can be posited without taking into account the values promoted or advanced by the site of normative activity under consideration.[53]

As for feedback loops, the point is equally important. Many modern assessments from the field of public administration seek to define tools and to describe patterns of their use, how each tool is selected, and the management challenges inherent in each tool.[54] The idea that the choice of instrument is a path-dependent outcome of lexically ordered steps has been abandoned in favour of a dialogic model even by many law and economics scholars who work in the public-choice paradigm.[55] As far as I can discern, no theory of instrument choice today rests on the assumption that instruments do not shape ends and that certain ends cannot be pursued with certain instruments. Similarly, no choice of governing-instrument theory today presumes that the metric of evaluation can be applied along a single dimension – whether of efficiency or of other predetermined single ends.

### *Back to the Future?*

It is generally acknowledged that the first iterations of the "choice of governing instrument" thesis were ideologically loaded. Less accepted is the idea that the more nuanced, second-generation "choice of governing instrument" discourse in the late 1980s and early 1990s was also grounded in ideological considerations. Consider the position of those who expressed skepticism, even in regard to the moderate, thoughtful positions taken by Michael Trebilcock et al. in 1982. These critics focused on two core ideas.

First, they argued that deregulation was a misleading descriptor for a new regulation that was neither democratic (or enfranchising) nor just. The ideological point they advanced was that the state was not the enemy of citizens. Even though efficiency was acknowledged as only one of a number of intermediate ends that governments pursue, critics noted the persistence of the assumption that ends could be fixed in advance without regard to means. Second, they pointed out that a complex, modern society is shot through with multiple modes and sites of regulatory governance, generated by citizens themselves in their day-to-day interactions. The hyper-positivism of instrument-choice theory's focus on the state as the regulator of social action was seen as misguided. The role of the state was not to act as the top-down director of



all manner of human action. Rather, the state was meant to facilitate the just achievement of individual and collective purposes in a manner that enhances human agency.

These are still live issues. Even though the "deregulatory and privatization" critique is now somewhat attenuated, the logic of "governing instruments" persists. So, for example, scholars today are being asked to consider governance in the globalized world order; and to focus on how governments can deploy their policy instruments more effectively in coopting private-sector actors into partnerships, joint ventures, and third-party governance strategies in order to recognize both social and economic interests; and to reflect on how better risk management in state action can be engendered.

To restate the central point of this intellectual history, it is the very logic of instrument-choice thinking that is problematic – rather than any particular outcomes that it may or may not mandate. To talk the language of "choice of governing instruments" is to talk the language of a divorce of means and ends, to reduce governance to mere instrumentalism, and to forget that society generates the state and not the other way around. Instrument-choice language simply begs a question to which I return in the conclusion to this chapter: Instrumental to what?

## A GOVERNANCE PROSPECTIVE (SINCE 2002): PLURAL MODES AND MULTIPLE SITES

In this part, I shall attempt to further the debates of the past two decades about instrument choice and the lessons of the past half-century about processes of social ordering through an extended allegory. I invite you to consider the Swiss Army Knife as an instantiation of the logic of plural modes and multiple sites of governance. In the discussion that follows, I develop at greater length nineteen theses about governance. For the moment I briefly note three general ideas.

Most importantly, we should remember that however much a Swiss Army Knife is an instrument or tool (or more accurately, an assemblage of instruments and tools), it is also more than that. The gadgets of the knife are hypotheses of action; they presuppose their own uses. They are also hypotheses about what human acts are valuable enough to warrant a tool; they lexically order the way in which human actions are judged. And they are hypotheses about the relationship between aspiration and action as mediated by human structures and institutions.

In addition, I want to note that the idea of the traditional Swiss Army Knife – whether made by Wenger or by Victorinox – does not exhaust the possibilities. For cognoscenti there is a "new kid on the

block": a device made by the Leatherman Tool Group. The configuration of instruments at any given time is politically contingent. The very structure and labelling of tools – and our decision to call a Swiss Army Knife a knife (rather than a tool) or to call a kirpan a dangerous weapon rather than a ceremonial dagger – is not a decision about what an instrument is. It is a decision about ends and purposes.

Finally, a Swiss Army Knife is not idiot proof. As I note in the last thesis, there is a ghost in the machine. A human being. No amount of instruction, no amount of education in use, no amount of supervisory control can ever prevent a person intent on doing harm with a Swiss Army Knife from accomplishing his or her objectives.

## *"Tool" Is Both a Noun and a Verb – a Means and an End*

The central question of all institutional design, whether implicit or explicit, is *how are we to understand the relationship of means to ends in imagining and developing human institutions and processes of social ordering?* This question is necessarily prior to any reflection on "instrument choice" simply because the instruments wielded by the state are secondary. The initial means-ends question, deeply rooted in political theory, is "why the state?"

### THE STATE IS ALSO A TOOL

The political state is only one instrument, one institution among many, that people choose to let manage their lives in common. The state does not precede social life; nor does it precede law. Unless we begin with a metaphor of multiplicity, we cannot understand the range of options open to us in the governance of everyday life, let alone in the governance of the state and ultimately in the governance of the world.

The multiplicity metaphor does not imagine the state as primary, as the institution charged not only with making governance decisions, but also with allocating governance decisions among other actors. It is a perspective that sees the possibility of other social institutions – families, neighbourhoods, religious organizations, socio-ethnic groups, unions, cooperatives, communities of interest – also being primary normative sites.

The multiplicity metaphor also does not imagine the choice of governing instrument to be the direct consequence of goals being pursued. If contract is an instrument (a means), it is also an end (a consequence of a conception of human beings and human society); if delegated self-regulation (e.g., of a profession or of agricultural producers) is an instrument (a means), it is also an end (a consequence of a conception of local democratic decision-making).



### THE SWISS ARMY KNIFE IS NOT JUST A TOOL

The allegory of the Swiss Army Knife frames the initial governance consideration in two hypotheses:

1 I have to do X. Which tool (gadget, implement, instrument, device) on my Swiss Army Knife should I use?
2 I have a Swiss Army Knife. What can I do with it?

Question 1 initially appears to involve no more than finding an appropriate means to an end; the end is clear, but there are several means available to achieve it. Viewed in this light, we can immediately see how the end constrains the choice of means. Even if a Swiss Army Knife were to have every conceivable gadget known to human society, some of these would not be appropriate to the task at hand. If you are seeking to whittle a block of wood into a toy boat, the corkscrew or the reamer will likely be of little use.

Nonetheless, ends themselves are rarely given. Whatever you may have wished to achieve in setting out to make a wooden toy boat, constraints on time, changes of desire, or discovering new possibilities of action in the very act of construction may lead to an entirely different appreciation of the possibilities for the corkscrew, the reamer, or the can-opener. For example, a chance examination of a partially whittled boat may suggest that a more satisfying project would be to carve a beaver. In this endeavour, the corkscrew and the reamer may well reveal hidden utilities.

Question 2 initially appears to involve no more than finding an appropriate end attainable by the means available; the end is indeterminate. It might well be possible to formulate a simple, generic end (for example, whittling things), but there are also many other ends (even generic ends) possible with the tool in hand. Here, the means constrain the choice of ends. With the typical Swiss Army Knife, you can fix your eyeglasses, make a kite, whittle a toy boat, or carve a wooden beaver, but you cannot change your sparkplugs, lever boulders out of a road, or build a basement stud-wall.

Yet again, means are also rarely given in an unalterable form. Sometimes we can imagine a novel possibility for a gadget that presents itself under a known or conventional label. Despite their names, the "hook disgorger" or the "fish scaler" may turn out to be ideal woodworking implements for roughing up the block in order to replicate the texture of a beaver pelt. Sometimes a recasting of ends (or breaking them down into smaller or intermediate ends) opens up possibilities for deployment of gadgets to accomplish previously unimaginable goals. No tool on a Swiss Army Knife looks immediately helpful for constructing a

stud-wall. But when the task is described as ensuring that the wall is perfectly vertical, the key ring suddenly presents itself as an indispensable component of a plumb bob if the weight of the knife itself is being used to serve that end.

## *The Swiss Army Knife of Governance*

The company Victorinox manufactures several models of what it calls the "Original Swiss Army Knife," the largest of which – (the Swiss Champ) has thirty-four features (gadgets) and the most modest of which – (the Soldier) has twelve. (It may be noted in passing that even in the realm of the Swiss Army Knife, there is relatively little esteem visited upon the Soldier. On the other hand, as yet there is no top-of-the-line Swiss Diplomat model. Even in knife design, semiotic considerations go well beyond technology and gadget counting.) In most of the reflections below I have used the model name of a Victorinox Swiss Army Knife to identify a specific governance thesis.

### THE VICTORINOX SWISS CHAMP: TOO MANY TOOLS

"I want to immortalize my girlfriend and me by carving our initials in this tree. Should I use the large knife blade, the small knife blade, the reamer, or the corkscrew?"

*Problem:* Faced with a simple job, several tools (or perhaps several ways to use the same tool) might accomplish the job. There is not necessarily a best tool in a given situation. A variety of implements on the knife will work, some better than others, but there is no single tool designed specifically for this use. Moreover, different users might have preferences for one or the other tool, and these preferences might not be what the knife designer considers to be the best choice.

A related problem is that people's preferences might blind them to a more effective choice. A person might naturally think that the knife is the best choice. However, given the way the Swiss Army Knife folds, a knife tends to close unexpectedly when used to carve in trees, so the reamer or the corkscrew, which open perpendicular to the body of the knife, might work better to scratch in the writing (particularly if the tree has particularly rough or thick bark).

*Governance:* There is no best response to a given problem, particularly as the precise limitations of a given response cannot be known until it is implemented. Likewise, atavisms and deep ruts in our thinking tend to match particular obvious responses to particular problems (e.g., more police or stiffer penalties in response to a crime wave), when other less obvious solutions might actually prove to be more effective.



In particular, responses that seem to be politically necessary (e.g., the antiterrorism legislation in Bill C-36) may be the path of least resistance but are seldom the most effective since they tend to deal with the visible symptoms rather than the underlying disease.

### THE VICTORINOX HANDYMAN: OVERINCLUSIVENESS

"I just want a knife. Can't I get a model without all that other stuff?"

*Problem:* A multipurpose tool is, by design, very flexible, but flexibility may or may not be a relevant criterion for users. There are two aspects to this issue. First, you don't always know what you will need, so it doesn't make sense to limit yourself at the outset by rejecting all the other available implements. Second, if all you really want is a knife blade, you don't need to buy a Swiss Army Knife at all – look instead at other kinds of knives, such as pocketknives, penknives, or hunting knives. Although the Swiss Army Knife is flexible and highly varied, sometimes a different knife altogether is called for, whether a laguiole, a bayonet, or a stiletto, depending on whether you are planning to eat a steak, go to war, or mug people in an alley.

*Governance:* Conceptualizing the problem at the outset is important, and if there is a defined and specific end in mind, crafting the response to deal with that end is important. However, conceptualization in this way is a narrowing process, and there is a danger of closing off useful directions by designing a response solely for a particular end currently in view. Moreover, when governing through delegations, providing an *ex ante* menu of precise instruments rather than a general power may overly constrain the delegate.

### THE VICTORINOX MOUNTAINEER: WRONG TOOL

"My car broke down, and all I have is this lousy Swiss Army Knife!"

*Problem:* For certain jobs, a particular tool will be of no help at all. Sometimes it just won't work, and you've got to call someone else. In some cases the problem is the wrong tool for the job, but in other cases the problem is the wrong person. If you don't know how to fix a car, it doesn't matter whether you have a Swiss Army Knife or a full mechanic's set of tools.

*Governance:* Some problems are beyond the capabilities of the solution proposed. In such cases, an effective solution probably will involve both deploying a larger variety of tools as well as bringing in a different actor. For example, the problem of illegal drug use requires more than a quick-fix amendment to the Criminal Code or extra funding for police patrols. Government may not be the best actor to solve all aspects of this problem.

### THE VICTORINOX CLIMBER: INTENDED USE, UNFORESEEN PROBLEMS

"I tried to use the can-opener to open a tin of beans, and it slipped and cut my hand."

*Problem:* collateral damage from a poorly designed tool (or from using a less-than-optimal tool). Although a tool may be designed for a particular purpose, other design compromises can limit its effectiveness. The can-opener is designed not just to open cans, but also to fit into a small space, so can-opening tends to be somewhat awkward. Notice that this is not a problem of the user's lack of sufficient knowledge or adequate skill. Even when competence can be presumed, the tool itself carries the risk of unintended consequences. This is inherent in the separation of means and ends, for all means ultimately change ends. To put it most strongly, the more effective the means, the more radically will it have long-term implications in how we conceptualize our social ends.

*Governance:* Even when deployed within their design specifications, some regulatory solutions can have unforeseen negative consequences. Regulation is an interaction between the situation and the solution; thus the peculiarities of the situation can force the solution to behave in strange and unpredictable ways.

### THE VICTORINOX CAMPER: CREATIVE USE, UNFORESEEN PROBLEMS

"I tried to use the screwdriver to pry open a paint can, and it snapped off."

*Problem:* Sometime the actual use is beyond the capacity of the tool. Not all imagined uses of a tool are possible, given the tool's design limitations. A Swiss Army Knife needs to be small, and each implement needs to fold neatly into the casing. This limits the size, the shape, and the number of implements that are possible, and these design limitations limit the uses to which the implements can be put.

*Governance:* Regulatory solutions are not infinitely flexible, and efficiency and other problems can arise if a solution is asked to do too much. Some would say that the Criminal Code and the Income Tax Act are both already groaning under the weight of the multiple policy objectives that they are being asked to serve.

### THE VICTORINOX RANGER: DESIGN REDUNDANCIES

"Why are there always two knife blades, when they're not all that different in size?"

*Problem:* Remnants of vestigial uses can clutter an otherwise efficient tool. The large blade is generally seen as a multipurpose blade and is close to the length of the knife casing. The small blade began life as (and is still sometimes called) a penknife even though no one needs to trim pen nibs anymore. Given the small size of the Swiss Army Knife, the difference in size between the two blades is not great, so there is a large degree of overlap between the functions of these two blades. Yet design redundancies can produce novel approaches to use. I well recall that my father always kept his little blade razor sharp and only used it for what were (in his mind) well-defined purposes. The big blade was the all-purpose knife, good for cutting anything (and even spreading peanut butter).

*Governance:* Since explicit, legislative law reform tends to be incremental rather than revolutionary, new initiatives are constrained by the vestiges of existing regimes. Radical changes make legislators uncomfortable and often lead to outrage among citizens who are used to dealing with the familiar and who thus see innovation as a threat to stability. However, leaving these vestiges in place increases the possibility of duplication, which can lead to ambiguity and inefficiency, on the one hand, or to a further specification of more particular purposes, on the other.



### THE VICTORINOX TIMEKEEPER: SPECIFIC-USE TOOLS

"Thirty-two gadgets, and it still doesn't have the one I need!"

*Problem:* Greater specificity of intended use tends to cut off creative rethinking of uses. The smaller knives have a minimum of tools, although imaginative users can adapt them to a wide variety of uses. The larger knives have lots of specific-use tools (e.g., hook disgorgers, magnifying glasses, cigar cutters), suggesting a single use for each (although imaginative users can still find other uses even for specific-purpose implements). Moreover, when you get into highly specialized tools, might you not be better off getting the real thing? Is the hook disgorger on the Swiss Champ going to work well enough (and be used often enough) to warrant the extra thickness of the knife?

*Governance:* Microregulation tends to sell people short by denying the creative role that citizens can have in solving their own problems. Specific regulations (of the "do this, don't do that" variety) tend to promote a culture of legalism, in which rules are seen as rigid and inflexible, with the boundary between "law" and "not-law" (or "yes" and "no") roughly coterminous with the statute book rather than with people's moral intuition or common sense. Furthermore, excessive detail tends to make for unwieldy and unworkable regulation. It is worth comparing, in this respect, the general propositions of a classic civil code (e.g., the Code Napoléon and the Burgerlichesgesetzbuch) with the detailed quasi-regulatory provisions of the new Civil Code of Quebec.

THE VICTORINOX EXPLORER: DESIGN TRADE-OFFS

"Should I bring my Swiss Army Knife on the canoe trip or my tool-box?"

*Problem:* There are inevitable trade-offs in tool design, sometimes driven by use and sometimes by functionality. The knife does many things adequately and is both compact and lightweight. The toolbox does many things well but is a compendium of full-sized implements and is heavy. It also likely has many things in it that are completely unnecessary for any conceivable canoe trip (e.g., plumbing tools and an electrical circuit tester). A corded power drill with a full set of bits works much better than the reamer on a Swiss Army Knife but is useless in the bush. On a canoe trip, the Swiss Army Knife is a better choice. To assemble a bicycle, a toolbox is what you need.

*Governance:* The criterion used to evaluate a regulatory solution is important, and the criterion is closely related to the ends sought. The more complex the ends, the more difficult it is to weigh up alternatives. So, for example, a multifaceted program of criminal sanctions, public education, subsidies for mass transit, tax incentives, regulatory permits, and so on may be overkill if all you want to do is create no parking zones in front of schools.

THE VICTORINOX SOLDIER: CULTURAL LIMITS

"Why doesn't the US army carry Swiss Army Knives?"

*Problem:* Cultural factors influence the design of tools, their use, their nonuse, and even their characterization. Sometimes these cultural reasons are directly tied to images of the instrument in question. A kirpan is, and is not, a knife; a kirpan is not, and is, a weapon. Sometimes cultural reasons influencing the choice of an instrument or the manner of its deployment have little or nothing to do with the central characteristics or standard uses of the thing in question. In the abstract, both chopsticks and a fork are equally effective at conveying food to the mouth, although for cultural reasons the implement that one does not usually deploy is, at least initially, hard to use.

*Governance:* A Canadian-style health-care regime (regardless of the economic and administrative facts) raises the spectre of "socialized medicine" and is therefore unlikely to be adopted in the United States given its hostility toward anything smacking of socialism. So, too, the creation of Crown corporations. Yet the number and scope of "government-owned enterprises" in the US, especially on the periphery of the military, is substantial. Whatever these operations may be or do, they cannot be conceived as governmental business corporations. Another impact of cultural factors can be seen in the financing of university education and especially in the trade-offs between *ex post* tax-subsidized alumni donation programs and tax-subsidized *ex ante* tuition charges. Cultural predispositions limit at the outset the possible range or character of regulatory solutions available.



THE VICTORINOX ANGLER: PRECONCEPTIONS OF USE

"Why does the Swiss Army Knife have a corkscrew? I never bring bottles of wine on my camping trips."

*Problem:* Preconceived notions of tool use, whether arising from labelling or prior experience, can limit flexibility in deployment. The point is both general and specific. To someone who remembers Swiss Army Knives only from boy-scout (or summer-camp) days, it may be hard to reconceptualize them as a handy household tool. More specifically, sometimes our preconceived notions of what something is used for can narrow the field of possible uses. The knife is useful in many situations other than camping, situations in which a corkscrew may well come in handy. Also, some people do bring corked (as opposed to decanted) wine on camping trips. This fact illustrates the converse of the idea that we can often (usually) find other uses for tools than the obvious ones. In some situations, our preconceptions about a tool's intended use actually prevent us from seeing other possible uses or other possible situations in which the tool might be used. The corkscrew is a key development in the modern pocketknife, for it shows us that ends are not simply servants of the means we employ but develop interactively and through a system of feedback loops. Camping as a cultural practice developed in response to many factors, which are not meaningfully limited by the range of tools in a Swiss Army Knife. That the knife has integrated a corkscrew suggests how the knife reflects changed social practices since corked wine would hardly have been the drink of choice of those who were initially the target consumer audience of the Swiss Army Knife.

*Governance:* Like anything else, regulation tends to follow well-worn paths. Criminal sanctions tend to be used for certain kinds of problems, tax incentives for others, deregulation for others, and so on. Sometimes a creative solution requires shifting categories.

THE VICTORINOX SPARTAN:
PRIMARY VS SECONDARY CHARACTERISTICS

"Should I buy my Swiss Army Knife in red plastic or in brushed aluminum?"

*Problem:* Decision making based on primary versus secondary characteristics tends to deflect from intelligent judgment. There are primary (essential) characteristics with which to judge tools (e.g., strength, durability, design) and secondary (external) characteristics that are often

less important, like price and brand name. To judge solely based on one criterion to the exclusion of others is foolish. At the same time, however, with all other things being equal, there may be a reason to judge according to secondary as well as primary characteristics. Of course, in the very description of a characteristic as primary or secondary lies an important evaluative judgment: A feature is one or the other depending on why one is choosing the implement in question (e.g., actually using the knife on a canoe trip vs trying to impress other members of the trip).

*Governance:* Is efficiency an essential or a secondary characteristic of regulatory solutions? There will always be numerous criteria with which to judge a solution: efficiency, effectiveness, raw cost, political popularity, availability of trained personnel to implement it, etc. Determining which criteria are essential and which are secondary depends on the end sought. If the end is pure bang for the buck, then perhaps efficiency is essential. If the end is saving lives in emergency rooms, or getting the homeless permanently off the streets, then perhaps not.

### THE VICTORINOX HUNTSMAN: RELATIONS BETWEEN USES

"I used the hook disgorger on my Swiss Champ during my last fishing trip, and now there are fish guts all over the whole knife!"

*Problem:* A particular use can for various reasons negate or compromise other uses. Tools or practices pick up cultural meaning, which can in some situations close off certain uses to certain groups. One is probably not going to use one's Swiss Army Knife on a picnic to cut the brie after having used it to gut and scale fish the weekend before. Indeed, it is unlikely that one would ever use a Swiss Army Knife to cut brie (as opposed to cheddar) even on a camping trip.

*Governance:* A particular regulatory strategy might be effective and efficient but unpalatable to certain groups for other reasons. Sex education in schools, for example, can be effective in reducing unwanted pregnancies, but some religious or social groups may feel that moral reasoning should always trump public-health considerations. In any situation, finding the regulatory register is a precondition to imagining the entire range of possible regulatory responses. Often it is impossible to change registers (cutting brie) once patterns have been established (gutting fish). The inability of governments to deal intelligently with drugs as a matter of governance, economics, or public health flows directly from the "moral panic" campaigns of the 1930s that set a regulatory framework in the language of morality.



### THE VICTORINOX SWISS CHAMP OR THE WENGER HIGHLANDER: POLITICAL IDEOLOGY

"Should I buy one of the Victorinox or one of the Wenger models?"

*Problem:* Often we make choices for reasons external to all considerations of regulatory efficiency. The history of the Swiss Army Knife is instructive. In 1886 the Swiss Army decided to equip every soldier with a regulation knife. In the Swiss government's typical neutral fashion, contracts were issued for their Swiss Army Knives to both the Wenger steelworks, in the French-speaking Jura region, and to the Victorinox company, in the German-speaking Canton of Schwyz.[56] They are the exclusive producers of the Swiss Army Knife. By gentlemen's agreement, Wenger is proclaimed as the manufacturers of the "Genuine" Swiss Army Knife, and Victorinox uses "Original" Swiss Army Knife as its advertising tag line. While the designs of the knives are largely similar, there are many more models in the Victorinox catalogue, and the Wenger knives all seem to have only one blade, while Victorinox knives generally have two.

*Governance:* In all governance matters, ideology looms large. Sometimes this is merely labelling and can be traced to small-scale partisan ideology. One wonders, for example, whether the new Law Commission of Canada would have been reconstituted as the Law Reform Commission (to directly emphasize the policy disagreement with the previous government that abolished the agency) if there had not been another political party on the scene bearing the name "Reform." Frequently, ideological symbolism is more substantive. How much federal policy directed to the choice of governing instruments is shaped by the consideration that some forms of instrument – departmental management, departmental corporation, Crown corporation, land ownership, direct subsidy by cheque rather than by tax deduction (or even by electronic funds transfer) – make it easier to display the Canadian flag? And sometimes the ideology is fundamentally substantive. Only ideological zealots would privatize corporations that were initially created for ideological reasons (e.g., Ontario Hydro and Hydro Québec).

### THE WENGER CIGAR – CUTTER IN BRUSHED STAINLESS STEEL: ADMINISTRATIVE COST-BENEFIT ANALYSIS

"I wish they'd dispense with most of these gadgets and just produce an easy-to-use Swiss Ranger."

*Problem:* A number of gadgets on advanced models require a high degree of sophistication in order to be deployed properly and often demand a good sense of the purposes for which each tool was initially

designed. Achieving this knowledge and sophistication may not be worth the time required to do so if the task at hand can be accomplished relatively effectively with another simpler instrument.

*Governance:* A particular governing instrument may require a regulatory infrastructure that is simply not justified given the purposes of the policy being advanced. One of the primary disadvantages of tort litigation as a regulatory strategy is the transaction costs associated with bringing a lawsuit. Especially where the idea is to shift a large number of small losses onto wrongdoers who are hard to identify, costs can be disproportionate. Even with procedural streamlining through class actions and with market-share liability presumptions, litigation may be cost-ineffective. A similar problem arises in respect of mass adjudications. While a full civil trial may result in a minor redistribution from some beneficiaries (who get too much) to others (who are short-changed), administrative compensation schemes (whether or not combined with no-fault regimes) can be administered far more cheaply than civil trials – resulting in a greater percentage of the total budgetary envelope actually finding its way into the hands of intended beneficiaries.

### THE WENGER TRAVELLER: DEPLOYMENT DIFFICULTY

"I read the instructions, and I just can't figure out how to make this darn thing work."

*Problem:* Every implement requires a certain knowledge and physical capacity in order to be used effectively. More than this, every implement requires a degree of judgment and maturity by users in order to avoid dangerous misdeployment. Of course, these difficulties decrease or multiply in proportion to the number of gadgets. But they are present even in the simplest devices. Some more complex Swiss Army Knives are inappropriate in the hands of an eight year old but generally safe in the hands of a teenager. Some more complex models have devices, like a wire stripper, hook disgorger, metal saw, and chisel, that require education for effective use. And no Swiss Army Knife is safe in the hands of anyone who thinks it can be used to pry a stuck plug out of a live electrical circuit.

*Governance:* A particular governing instrument may be appropriate in the hands of certain users or when deployed against a certain regulatory clientele but inappropriate in other circumstances. For example, the powers of arrest granted to peace officers under the Criminal Code and various police acts should not be given to security guards and private police forces. Or again, it is not clear that a regime of self-prescription or automatic renewals is optimal for potent medicines. This is especially the case where the regulatory targets (in this instance, the delegated power holder is the individual citizen, and the regulatory targets are licensed



pharmacists) have the means and the desire to provide a check on those vested with self-regulatory authority.

### THE WENGER PATRIOT: THE POSSIBLE BECOMES THE NECESSARY

"Just hold on a second till I get my Swiss Army Knife awl; that's how we can unravel and retie the granny knot."

*Problem:* The great number of gadgets designed to achieve a wide range of purposes suggests the necessity of the Swiss Army Knife for whatever tasks it claims to be capable of performing. That is, the proliferation of implements invites people to look to the knife first to solve an issue rather than simply deploying other easily available mechanism – like fingers – to undertake a task. New uses come with each new implement. Need to rewire a lamp? – add a wirecutter. Need to tighten nuts? – add an adjustable crescent wrench. Need to repair tents or sails? – add a curved upholsterer's needle. And so on. These tools individually may be decent enough at their appointed tasks, but the knife as a whole gets so unwieldy that it becomes harder and harder to use it at all (consider, for example, the Income Tax Act). Finally, sometimes the "most appropriate" special-purpose gadget is more dangerous than it looks or than is necessary.

*Governance:* The extraordinary police powers of arrest without warrant granted by Bill C-36 have two immediate dangers. The first is that they implicitly suggest that regular police powers are not ever sufficient to deal with "suspected terrorism." That is, because these powers exist, they must be necessary and they must be deployed. Second, the proliferation of special-purpose tools destroys the reflection and judgment that are necessary in choosing between instruments or in choosing not to use a particular instrument. Rather than the holders of regulatory power asking themselves what kind of situation they confront, and how it should be managed, they now take the characterization of a particular situation (e.g., terrorism) that gives them the particular instrument they have deemed to be most efficient.

### THE WENGER STANDARD ISSUE: IF IT IS TOO COMPLEX IT WILL BE USED FOR SOMETHING ELSE

"You know this thirty-four-gadget thing is just the perfect paperweight. Looks nice and is just the right size."

*Problem:* Almost any conceivable usage can be accommodated within the basic design of the Swiss Army Knife if the knife is simply made thicker and/or bigger each time. (There is a photo in old editions of the *Guinness Book of World Records* of the world-record

pocketknife, which was about three feet high and bristling with blades like a porcupine.) One of the most popular Swiss Army Knife models is the Standard Issue. Interestingly, it appears that almost no Standard Issue models are given as gifts, whereas they are the largest selling model for personal purchase. It also appears that many of the Swiss Army Knives with lots of gadgets that are given as gifts are rarely used but languish on office desks or in dresser drawers as keepsakes. The remarkable success of the Nokia-brand cellphone is further confirmation of the virtue of simplicity.

*Governance:* Highly sophisticated regulatory analysis leads governments to create highly sophisticated regulatory instruments. This is especially the case in respect of "standards" regulation in drugs, food, toxic substances, and so on. But most often, in everyday social intercourse people do not think of orienting their conduct by reference to such a vast range of implements with highly specialized uses. Primary regulatory targets do respond to regulatory instruments that are tailor made to their concerns. The realm of tax deductions, credits, and rebates given to employers can often lead to micromanaged economic change. It is far less clear that the average taxpayer deploys them. The same is true of the detailed requirements for the storage and disposal of toxic chemicals. This is why the packaging and sale of such chemicals in quantities likely to be fully used in a first application is such an attractive regulatory strategy for the ordinary public.

## THE WENGER ESQUIRE: MULTIPLE REGULATORY SITES

"I had selected the knife I wanted from the brochure, but then I discovered that another company makes an almost identical product for a cheaper price."

*Problem:* Altogether Victorinox has about twenty models and Wenger has nine. But Wenger also has thirteen submodels of its Esquire model. Choosing the "absolutely right" model can, in the manner of constructing a meal from a genuine Chinese-food menu or a Caribbean vacation from among the array of tour and charter possibilities on the market, involve a considerable investment of time. At some point, the reality of choice becomes submerged in the paralysis of decision. There is, of course, another more important difficulty. There happens to be another company – the Leatherman Tool Group[57] – that makes a similar product to that of Victorinox and Wenger. Indeed, Leatherman enthusiasts claim that its implement far exceeds the Swiss Army Knife in practicality. No matter how one defines the relevant universe of choice, a slight recasting of the issue, usually by emphasizing functionality rather than "essential characteristics," opens an infinitely greater range of possibilities.



*Governance:* Typically, governance has been understood to be the affair of government. On such a view, the primary competition for governance (at least in federations) lies between the central and the provincial (or state) governments. This can cause considerable difficulty when different instruments are deployed. Whatever limitations may lie on governments when requesting legislatures to enact statutes, similar limitations do not apply when it comes to these governments' spending power. Moreover, while some constitutional limitations are still present in respect of taxation, to all intents and purposes both the provinces and the federal government can tax whatever of their residents they choose and in whatever manner. Still, some forms of regulation, especially when delegated to the private sector, may run afoul of constitutional limits. Can provinces create civil-status regimes in parallel to the federal regime of marriage? Could the Parliament of Canada create a Crown corporation to distribute alcohol and drugs? Functionality raises regulatory issues both in connection with the capacity of any government to legislate on such a basis and especially given the laundry list approach of Sections 91 and 92 of the Constitution Act 1867, whether certain regulatory instruments are constitutionally located in one jurisdiction or another. It also points to the possibility of multiple, overlapping sites of regulation, only some of which are under the direct management of the state. Whatever the Swiss government may do in splitting its concession between Victorinox and Wenger and whatever arrangements these companies may come to about dividing markets, attributing trade names, and sharing patents, none of these governance strategies will have any direct regulatory effect on the Leatherman Tool Group.

## THE WENGER MINI-GRIP: THE GHOST IN THE MACHINE

"Can you believe it. You give a guy a Swiss Army Knife and he becomes a tire slasher."

*Problem:* No amount of instruction, no amount of education in use, no amount of supervisory control can ever prevent a person intent on doing harm with a Swiss Army Knife from accomplishing his or her objectives. There are few artefacts of modern society that cannot be deployed for nefarious purposes. A Swiss Army Knife is meant to facilitate the accomplishment of many human purposes, but slashing tires is not one of them – unless an abusive drunk is about to get into a car and drive off through a crowded sector of a city, or a robber inside a bank intends to use the car as an escape vehicle, and so on. Even acts that seem in one light to be morally beyond the contemplation of the implement designer, may in some cases be benign. But this is the exception.

*Governance:* As a matter of governance, certain tools enhance the agency of the user more than others; certain delegations formally escape obligatory governmental collateral norms. So for example, a privatized service will not necessarily fall under public-sector employment-equity guidelines, nor be required to respect federal policy on bilingualism, nor follow procurement norms of the federal contractor's program, nor follow basic labour standards of the delegating government. One presumes – in the same manner that one presumes owners of Swiss Army Knives will not become tire slashers – that the regulatory form will not undermine collateral regulatory objectives. Still, short of keeping the delegates of regulatory authority on short leashes (and even then, with no guarantee of success), agency-enhancing regulatory choices have typically had the effect of enhancing collateral policy risks.

## CONCLUSION: THE GOVERNANCE OF HUMAN AGENCY

I should now like to return to my primary substantive point – a point foreshadowed in the chapter's introduction. As much as it is worth contemplating the means by which we render public aspiration into accomplishment, it is even more important to be talking about what kind of society and state (or in Canada, what kind of national policy) we wish to achieve, what conception of human beings such an achievement presupposes, and what kinds of social, economic, and political institutions are most coherent with this vision of society and state.

It is certainly not my objective here to describe what type of society and state people should want in general. I am not even competent to answer an even narrower question: What should a third national policy for Canada look like? Nonetheless, on the basis of the considerations raised in the two core parts of this chapter, I do feel able to suggest what might be its general outlines. After doing so, I will raise four governance issues that I believe are at least as important as the subjects explicitly addressed in the final chapters of this collection – namely, the welfare state, the environment, occupational health and safety, and consumer protection.

The key feature of governance for the twenty-first century (and by implication the key feature of a new national policy for Canada) is to put citizens into the centre of the policy debate. As I have argued elsewhere, citizens are not merely law-abiding; they are law-creating.[58] What we have experienced as "identity politics" is nothing short of the claim that personal identity is an iterative endeavour between structures and agents, not the creation of structures alone. The invention of "international human rights" (in Canada, the equivalent being the Charter of Rights and Freedoms) is important less for the impoverished and instrumental "rights discourse" that it promotes as a substitute for politics than for the symbolic aspiration to a "common humanity" (in Canada, Charter patriotism) that it has induced.



We should remember that the Swiss Army Knife was created to put a weapon or instrument in the hands of citizen-soldiers. The Swiss government asked: What equipment does the citizen-soldier need? Today democratic governments (in Canada and elsewhere) need to ask: What equipment and what resources does the citizen-regulator need?

This said, let me now turn to the central issues of governance that should be preoccupying scholars and policy analysts right now. The three I have selected are meant to highlight three themes that shape how identity is symbolically constructed in contemporary liberal democracies. I had initially included a fourth, equally as important – namely, foreign aid – but have left that aside in order to focus on domestic policy.

The first issue is the way we symbolize and seek to regulate "illegal" drugs. Today we treat this as a moral question to be decided by the criminal law. Surprisingly, just over a century ago (at the time when the Canadian government was elaborating its first National Policy and European states were promoting communications and transportation infrastructures) many Western democracies took a similar position on alcohol, gambling, and the sex trade. Today the first two of these are practically government monopolies. Might we not then ask whether there are not other ways of characterizing the consumption of recreational drugs? As a public health problem? As a problem of regulatory governance (like alcohol and gambling)? As a problem of resource expenditure? As a problem of corrupting citizens by forcing them into intercourse with organized crime? Even prior to thinking through these questions as a matter of instrument choice, we need to ask how we wish to symbolize drugs: Choosing between morality, health, and public-expenditure paradigms directly affects the range of instruments we see as plausible for achieving our regulatory purposes.

The second issue is the way we symbolize and seek to define close personal relationships of high affect. If the state should take an interest in the physical, emotional, and economic wellbeing of all citizens, why does it frame the introduction of significant social policy on same-sex unions as being dependent on its first defining marriage? Are not high-affect relationships of whatever sort equally important in terms of policy outcomes? More than this, on what basis should traditional moral prohibitions on who can marry (notably, but not exclusively, the opposite-sex requirement) be carried forward into the regulatory regime of the state? Aren't these definitional limitations best left to other sites of

governance, such as religion? Again, even prior to thinking through the governance of marriage as a matter of instrument choice, we need to ask how to characterize the relationship that it ostensibly regulates.

The third issue is the way we understand the present "other" as a matter of history and policy. This issue arises for most countries in the domain of immigration and citizenship policy. On what basis do we decide who is to be "included" in our moral community? In most of the Americas and other white colonial states, such as Australia and New Zealand, there is a further dimension of "exclusion" that must be addressed. On what basis do we continue to think about aboriginal peoples as "wards of the state"? The lessons of the "residential schools" in Canada and the "stolen children" in Australia are not lessons about residential schools and aboriginal adoption. They are lessons about identity, agency, and community. Might it not be time to move beyond choosing the appropriate "governing instrument" as a vehicle of continued colonization?

The brilliant social historian, Carl Becker, famously claimed that the *philosophes* were not the heralds of the Enlightenment (as had usually been claimed in historical analyses) but were rather the last defenders of the Renaissance.[59] Those who speak the language of "instrument choice" are the *philosophes* of the welfare state. They now talk of increased social regulation as defining the new millennium. In fact, however, a failure to acknowledge the substantive foundations of the state to be imagined in the twenty-first century (i.e., to consider, in the case of Canada, what its new, and third, National Policy might be) means that they are simply "saving the appearances" of the past paradigm.

Much legal scholarship of the past quarter-century has focused on instrumental considerations – for example, how best to achieve compliance, or how to reduce the burden of government without losing policy control, or how to enhance regulatory efficiency by promoting so-called "smarter" government. Academic and policy reflection was so strongly influenced by "law and economics" analysis that issues of governance were conceived to involve little more than the selection of the optimally efficient "governing instrument" or "regulatory tool." While the idea of "governing instrument" does suggest the need for law in order to render public policy into prescriptions and programs, in this conception of the governance endeavour, there is an in-built presumption against certain forms of state action. This presumption was usually expressed in slogans like "deregulation," "privatization," and "smaller government" that imagine the possibility of a prepolitical societal *arcadia* where human beings and markets can operate free of the constraints of misguided, inefficient, redistributive "policy intervention."



Today, however, a broader understanding of the entailments of governance through law in a liberal democracy is emerging. Governance through law is a process of reciprocal construction of social interaction through which lawmaker and citizen constantly adjust their expectations of each other. At its margins, governance through law – especially in the form of the criminal law – involves establishing constraints on pathological action so as to make human agency possible. At its core, however, governance through law – whether in the form of rules of property, contracts and civil obligations, or processes of everyday administrative and regulatory law – involves creating mechanisms and incentives for largely self-directed human action. Descriptively, governance has been taken to be the iterative endeavour of identifying goals and objectives, designing policies, selecting processes and instruments, deciding upon particular programs, targeting sites and systems, and identifying actors by and through which human aspirations and actions may be rendered into achievements and accomplishments.

This said, the governance issue confronting governments today is how law and legal institutions should be deployed to achieve the symbolic governance of human agency in a manner that facilitates the just achievement of individual and collective human purposes. At the same time, human beings express their agency through their acts of self-governance and through their voluntary or coerced participation in governance structures that they share with others and that channel the occasions for exercising this human agency. Prescriptively, therefore, governance is taken to be the endeavour of identifying and managing both aspiration and action in a manner that affirms and promotes human agency.

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## CHAPTER NINE

1 This chapter, first prepared for delivery at the opening plenary session of the research conference occasioning this volume, was revised for publication in October 2002. Apart from minor editing, it has not been recast to incorporate themes and ideas addressed in the scholarly and policy literature since then.

I am most grateful to my research assistant, Eric Reiter, for his superb development of the Swiss Army Knife allegory. Most of the chapter's second part derives from his research notes. Simon Chamberland has also provided excellent research assistance throughout this project. My colleagues at McGill – Richard Janda, Nicholas Kasirer, Desmond Manderson, and Shauna van Praagh – closely reviewed and critiqued an earlier version of the manuscript, as did Professor R.D. Wolfe at the School of Policy Studies, Queen's University, and Nathalie DesRosiers, president of the Law Commission of Canada. I am much in their debt. The usual caveat applies.

2 For an outstanding effort to plumb the promise and perils of transdisciplinarity, see Somerville and Rapport 2000.
3 See Ellickson 1991 and Posner 2000.
4 See Parsons and Shils 1962 and Weber 1986.
5 See Hart 1994 and Kelsen 1967.
6 Fuller 1969, 106.
7 See *Royal Commission of Inquiry into Dominion-Provincial Relations* (1937). For contemporary critical commentary, see Innis 1940; for reflections a generation later also incorporating an assessment of Quebec's *Report of the Royal Commission on Constitutional Problems* (the Tremblay Report; 1957), see Smiley 1962.
8 See Creighton 1937 for the argument that a national policy cannot be simply the policy of the national government and that no national government can have only one policy over a period of many years. In fact, Creighton maintains that a national policy is a policy for building a nation and that, in rough form, the first National Policy predates Confederation. Indeed, he

argues that Canada was an instrument of the policy, not the other way around. That is, the national policy as a project of Montreal elites was conceived at least as early as 1840, and Confederation was simply one more instrument for its pursuit. The importance of this observation – that the state itself can be seen as a tool of governance – to my claims later in this paper about the interconnection of means and ends cannot be understated.

9 See, for example, Smiley 1975; the Symposium "Canada's National Policies" 1993; and Courchene 1997.

10 See notably Fowke 1952.

11 See Duxbury 1995, ch. 4.

12 A good intellectual history of the legal-process approach is presented in Roach 1997.

13 The first iteration of this idea was set out in chapter 6 of Fuller 1949. Fuller was the Carter Professor of General Jurisprudence at Harvard from the mid-1940s to the mid-1970s. While not well known outside North American legal circles, he is generally acknowledged to have been the most significant figure in US legal philosophy during the twentieth century. For an intellectual biography, see Summers 1984.

14 Fuller's several essays on the *eunomics* theme were collected in a posthumous volume (1983).

15 See Hart and Sacks 1958. For an interpretation of the legal process school, see Eskridge and Frickey 1994b.

16 For many followers of Hart and Sacks, and contrary to the *eunomics* ideas advanced by Fuller, the logic of legal process also compelled the search for nonpolitical "neutral principles" to constrain judicial activity. See, for example, Peller 1988. Compare Winston 1999.

17 The path-breaking work on models of civil disputing was Goldberg, Green, and Sander 1973.

18 See Packer 1968. The literature on restorative justice is extensive. For an overview, see Cragg 1992.

19 See Chayes 1976. A thoughtful summary of contemporary theorizing of procedural fairness may be found in Bayles 1990.

20 An extended review of this literature in Canada is presented in Macdonald 1985, especially at footnotes 2–13.

21 See, for an iteration of these themes, Hood 1986 and Salamon 1989.

22 See, for an illuminating discussion, Wolfe 2002.

23 The program pursued during this period in Canada, to recall, was known as the second National Policy. Recently, some scholars have argued, in my view unpersuasively, that a third National Policy of "post-embedded-liberalism *compensatory liberalism*" has been on the policy agenda for two decades. See, for one such endeavour, Eden and Appel Molot 1993.

24 On the legal framework implied by such a conception of the state, see Janda and Downes 1998.



25 For a slightly different periodization, see Hill 1996.

26 Bernier and Lajoie 1986; see especially volumes 46 and 48.

27 The lead paper on this theme was Howse, Prichard, and Trebilcock 1990.

28 Friedland 1989 and 1990.

29 Salamon 2002c.

30 Of course, the "tools of government" model remains statist. The assumption is that governments can often usefully conscript private actors into the regulatory endeavour, not that truly democratic collaboration may involve deference to nongovernmental mechanisms of governance. For discussion of "regulatory absence" as a legitimate policy option, see van Praagh 1996. I have attempted to apply this type of analysis in a recent paper analyzing legal-policy options that was prepared for the Senate Committee on Illegal Drugs; see Macdonald 2002a.

31 The parallels between the theoretical concerns of this collection (and, more generally, modern instrument-choice thinking such as that animating Salamon 2002c) and the institutional design preoccupations of the Harvard legal-process approach are striking. See, for example, Eskridge and Frickey 1994a as well as the several essays published in Witteveen and van der Burg 1999.

32 See Innis 1946 and 1956. In addition to the famous article by Fowke (1952), see Fowke 1957. For a modern proposal, see Courchene 1997.

33 In addition to those coauthored essays already cited, see Trebilcock 1994 and 2001.

34 This is not the place to rehearse the nefarious effects of "state legal positivism" as dominant ideology within faculties of law and other university departments. For an overview, see Cotterrell 1989.

35 A fine overview of regulatory history is presented in McCraw 1984, which is comprised of biographical studies of Charles Francis Adams, Louis D. Brandeis, James Landes, and Alfred Kahn.

36 The slogan was coined in Goldberg, Green, and Sander 1973.

37 For an elaboration of the point, see the papers collected in Ontario Law Reform Commission 1995.

38 See, for an elaboration of this idea, Peters 2002.

39 Fuller 2001c, 69.

40 See, for example, Komesar 1994, 274: "Reform is not ... [just] ... the embracing of goals. Reform is ... [also] ... the designation of the means of achieving them."

41 For classical presentations, which show the power of the paradigm even over those committed to "reregulation" rather than "deregulation," see (from a business-school perspective) McCraw 1981 and (from a law-faculty perspective) Breyer 1982.

42 Macdonald 1985.

43 On condign power, see Galbraith 1983.

44 See Howse, Prichard, and Trebilcock 1990.
45 Smith and Ingram 2002.
46 The point is trite and hardly merits a note. Yet it is difficult to find the underlying theoretical point stated in broad compass. For a now classical statement, see de Sousa Santos 1995. An early allegorical attempt to show the bearing of a rejection of these dichotomies on questions of public governance was attempted in Macdonald 1990.
47 Charles Lindblom (1977) was one of the first to frame the point in such a manner. For his further reflections, see Lindblom 1993.
48 See, for example, Farber and Frickey 1991.
49 For an excellent study reflecting the policy outcomes that would flow if law and economics scholars adopted a stance of moderate pessimism, see Ellickson 1991.
50 See, for an elaboration of a strongly optimistic perspective, Fuller 2001a.
51 See Hart and Sacks 1958.
52 This is not the occasion to give a full-blown presentation of contemporary theories of legal pluralism. For two recent studies, see Tamanaha 2001 and Melissaris 2004.
53 I have tried to explore this point in Macdonald 2002b.
54 See notably, Salamon 2002a and 2002b.
55 See, for example, Elster 1992 and Posner 2000.
56 Wenger, www.wengerasi.com; Victorinox, www.victorinox.com.
57 Leatherman Tool Group, www.leatherman.com.
58 For an extended development of this idea, see Kleinhans and Macdonald 1997.
59 See Becker 1932.

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## CHAPTER TEN

1 I would like to express my appreciation to a number of people who provided me with their thoughts on the sustainable-governance concept: David J. Bell, of the York Centre for Sustainability; Kathy Brock, of the School of Public Policy, Queen's University; John Chibuk, of Strategic Policy, Industry Canada; Cary Coglianese, of the John F. Kennedy School of Government, Harvard University; Bruce Doern, Les Pal, and Susan Phillips, of the School of Public Policy and Administration, Carleton University; David Hecnar, of Alcan Incorporated; Derek Ireland, of Chreod Associates; Michael Jenkin, of