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## Is Our Legal Order Just Another Bureaucracy?

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# Is Our Legal Order Just Another Bureaucracy?

Robert P. Burns\*

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## INTRODUCTION

In our usual public discourse and debate, the rule of law is a very good thing, so good that we are committed to exporting it around the world. By contrast, bureaucracy is very bad—a threat to human freedom and the ability to thrive. Indeed, one of the distinctively modern themes, associated with Max Weber and Franz Kafka, describes bureaucracies as the site of “organizational gothic” where organizations are “‘sites of darkness’, ‘labyrinths with endless corridors’; and ‘locked doors hiding evil secrets’ shifting from ‘the dark street’ to ‘the cramped office’ . . . .”<sup>1</sup> Given the rule of law’s positive outlook and bureaucracy’s negative connotation—it would seem to be simple to distinguish a legal order<sup>2</sup> from a bureaucracy. But this is not so. Our notions of the rule of law and

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1. Malcolm Warner, *Kafka, Weber, and Organizational Theory*, 60 *HUM. REL.* 1019, 1022–23 (2007) (quoting Martin Parker, *Organisational Gothic*, 11 *CULTURE & ORG.* 153, 159 (2005)).

2. I avoid the more usual phrase, “legal system,” because the term already shows hints of bureaucracy.

bureaucracy are far from univocal—but rather, “essentially contested.”<sup>3</sup>

Deciphering the distinction between the rule of law and bureaucracy is not simply a matter of attaining conceptual clarity. One major political task concerns ascertaining what kinds of institutions and practices are appropriate to bring good order to the more or less distinct realms of social life, or what Lon Fuller calls “forms of social order.”<sup>4</sup> Where should we resort to informal bureaucratized psychological pressure through interrogation, as we do in our criminal justice system 95 percent of the time? Where should we rely on the instrumental application of social scientific methods, specifically microeconomic reasoning, as we mainly do in antitrust law? Where should we rely on the broadly clinical judgment of administrators “bred to the facts” and committed to the relatively unconstrained definitions of agency purpose?<sup>5</sup> Where is it important to strictly follow predictable formalist modes of legal reasoning, designed to enhance predictability and control official discretion?<sup>6</sup> Where should we provide plenary narrative-dramatic consideration of a human situation that relativizes “the rule of law as a law of rules,”<sup>7</sup> as we do in the relatively few jury trials we still conduct?<sup>8</sup> Some of these approaches can fairly be called bureaucratic, and some cannot, so it is useful to get a grip on the practical meaning of the terms.

This Essay’s argument proceeds in twelve steps. First, this Essay describes why (almost) no one wants to belong to a bureaucracy and why American lawyers would recoil from considering our legal order to be just another bureaucracy. Second, this Essay provides a classical understanding of bureaucracy that still has power, as a form of social ordering that effectively deploys instrumental reason in the service of a

3. Walter Bryce Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 169 (1956).

4. Fuller called this question “eunomics.” Lon Fuller, *American Legal Philosophy at Mid-Century, A Review of Edwin W. Patterson’s Jurisprudence: Men and Ideas of the Law*, 6 J. LEGAL EDUC. 457, 476 (1954).

5. “Bred to the facts” is James Landis’s term. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 39 (Greenwood Press 1938). See *infra* text accompanying note 21 (discussing Weber’s acceptance of the “neo-Kantian strict distinction between fact and value”). See generally CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY* (4th ed. 2015) (advocating the United States bureaucracy as one of the most effective institutions of any in the world).

6. ROBERT P. BURNS, *A THEORY OF THE TRIAL* 10–15 (1999); BRIAN Z. TAMANAHA, *THE RULE OF LAW: HISTORY, POLITICS, THEORY* 96–101 (2004).

7. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

8. ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 113 (2009). There are “relatively few” trials compared to our own past. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 251 (BasicBooks 1994). The United States still sees about 150,000 jury trials each year. *Id.*

predetermined goal set by a sovereign will. Third, this Essay recounts a familiar understanding of the relationship between courts and bureaucracies—in which courts impose rules that constrain the wholly-instrumental pursuit of the sovereign’s goal. Fourth, this Essay puzzles over the obvious problem for this latter understanding—namely that bureaucracies can be highly rule-bound without ceasing to be bureaucracies. Fifth, this Essay concedes that courts might have a different attitude toward rules than do bureaucracies, but that this distinction does not necessarily signal a difference in kind. And, sixth, this Essay notes that post-formalist courts have relaxed that different attitude to the point where courts begin to look like premodern bureaucracies. Still, seventh, there are aspects of society’s legal order that are discontinuous with bureaucratic ordering. Eighth, those non-bureaucratic aspects of our legal order are currently under siege, something that might simply pose a question of political will or, more ominously, reflect an inevitable “bureaucratization of the world”<sup>9</sup> and the epochal dominance of instrumental reason in modernity. Ninth, these residual elements in legal order still allow some judges and juries to realize the values implicit in society’s deepest convictions—what Paul Ricoeur called an ethics already realized—and tenth, allow those decision makers to make judgments of relative importance among the inevitably competing values in a world where “justice is conflict.”<sup>10</sup> Eleventh, on the theoretical level, that would suggest an account of the way in which our trial and appellate procedures actually *could* provide access to the valid norms implicit in our common life.<sup>11</sup> Twelfth, in our post-modern world, this theoretical account would probably rely on a kind of realism in which we know these norms because we are immersed in them through our practices.

### I. SO WHAT IS WRONG WITH BUREAUCRACY?

Weber’s classic account held that “[b]ureaucratic administration means fundamentally the exercise of control on the basis of knowledge. This is the feature of it that makes it specifically rational. This consists

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9. See generally HENRY JACOBY, *THE BUREAUCRATIZATION OF THE WORLD* (Eveline L. Kanes trans., 1973) (showing how the bureaucratic system has permeated society).

10. STUART HAMPSHIRE, *JUSTICE IS CONFLICT* *passim* (1999).

11. I am not suggesting that our practices need to await such a theory. Of course, they do not. On the darker side, I recall Hegel’s warning that a full theoretical elaboration of a form of life occurs only when the latter is at an end. “The Owl of Minerva spreads its wings only with the falling of the dusk.” GEORG HEGEL, *PHILOSOPHY OF RIGHT* 13 (T.M. Knox trans., Oxford Univ. Press 1952) (1896).

of “technical knowledge which, by itself is sufficient to ensure it a position of extraordinary power.”<sup>12</sup> It is “domination through knowledge.”

Roberto Unger explains that bureaucratic law becomes possible when the separation of state and society has already occurred. This allows for the conviction that “some social relations are and ought to be an object of human will”<sup>13</sup> which partially rejected the earlier and more universal notion that society is “the expression of an order that men do not and ought not control.” The commands of a sovereign in a bureaucratic organization will eventually take the form of general rules, rules that allow the sovereign and the top bureaucrats greater power over the decisions of the lower bureaucrats. “But this will simply be a generality of political experience, a way to get things done more effectively. It may and will be violated whenever the considerations of administrative efficiency that led to its adoption point the other way.”<sup>14</sup> Unlike formalist concepts of the rule of law, “there are no commitments to generality in lawmaking . . . that must be kept regardless of their consequences for the political interests of the rulers.”<sup>15</sup>

Alasdair MacIntyre has argued that the *contemporary* bureaucrat’s strongest claim to legitimacy stems from his or her claimed ability to deploy a body of scientific and, above all, social scientific knowledge, that is at its strongest in the form of law-like generalizations that explain and predict the future of social life.<sup>16</sup> These contemporary bureaucrats study the work of economists, sociologists, and organizational theorists that have informed the textbooks studied at the Grand Ecoles, the London School of Economics, and the Harvard Business School.<sup>17</sup> Despite differences, “in every case the rise of managerial expertise would have to be the same central theme, and such expertise . . . has two sides to it: there is the aspiration to value neutrality and the claim to manipulative

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12. MAX WEBER: THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 339 (A.M. Henderson & Talcott Parsons trans., Oxford Univ. Press 1947).

13. ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 59 (1976). Karl Polanyi’s controversial book, *The Great Transformation: The Political and Economic Origins of our Time*, is the classic account of how that conviction allowed for the imposition of the “utopian” ideal of the self-regulating market on European society. For an account of its contemporary relevance, see FRED BLOCK & MARGARET R. SOMERS, THE POWER OF MARKET FUNDAMENTALISM: KARL POLANYI’S CRITIQUE 8 (2014).

14. UNGER, *supra* note 13, at 67.

15. *Id.*

16. *Id.*

17. Philosopher Alasdair MacIntyre doubts that these law-like generalizations actually exist in any strong “scientific” sense. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 86 (3rd ed. 2007).

power.”<sup>18</sup>

This Weberian identification of bureaucratic ordering with value-free instrumental power contains the seed of a major criticism of bureaucracy and of the concern with a legal order that is simply a form of bureaucratic ordering.<sup>19</sup> Weber considered the value-free nature of social science to be a main virtue, if not a cultural necessity.<sup>20</sup> Because Weber accepted the neo-Kantian strict distinction between fact and value *and* assimilated Nietzsche’s critique of Kantian morality,<sup>21</sup> he could describe the significance of the physical and social sciences that informed the bureaucrat’s action using Tolstoi’s simple answer to the question of the importance of science to practical questions: “Science is meaningless because it gives no answer to our question, the only question that is important to us, ‘What shall we do and how shall we live?’”<sup>22</sup> From this perspective, the problem, then—with a legal order that wholly assimilates itself to bureaucratic rationality—is that such an order is systematically blind to the most important questions of value that are inevitably intertwined with adjudication.

At its worst, then, totalitarian regimes can exploit bureaucratic government’s instrumental character. In those regimes, as stability disappeared, decree followed decree in the pursuit of an ever-receding goal ideologically determined by Nature (Nazism) or History (Stalinism). In Arendt’s wonderful phrase, “all the laws are laws of movement.”<sup>23</sup> In such a world, there obviously can be no place for rights that would serve only inappropriately to limit the most efficient achievement of those transcendent goals—ends in comparison to which any more local consideration melts into air.

James Landis—a towering New Dealer, Justice Felix Frankfurter’s student and Justice Louis Brandeis’s clerk, a member of the Security and Exchange Commission, the Federal Trade Commission, and later the Civil Aeronautics Board—was celebrating this instrumental vision, though in a much more benign context, when he explained in the thirties that the administrative state grew up from the perceived inadequacies of

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18. *Id.*

19. *Id.*

20. *Id.*

21. Marianne Constable tells the story of our current problem in jurisprudence as taking these same steps through Kant to instrumentalism to Nietzsche. MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 9, 36–43 (2007).

22. RICHARD J. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* 47 (Harcourt 1976) (quoting MAX WEBER, *ESSAYS IN SOCIOLOGY* 143 (H.H. Gerth & C. Wright Mills eds., 1946)).

23. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 463 (Harcourt 1973) (1951).

eighteenth century forms to the problems posed by the perceived need to control the vast instrumental entities that dominated the nation's economic life. He said, with some satisfaction: "One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually the statutes that he translated into reality," but "assumed they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions."<sup>24</sup> The rise of the administrative process, society's more benign term for bureaucracy, represented the hope that the policies to shape our economy and society could adequately be developed by "men bred to the facts."<sup>25</sup> He believed that government bureaucracies that could harness the power of disciplined instrumental rationality were necessary in a world where private bureaucracies organized around profit maximization dominated so much of the world's economic and social life. Landis recognized that the world was already a "profoundly bureaucratic society"<sup>26</sup> and democracy's effective means had to include the same instrumental rationality that prevailed in the corporate world.<sup>27</sup>

As a child of his time, Landis could assure himself that the ultimate ends for the instrumental rationality were largely set by President Franklin D. Roosevelt's vision in the New Deal that was democratically endorsed in his early landslide victories. Consider, by contrast, this rather bleaker view of the current situation in 2016:

The House majority turned most of its attention from passing laws to investigating the bureaucracy. Political division within the nation became more bitter than usual because of unlimited anonymous political contributions; computer-assisted redistricting to make legislative districts safe for extremists; a 24-hour television news cycle that instantly sensationalizes events; a profuse set of social media that has created a free-for-all public discourse echo chamber; and permanently unresolved hot-button issues like abortion, gay rights, gun control, immigration, and global warming.<sup>28</sup>

A loss of faith in electoral politics as expressing democratic judgment would run the risk that the *only* kind of rationality that we could deploy

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24. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 217 (Oxford Univ. Press 1992) (1977).

25. LANDIS, *supra* note 5, at 144. These were the "facts" largely mediated through the devices of applied social science.

26. DAVID GRAEBER, *THE UTOPIA OF RULES ON TECHNOLOGY, STUPIDITY, AND THE SECRET JOYS OF BUREAUCRACY* 13 (2015).

27. For a contemporary argument to this effect, see generally CHARLES T. GOODSSELL, *THE NEW CASE FOR BUREAUCRACY* (2015).

28. *Id.* at 182.

publicly was instrumental rationality. And so the first concern about a bureaucratic legal order would be that it was incapable of engaging in the most important normative issues. It could deal only with means, never ends, so that “means became ends.”<sup>29</sup>

A second concern with bureaucracy focuses not on its purely instrumental character, but on its alleged penchant for the mechanical application of rules without any concern for their purposes. Notice that this claim is paradoxical, given the first criticism—which alleges that bureaucracy is *only* concerned with the effective realization of predetermined goals. Notice too that the term “mechanical jurisprudence” applied historically to an obsessive legal formalism in legal decision making. Therefore, this penchant for purposeless rule-following might not serve deftly to distinguish the legal order from (other?) bureaucracies. This charge against bureaucracy is largely the picture of “organizational gothic” that this Essay described at the beginning, whose greatest literary analyst was Franz Kafka.<sup>30</sup>

David Graeber has argued that the United States has been “a profoundly bureaucratic society” for over a century.<sup>31</sup> “If we do not notice it, it is largely because bureaucratic practices and requirements have become so all-pervasive that we can barely see them—or worse, cannot imagine doing things any other way.”<sup>32</sup> Surprisingly, market societies produce more rules and procedures for applying them, not fewer.<sup>33</sup> As Kafka understood, bureaucratic procedures have their allure:

The simplest explanation for the appeal of bureaucratic procedures lies in their impersonality. Cold, impersonal bureaucratic relations are much like cash transactions, and both offer similar advantages and disadvantages. On the one hand, they are soulless. On the other, they

29. RALPH P. HUMMEL, *THE BUREAUCRATIC EXPERIENCE: THE POST-MODERN CHALLENGE* 89 (5th ed. 2008).

30. ROBERT P. BURNS, *KAFKA’S LAW: THE TRIAL AND AMERICAN CRIMINAL JUSTICE* (2014); see also *supra* note 1 (“[O]rganizations are ‘sites of darkness’, ‘labyrinths with endless corridors’; and ‘locked doors hiding secrets’ shifting from the ‘dark street’ to the ‘cramped office.’”).

31. GRAEBER, *supra* note 26, at 13.

32. *Id.*

33. This is consistent with Polanyi’s argument that a market society is a highly artificial construct that requires constant maintenance through administration and undercuts the vision of the market as purely “spontaneous ordering.” See generally THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (W.W. Norton & Co. 2009) (proposing that classical liberalism and capitalism have died and been replaced by interest group liberalism). Indeed, John Dewey concluded that Polanyi’s account had effectively demolished Hayek’s argument in *The Road to Serfdom* (2007). ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 460–61 (1991). For a criticism of the toxic combination of neoliberal economics and repressive penal practices, see BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 191–94 (2011).

are simple, predictable, and—within certain parameters at least—treat everyone more or less the same.<sup>34</sup>

It was this relatively impersonal, rule-bound nature of judicial proceedings that Hannah Arendt celebrated as placing the hedges between men that allowed them to act freely within those bounds (“Good fences make good neighbors!”). By contrast, totalitarian regimes, as she put it, press men up against one another so that there is no room for anyone to move. Graeber, however, does not want us to become too romantic about the doings of actual bureaucracies: “Even on the lowest levels, those who enforce the law are not really subject to it. It’s extraordinary [sic] difficult, for instance, for a police officer to do *anything* to an American citizen that would lead to that officer’s being convicted of a crime.”<sup>35</sup>

Charles T. Goodsell has argued that bureaucracy—sometimes even its strict Weberian sense<sup>36</sup>—can be made to serve benign purposes. Graeber contends, however, that bureaucracy as the mechanical application of rules is the *inevitable* device employed for truly malevolent purposes.

Situations created by violence—particularly structural violence, by which I mean forms of pervasive social inequality that are ultimately backed up by the threat of physical harm—invariably tend to create the kinds of willful blindness we normally associate with bureaucratic procedures. To put it crudely: it is not so much that bureaucratic procedures are inherently stupid . . . but rather that they are invariably ways of managing social situations that are already stupid because they are founded on structural violence.<sup>37</sup>

Further,

Bureaucratic knowledge is all about schematization. In practice bureaucratic procedure invariably means ignoring all the subtleties of real social existence and reducing everything to preconceived mechanical or statistical formulae. Whether it’s a matter of forms, rules, statistics or questionnaires, it is always a matter of simplification.<sup>38</sup>

William Stuntz indicts the contemporary American criminal justice

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34. GRAEBER, *supra* note 26, at 152.

35. *Id.* at 195.

36. Goodsell argues that there remains a place for that kind of bureaucracy, though he seems to see a place, in various contexts, to some democratizing and even privatizing devices. GOODSSELL, *supra* note 5, at 125–66.

37. GRAEBER, *supra* note 26, at 57.

38. *Id.* at 57. “[I]f one accepts Jean Piaget’s definition of mature intelligence as the ability to coordinate between multiple perspectives (or possible perspectives), one can see, here, how bureaucratic power, at the moment it turns to violence, becomes literally a form of infantile stupidity.” *Id.* at 80–81.

system for this reliance on complex mechanical formulae embedded in criminal law doctrine which increasingly defines criminality in strictly behavioral terms without any reference to contextual moral evaluation.<sup>39</sup> These doctrinal changes support bureaucratic extraction of confessions followed by pressure on defendants rooted in the mandatory minimum sentences. These, in turn, support charge bargaining and the increased discretionary maximum sentences that further enhance prosecutorial bargaining power and so reduce the eligibility of trial and have led to mass incarceration.<sup>40</sup> These changes are in contrast to an earlier regime where crimes were defined more “vaguely” and where the kind of contextual moral evaluation that we expect from local juries occurred regularly in the much more frequent jury trials that we conducted.<sup>41</sup>

The final consideration that suggests that we might not want our legal order to be fully bureaucratized is Hannah Arendt’s notion of bureaucracy as a “rule by nobody.”<sup>42</sup> “Bureaucracy is the form of government in which everybody is deprived of political freedom, of the power to act; for the rule by Nobody is not no-rule, and where all are equally powerless we have a tyranny without a tyrant.”<sup>43</sup> The central notion is that truly unspeakable things are more likely to occur when no human being is held responsible for what does occur, when human events take on a kind of natural inevitability.<sup>44</sup>

This concern about the abdication of human responsibility in our legal order has been expressed in different contexts. Some years ago, Joseph Vining complained about appellate opinions written by committees of clerks, which expressed no human voice:

Opinions now more often seem things written by no one at all. They are long, rather too long to be written by men struggling with a vast increase in caseload. They are too much things of patchwork, things which seem, on their face, to express more the institutional process of their making than the thinking, feeling, and the reasoning of author and those persuaded with him. Poor craftsmanship, if that were the

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39. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 308–09 (2011).

40. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 115 (2012).

41. STUNTZ, *supra* note 39, at 308–09.

42. *See generally* HANNAH ARENDT, *ON VIOLENCE* (1970) (arguing that the greater the bureaucratization of public life, the greater the draw to violence).

43. *Id.* at 81.

44. Kafka has a wonderful portrayal of the functionaries distributed in a warren of offices, none of whom are responsible for what occurs, but who are only unhappy because people believe them to be hardhearted. FRANZ KAFKA, *THE TRIAL* 67–70 (Breon Mitchell trans., Schocken Books 1998).

problem, can be cured by gradually replacing the authors of opinions with better craftsmen. The writing of opinions by no one, bureaucratic writing, is not so easy to change once it has taken hold.<sup>45</sup>

“Lawyers assume that legal writing is a means of access to the legal mind” and oral argument is actually “a dialogue undertaken on behalf of us all.”<sup>46</sup> To the extent the United States Supreme Court does become a bureaucracy, that assumption cannot be made.<sup>47</sup>

At the other end of our legal order, some criticize the ways in which the judicial system deprives juries of the knowledge of the consequences of their decisions—most dramatically in criminal sentencing<sup>48</sup>—and of morally relevant aspects of the full factual narratives that bring the case to trial.<sup>49</sup> In both cases, and in different ways, the system deprives juries of the means to ensure fully responsible decision making. Rules seek to transform even the jury into a cog in a bureaucratic process.

## II. ONE VISION OF THE RELATIONSHIP BETWEEN BUREAUCRACIES AND COURTS

One common vision of the relationship between bureaucracies and courts relies on the distinction between instrumental reason and formalistic rule following. In this view, our bureaucracies, true to MacIntyre’s account, are the sites—and the means—for deployment of manipulative techniques guided by technocratic science.

By contrast, the courts provide constraints on this function by insisting that the agencies “abide by the rules” even when that interferes with the most effective action—the unlimited achievement of “domination through knowledge.”<sup>50</sup> This vision relies on a scheme that comes

45. Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 251 (1981).

46. *Id.* at 253.

47. Joseph Vining, *Justice and the Bureaucratization of Appellate Courts*, 2 WINDSOR Y.B. ACCESS TO JUST., 3, 9 (1982); see generally JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2006) (analyzing the force behind the human language and the ethics behind human expression within the law). See also Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983) (indicating that the hierarchy present in the judiciary renders the decision or opinion as not wholly the judge’s own work).

48. See William E. Nelson, *Political Decision Making by Informed Juries*, 55 WM. & MARY L. REV. 1149, 1160 (2014) (arguing that it is improper to keep jurors ignorant of law and facts that might influence their judgment).

49. See *United States v. Shonubi*, 895 F. Supp. 460, 493 (E.D.N.Y. 1995) (demonstrating Judge Jack Weinstein’s views on the sophistication of American juries); see also Peter W. Murphy, *Some Reflections on Evidence and Proof*, 40 S. TEX. L. REV. 327, 328 (1999) (arguing that it is a benign development that we now entrust juries with more evidence and exclude less).

50. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 225 (Guenther Roth & Claus Wittich eds., 1978).

naturally to the modern mind, probably because of its attachment to an identification of rationality with a fundamentally technocratic understanding of science, one in which science's principle of sufficient reason, its criteria of validity, are prediction and control. So Kant, the paradigmatic modern philosopher, built his ethical theory around the contrast between our natural inclination to pursue our own happiness, the satisfaction of our (naturally determined) desires, and the limitation on that pursuit through self-legislated rules—the various formulations of which Kant called the Categorical Imperative. At a much more localized level, the law of professional responsibility is built around a largely instrumental understanding of the lawyer's obligation to “zealously” pursue his or her client's ends<sup>51</sup>—as understood by the client—and the lawyer's constraint by specific rules that serve to limit that otherwise generally instrumental practice—for example, rules prohibiting misrepresentations of fact and law.<sup>52</sup>

The Administrative Procedure Act (“APA”)—the “fierce compromise” that emerged in partial reaction to the perceived tension between the instrumental rationality of New Deal agencies and traditional notions of legal rules as protective of individual rights—imposed very limited formalisms on internal agency action.<sup>53</sup> Under the APA, reviewing courts were left to determine whether the agency's final action was “unlawful,” “contrary to constitutional right, power, privilege or immunity,” “in excess of statutory jurisdiction, authority of limitations,” “without observance of procedure required by the law,” or “not in accordance with law”—all formalist criteria that require agencies to “follow the rules laid down,” and then, somewhat more curiously for this scheme “arbitrary, capricious, [or] an abuse of discretion.”<sup>54</sup> The APA's original understanding did reflect a dichotomy between instrumental pursuit of the ends very broadly set by legislative intent and the constraints on that pursuit by specific legislative and constitutional rules.<sup>55</sup>

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51. See MODEL RULES OF PROF'L CONDUCT Rs. 1.2, 1.3 (2012) (discussing the distribution of authority between lawyer and client, as well as rules pertaining to diligence).

52. MODEL RULES OF PROF'L CONDUCT Rs. 3.3, 3.4, 4.1 (2012).

53. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558–59 (1996) (stating that the “balance that the APA struck between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force, with only minor modifications”); see generally 5 U.S.C. §§ 701–06.

54. 5 U.S.C. § 706.

55. I am not interested here in the vast web of doctrine that surrounds these categories or the way in which case law has rendered the neat dichotomy I am suggesting much more problematic.

We often conceive of the relationship between our police bureaucracies and courts in a similar way. The police, we are told, are in the “competitive enterprise of ferreting out crime,” an enterprise in which we expect bureaucratic efficiency.<sup>56</sup> We are not surprised that they rely on social scientific methods in their work: think of the Comstat statistical system for deploying officers and the Reid-Inbau interrogation manuals, which is based loosely on applied psychology and the controversial integration of professional psychologists in military interrogation. The courts are often viewed as imposing rule-based constraints on police tactics, whether through the Fourth Amendment’s prohibition on unreasonable searches and seizures or through the Fifth and Sixth Amendment’s limits on police interrogation, both through the assumed deterrent effects of the exclusionary rule. That much of this often Byzantine superstructure of rules and exceptions to rules is practically irrelevant, invoking “mostly symbolic and largely ineffectual constitutional laws”<sup>57</sup> suggests that it says more about our thought-ways than about our actual institutional commitments.

### III. FOLLOWING RULES IN BUREAUCRACIES AND COURTS

It may be helpful at this point to distinguish explicitly in ideal-type terms four different kinds of decision making: (1) instrumental decisions, the choice of the most effective means to achieve predetermined ends set by a sovereign will; (2) formalist decisions, determinations as to whether a particular act or event (always under a description) fits within a verbal category, a determination, as will see, has an indeterminate relationship to the realizing of the sovereign’s goals; (3) decisions that best embody a value, norm, standard, or ideal incompletely comprised within the strict semantic meaning of a rule, such as constitutional decisions that reflect one way or another a transcendent “higher law”<sup>58</sup> or certain “purposive” interpretations of statutes; and (4) decisions that determine practically which relevant competing value is most important in a concrete situation as interpreted through all the narrative and dramatic resources we can deploy, such as those that constitute the trial.<sup>59</sup> The first of these forms of decision making is clearly bureaucratic. The second is likely to be bureaucratic, though in a “legal system” formalist decision making may

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56. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

57. RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 291 (2008).

58. See Edward S. Corwin, *The Higher Law Background of American Constitutional Law*, 42 HARV. L. REV. 149, 153 (1928) (explaining the concept of a “higher law” as one that is derived from a common belief that the law embedded in the Constitution is “superior to the will of human governors”).

59. ROBERT P. BURNS, *A THEORY OF THE TRIAL passim* (1999).

take on a life of its own detached from the will of the sovereign. The third and fourth styles of decision making are not bureaucratic at all.

Notice how this taxonomy is not, once again, congruent with the institutional divide between agencies and courts. First, bureaucracies may be highly rule-bound to allow the sovereign and the highest bureaucrats the greatest control over the lower bureaucrats. Second, the most rule-bound agencies will find themselves inevitably exercising discretion as new situations arise. Third, courts may embrace instrumental ideals that suppress adherence to the most obvious meanings of rules, whether invoking a utilitarian, wealth-maximizing, or pragmatist justification. Philosophical pragmatism provided much of the intellectual underpinning of the Realist movement in the United States. For John Dewey, for example, truth was achieved when the environment was transformed to eliminate an imbalance between the needs of the human organism and its environment, a so-called “problematic situation.” “[S]ince the purpose of knowing is to assist in controlling the environment, success at it (truth) is effective control.”<sup>60</sup> A persistent criticism of Dewey’s philosophy has been that it too uncritically attempted to assimilate all intelligent practice to the instrumental methods of physical science. Thus, even a sympathetic critic of Dewey’s philosophy concludes that Dewey’s understanding of scientific method “does not sufficiently help us to understand the crucial differences between scientific and democratic communities, or how instrumental rationality and scientism can deform the deliberation and judgment required for the practice of democracy.”<sup>61</sup> And so it is not surprising that we find Brian Tamanaha harshly criticizing Realist courts as acting inconsistently with the rule of law.<sup>62</sup>

So when a Realist judge decides a case, he or she seems to be acting like a bureaucrat unburdened by a formalist understanding of the rule of law. On the other hand, a formalist may still be a bureaucrat, albeit one

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60. WILLIAM D. BLATTNER, *The Primacy of Practice and Assertoric Truth: Dewey and Heidegger*, in HEIDEGGER, AUTHENTICITY AND MODERNITY 231, 239 (Mark Wrathall & Jeff Malpass eds., 2000).

61. RICHARD J. BERNSTEIN, *PHILOSOPHICAL PROFILES: ESSAYS IN A PRAGMATIC MODE* 271 (1986).

62. *See generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004) (discussing the concerns of Western conservatives about the decline of the rule of law and how the radical Left promoted this decline); *see also* Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 *DEPAUL L. REV.* 469, 504 (2007) (“In the present atmosphere, with prevailing misunderstandings about the Realist position and about the implications of postmodernism, judges may become convinced that to decide in a rule-bound fashion is a chimerical or naive aspiration.”).

that embraces, like a “rule-utilitarian,” the importance of adhering to the semantic meaning of rules for the sake of consistency and the control of the lower bureaucracy, in this case, the lower courts. The formalist is simply a more Weberian bureaucrat.<sup>63</sup> Unger described the continuity between primitive discretionary bureaucracies and formalist courts as such:

The administrator focuses on the most effective means to realize given policy objectives within the constraints of the law. For him, rules of law are a framework within which decisions are made. For the contrary, the law passes from the periphery to the center of concern. Adjudication calls for distinctive sorts of arguments, and its integrity demands special institutions and personnel.<sup>64</sup>

Under the formalist vision of the rule of law, the judge becomes somewhat detached from an immediate understanding of the will of the sovereign and relies on adherence to the conventions of ordinary adjudication to determine whether a particular case falls within the authoritative verbal category, as in the second style of decision making described above. This formalism, however, is often simply thought of as the most appropriate method actually to affect the will of the sovereign, because it is the statute’s language that provides the most reliable guide to an otherwise elusive sovereign will.<sup>65</sup> This would mean that there might be a difference in degree between bureaucracy and court, but not really in kind. To the extent that the canons of statutory interpretation are rules of thumb—and given their internal tension that’s all they could be—courts again come to resemble bureaucracies more closely. This is especially true for courts enforcing the open-ended statutes that often form the organic statutes under which agencies operate.

#### IV. IS THE LEGAL ORDER ANYTHING OTHER THAN A SOMETIMES STYLIZED BUREAUCRACY FOR EFFICIENTLY ACHIEVING THE WILL OF THE SOVEREIGN?

Jerry Mashaw similarly characterizes “bureaucratic rationality,” specifically in the context of administrative adjudication, as the identification of the most efficient means to achieve the goals of a predetermined legislative will.<sup>66</sup> In the program he studies, the Social

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63. See *supra* Part I (discussing the issues a bureaucracy creates).

64. UNGER, *supra* note 13, at 177.

65. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI L. REV. 533, 547 (1983) (explaining that “because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable. . . . The body as a whole, however, has only outcomes”).

66. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 25–26 (1985).

Security Disability Program, he takes that will to be an Austinian command: pay Social Security Disability Benefits only to those eligible as determined by the statutory criteria. Thus factual accuracy and fairness of statutory fit are the bureaucrat's goal and thus the appropriate approach is "technocratic," in that it seeks the "least cost methodology" for assembling the relevant facts and making the dispositive categorization. By contrast, as he puts it, questions of "value or preference" are "obviously irrelevant to the administrative task, and it would view reliance on nonreplicable, nonreviewable judgment or intuition as a singularly unattractive methodology for decision."<sup>67</sup> After all, the legislature should have resolved all the value questions, in the Weberian framework, by an act of subjective will. In this context, bureaucratic determinations involve "information retrieval and processing" in a way Weber would recognize."<sup>68</sup> After all, "bureaucratic administration means fundamentally domination through knowledge" through the "usual bureaucratic routines."<sup>69</sup>

Mashaw distinguishes bureaucratic rationality from the "moral judgment model" whose natural home he finds in traditional understandings of common law adjudication, something which will be discussed shortly.<sup>70</sup> But he also argues that some administrative agencies have embraced not bureaucratic rationality, but a moral judgment model in developing norms in case-by-case adjudication that we might think continuous with civil or criminal adjudication.<sup>71</sup> The moral judgment model is one that centrally defines rights and determines which competing claim is the more deserving. It is not the importance or unimportance of rules that distinguishes bureaucratic from traditional adjudication, as Tamanaha seems to suggest,<sup>72</sup> but rather it is the way in which the process of adjudication is or is not "value-defining" where "the question is not just who did what, but who is to be preferred, all things considered, when interests and the values to which they can be relevantly connected conflict . . . so the criminal trial is interested not just in guilt, but in guiltiness."<sup>73</sup> Mashaw concludes that "a contextualized exploration of individual deservingness" has procedural implications that

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67. *Id.* at 26.

68. *Id.*

69. *Id.*

70. *Id.* at 29.

71. *Id.* at 30–33.

72. See *supra* text accompanying note 62 (discussing Tamanaha's views on the short comings of the Realist court and the inconsistent manner in which they act).

73. MASHAW, *supra* note 66, at 29–30.

connect up with many of our usual procedural commitments to due process, as expressions of what H.L.A. Hart called the first principle of procedural justice: “Let the other side be heard.”<sup>74</sup>

Notice again how the divide between bureaucracy and legal judgment does not track the dichotomy between agency and the legal system. The Supreme Court in *SEC v. Chenery Corp.* held, over vigorous dissents, that agencies had virtually the same authority as did courts to develop and refine the norms by which they passed judgment on private behavior.<sup>75</sup> This was true, the Court ruled, even if the “new rule” was declared in a case of first impression within the agency and had legal consequences for past behavior.<sup>76</sup> This value-defining enterprise cannot be the province of “rule by nobody.”<sup>77</sup> It requires more of the decision maker than does bureaucratic decision making of either the discretionary or rule-bound variety. The manner of “playing by the rules”—even to the extent that it is possible—means screening out the features of a concrete situation that common sense morality says is relevant to the decision. Here, for example, is Kalven and Zeisel’s list of the considerations that juries have found relevant though not envisioned by the law of rules: that the defendant was seriously injured at the time of the crime, or that the victim is not enthusiastic about proceeding, or that the defendant’s behavior is rarely prosecuted, or would not be illegal across the river in the next state, or that the defendant was not represented by counsel, or that he was suffering horrendous personal tragedies during the time he (even “knowingly”) failed to file an income tax return, or that the defendant used a toy gun rather than a real gun in an armed robbery.<sup>78</sup> In each case, the jury was willing to allow the factual context to “talk back” to a law of rules that demanded bureaucratic enforcement. The jury was able in each case to honor aspects of the situation that the trial’s devices disclosed<sup>79</sup> in a manner examined in the next Part.

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74. *Id.* at 29–31.

75. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (holding that administrative judgments are entitled to the greatest amount of weight by appellate courts, as they are the “product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts”). This case is also referred to as *Chenery II*, because it was the second time it reached the Supreme Court.

76. *Id.* at 203.

77. See HANNAH ARENDT, *ON VIOLENCE* 38 (1970) (defining the rule by nobody as bureaucracy or the rule of an elaborate system of bureaus in which no men can be held responsible).

78. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 293, 338 (1966).

79. On truth as disclosure, see generally JAMES J. DICENSO, *HERMENEUTICS AND THE DISCLOSURE OF TRUTH: A STUDY IN THE WORK OF HEIDEGGER, GADAMER, AND RICOEUR* (1990).

## V. ARE THERE ASPECTS OF OUR LEGAL ORDER THAT ARE NOT BUREAUCRATIC?

The contemporary American trial cannot be called a bureaucratic institution. This is precisely why it is under pressure.<sup>80</sup> There are fewer trials because of the triumph of plea bargaining, the doctrinal dominance of microeconomic analysis in antitrust, the rise of economic theories of tort law, the embrace of “objective” doctrines of qualified immunity in civil rights law that can be adjudicated on summary judgment and subject to interlocutory appeals that prevent trials (indeed some of which recognize a “right not to stand trial”),<sup>81</sup> and easier access to summary disposition on motions to dismiss and motions for summary judgment. Many developments move the legal order in a bureaucratic direction: the marginalization of the full narrative dramatic of the trial, the elevation of a mechanical practice of rule following, and the assimilation of legal decision making to expert economic determinations. They ensure that there will be fewer cases that turn on the significance of specific factual contexts and on the responsible engagement of decision makers.

Trials begin with opening statements. Opening statements allow counsel to tell the jury “what the case is about.” They allow the individual parties largely to define both the factual and normative issues that the case presents. The relatively free narrative of opening statements allows counsel to invoke the full range of life-world norms that are embedded in the common sense of the jury, simply by telling an engaging story. Of course the story is constrained by the rest of the trial, which effectively requires counsel to “keep his promise” to offer evidence that actually supports the narrative presented. Most of the evidence at trial is presented through the disciplined narratives of direct examination, limited to “the language of perception” and so, in its concreteness, offering a critique of the broader and more comprehensive narratives presented in openings.<sup>82</sup> Each direct examination is followed by cross examination. The cross examination performs a number of different functions: it can point out the details omitted from the direct that may change the significance of the narrative; it can suggest that the ordering or characterization of the episodes in the direct’s narratives emerge from a willful interpretation of a relatively indefinite set of perceptions; it can offer a full “counter-narrative” of the events; and it can suggest that the witness’s account is the result of a range of failings from over-casualness to negligence to

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80. ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 110–11 (1999).

81. *See generally* *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (explaining the small subset of cases where a right not to stand trial will justify an interlocutory appeal).

82. ROBERT P. BURNS, *A THEORY OF THE TRIAL*, 130–31 (1999).

deliberate misstatement.

The defendant's case in chief follows the plaintiff's case in chief, the plaintiff's rebuttal case follows the defendant's rebuttal case, and sometimes the defendant's surrebuttal follows the plaintiff's surrebuttal—a dialectic that allows the jury to see the case from every available perspective. The doctrine of materiality keeps the inquiry loosely tethered to the norms embedded in the substantive law and the requirement of testimony based on personal knowledge in the relatively value-free language of perception allows for the reinterpretation of events from the multiple perspectives that the trial itself creates. The requirement of foundations for all testimony assures that the question, “why do you believe this is true?” be answered before any particular bit of testimony is offered. These are all clarifying “parliamentary” devices, not hyper-technical requirements.<sup>83</sup>

In sum, a well-tried case can actualize a usually dormant, but extremely powerful democratic, common sense in order to achieve real insight into the persons and events being tried. The trial allows for a simultaneous grasp of facts, norms, and possibilities for judgment that its methods provide. It is an extremely refined and complex institution that embodies a set of conservative practices that is suited to our contemporary needs. It proceeds by the construction and deconstruction of different sorts of narratives thrown into dramatic confrontation. The opening statements, for example, allow the jury to contemplate the competing “as-structures” of the two cases (i.e., *as* a broken promise, *as* an act of disloyalty, or *as* an innocent misunderstanding). This provides the wherewithal to determine what the case *means* and what its dominant significance is in the common world within which it is placed. Direct examination allows the jury to evaluate the adequacy of the evidence supporting competing significances and cross examination allows the jury to see the inevitable willfulness that inheres even in apparently chaste descriptions of events. These devices refine and elevate common sense judgment well beyond its quotidian version largely created by the mass media. Because the trial respects the conflicting values embedded in the two cases, it really can serve as the crucible of democracy.

Triable cases always present conflicting values. The “law of rules” may pull in one direction. After all, rules provide stability and some measure of predictability. They make planning possible and protect us against the arbitrary use of power. In a liberal democracy, they should usually express the democratic will of the people. But common sense

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83. For an explanation of the distinction, see Robert P. Burns, *The Withering Away of Evidence Law: Notes on Theory and Practice*, 47 GA. L. REV. 691, 694 (2013).

morality may pull in another direction. More controversially—though certainly rooted in our history—the jury may take on an overtly political role and “send a message” to discourage abuses of power.

The trial’s fierce oppositions—embedded in differences in role and language—create almost unbearable tensions, the resolution of which, in modern society, actually constitutes justice.<sup>84</sup> This can occur if the juror’s mind dwells<sup>85</sup> in the tensions that allow for insight into the poles of the conflict, a kind of grasp or integration that cannot be reduced to representation, definitions, and inferences that bureaucratic decision making depends on, but rather requires a largely tacit grasp of a situation as a whole.

The trial is, in a word, dramatic.<sup>86</sup> It is essentially dialogic and allows for the interaction of relatively autonomous actors. It is not only recited, but performed. In good drama, this interaction of free agents is not simply a movement, but a revelation. It grants us “an insight, however limited, into the worlds that exist within horizons of meaning, within which a complex action unfolds, illuminated and judged by it.”<sup>87</sup> Dramatic forms keep us in the middle of things. As in drama, the result of a trial may be “both fittingness of surprise,” unlike what can be derived from the “semantic content of rules.” The decision makers at trial, to the extent that they allow themselves to be affected by its drama, may lose their ability to act in a purely instrumental manner.

Some of our limited understanding of law as a set of rules may come from our usual academic focus on the products of the appellate courts. Most lawmaking, in Mashaw’s sense of value defining,<sup>88</sup> occurs in the trial court through practices that are much more complex than simple rule-following. This will continue to be true unless, of course, either intentionally or acceding to glacial economic and social forces, we allow trials to disappear or reduce them to lower-level appellate courts, and in our terms, bureaucracies, by funneling decision making into their response to dispositive motions “on the papers.” Judge Patricia Wald

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84. See HAMPSHIRE, *supra* note 10, at 22 (noting that conflict, both social and psychological, plays its own role in creating a harmony that defines social justice).

85. MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* 332–34 (1958).

86. I follow DAVID C. SCHINDLER, HANS URS VON BALTHASAR AND THE DRAMATIC STRUCTURE OF TRUTH: A PHILOSOPHICAL INVESTIGATION (2004).

87. *Id.* at 17–18 (quoting HANS URS VON BALTHASAR, *THEO-DRAMA: THEOLOGICAL DRAMATIC THEORY*, VOL. 1: PROLEGOMENA 265 (Graham Harrison trans., Ignatius 1988)).

88. See *supra* text accompanying notes 66–74 (arguing that the justice system has gradually moved away from trials, in favor of bureaucratic resolutions. This doctrinal dominance comes at the expense of the common sense morality that accompanies the inherently dramatic trial).

warned years ago against the impoverishment of law even at the appellate level where appellate judges write the opinions without the benefit of what “the discipline of the evidence”<sup>89</sup> at trial has revealed.<sup>90</sup>

So the contemporary American trial, even though under siege, provides an aspect of our legal order that cannot fairly be called bureaucratic. It encourages neither instrumental decision making nor the mechanical application of rules. What about appellate decision making? Does it offer a forum for decision making that cannot fairly be called bureaucratic?

As mentioned above, some years ago Joseph Vining decried the bureaucratization of appellate decision making:<sup>91</sup> “The courts are among the last of the great voices to be rationalized, detached from substance and reduced to process, as a result of that pursuit of objectivity outside ourselves which has produced both the radical individualism and the impersonal bureaucracy we know today.”<sup>92</sup> He hoped that the full “bureaucratization of courts may not come to pass” and that we opt for the authoritative over the authoritarian.<sup>93</sup> To this end, he hinted vaguely that we should look “anew at the connections and distinctions between lawyers and the practitioners of other disciplines, not just the social sciences to which we have recently attended.”<sup>94</sup> His suggestion, in some ways reminiscent of MacIntyre’s views, is that many of the social sciences themselves embody the forms of instrumentalism that are characteristic of our bureaucratic and individualistic era.

Vining is not alone in suggesting that we need the humanistic disciplines even to see those aspects of the modern legal order that are not bureaucratic. Frederick Schauer has recently offered one distinctively modern account of the legal order, defending a version of the legal order that he calls “presumptive positivism” (i.e., that contemporary law, understood through the lens of the social sciences, really is embedded in rules that courts can and do presumptively follow).<sup>95</sup> These rules have no intrinsic connection with justice. They “entrench the past” and “serve

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89. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 162 (1994).

90. Patricia M. Wald, *Summary Judgment at Sixty*, 76 *TEX. L. REV.* 1897, 1943 (1998).

91. See *supra* text accompanying notes 45–47 (describing the increasingly bureaucratic tendencies of the courts to be a product of a necessity for bureaucratic efficiency in law enforcement).

92. Vining, *supra* note 47, at 15.

93. *Id.*

94. *Id.*

95. FREDERICK SCHAUER, *RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 196–206 (1991).

the goals of stability for stability's sake."<sup>96</sup>

Writing from a distinctively humanistic<sup>97</sup> perspective, Marianne Constable suggests that the identification of law with systems of rules, even those that realistically can be "followed," misses what is most important about law—its constitutive connection with justice.<sup>98</sup> "The tradition of jurisprudence treats the issue of how reasons for action become reasons to act as central. . . . [H]ence presumptive positivism fails to provide an account of what is distinctive to law as a normative and social system, beyond the social convention of calling it 'law.'"<sup>99</sup> Constable argues that Schaur's picture of the contemporary legal system understands rules as the results of social processes understood through the lens of the social sciences.<sup>100</sup> His presumptive positivism locates the source of motivation for decision in empirically knowable aspects of society and its norms, understood as a kind of fact. Further, Constable contends that "[i]n so doing presumptive positivism minimizes the place of human agency and freedom in initiating action and sets aside the possibility that a decision, as the action and responsibility of an actor rather than the outcome of a rule may instantiate 'law.'" To put it in Arendt's terms, law, as opposed to bureaucracy, cannot be "rule by nobody."<sup>101</sup> Constable argues that even today there is more to law:

In modern legal texts and practices are to be found not only presumptively positivist pedigreed "rule-formulations" and decisions grounded in rules and overriding social factors, however. In modern legal texts and practices are to be found judgments of responsibility and invocations of justice. Invocations of justice—which may not be explicitly stated, much less take propositional or even meaningful semantic form—are not at all acknowledged in Schauer's account of rules and social norms. Yet these invocations reveal the distinctiveness of law.<sup>102</sup>

The place of rules in a legal order depends on larger considerations. "Stability for stability's sake, unwillingness to trust decision-makers to depart too drastically from the past, and a conservatism committed to the view that changes from the past are more likely to be for the worse than

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96. *Id.* at 155–58.

97. She characteristically calls her perspective "rhetorical." CONSTABLE, *supra* note 21, at 8–11. It seems that Heidegger, especially the later Heidegger, is her most powerful influence.

98. *Id.* at 8.

99. *Id.* at 74.

100. *Id.*

101. *Id.* at 69–70.

102. *Id.*

for the better.”<sup>103</sup> And so the ultimate determination on the place and manner of rule-following in adjudication must be a matter of a responsible judgment: “Whether the favoring of the *status quo* over the new and stability for stability’s sake is judged a worthwhile goal is again not a matter of rules. It depends instead on a ‘substantive conception of where we are, and where we want to be.’”<sup>104</sup>

Constable thus concludes that justice can only exist in the “silence[s] of modern law,” not in its rules, but rather in the ability of legal proceedings to disclose a range of the aspects of a situation relevant to a just outcome even if not encompassed by the “semantic meaning” of a rule.<sup>105</sup> The possibilities for “justice and law” only “occur in glimpsing what lies behind the rules, ‘the poem behind the poem,’” the reality that can only show itself in the law’s practices, usually unveiled by the humanistic disciplines, not the positivist social sciences.<sup>106</sup>

James Boyd White has for many decades looked to the humanistic disciplines to provide an account of law that is not bureaucratic. Focusing mainly on the work of the appellate courts, he has argued that law “is not at heart an abstract system or scheme of rules” nor a set of institutions describable in the language of social science, but “an inherently unstable structure of thought and expression, built upon a distinct set of dynamic and dialogic tensions. It is not a set of rules at all, but a form of life. It is a process by which the old is made new, over and over again.”<sup>107</sup> Law is, then, “an activity of mind and language: a kind of translation, a way of claiming meaning for experience and making that meaning real.”<sup>108</sup> In a hearing, “the central institution of law as we know it,”

everyone got his or her opportunity to present the case in the best way possible, and to answer what was said on the other side. In a legal hearing, one could say whatever it was necessary or crucial to say about this injury, this divorce, this failed agreement, this event in the real world.<sup>109</sup>

When this joint performance works well—as of course it does not always do—it subjects the material of the law, and the facts too, to the most intense and searching scrutiny. Instead of seeking the single

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103. *Id.* at 71.

104. *Id.* at 157.

105. *Id.* at 177.

106. *Id.* at 178.

107. James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES L. 381, 382 (2011).

108. *Id.* at 386.

109. *Id.* at 385.

meaning of the statutes, judicial opinions, regulations, and other materials of authority, the two lawyers together are demonstrating the range of possible meanings that these texts may be given, and using all available powers to do so.

The two sets of arguments, in making explicit the range of possible choices open to the judge, make clear that the judge will have to make his or her choice and *have to accept responsibility for it*—not push the decision off on a statute or other text that is read in a conclusory or unthinking way.<sup>110</sup>

The resolution of the tensions created by the lawyer’s arguments “cannot be achieved simply by reference to a rule or practice or phrase or idea, but must be achieved afresh, in every case, by an art of judgment. This very fact gives life to the law.”<sup>111</sup> The discipline of legal argumentation is, however, only part of the story:

A part of [the judge’s] mind will think in terms of legal arguments of the kind we have been discussing, testing them against each other for their force and power. But beneath that layer of the mind is another, an intuitive center, educated by experience and reflection, that is really seeking the right decision. The judge knows that her written opinion can never express or justify what the center of herself is doing, the secret spring of judgment at her core. This tension cannot be resolved in any a priori way by a rule or principle, but must, like the others mentioned, be lived through in detail and addressed anew every time.<sup>112</sup>

The opinion therefore, however honestly written, has some of the characteristics of a false pretense: This is why I decided the case as I did, the opinion says; but the judge knows that the true springs of decision are deep within her, and can never be fully known or explained.

This is another tension inherent in the legal process.<sup>113</sup>

Even a (perhaps former) rationalist with great sympathy for scientific modes of thought such as Judge Richard Posner, writing in a very different idiom, says something similar. He contends that at the *appellate* level below the Supreme Court, where the facts have *already* been determined either by the methods of the trial described above or more peremptorily in a dispositive motion, “most cases can be and are decided by a straight-forward application of unchallengeable legal rules.”<sup>114</sup> Still,

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110. *Id.* at 391–93.

111. *Id.* at 394.

112. *Id.*

113. *Id.* at 394 n.13.

114. RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 176 (2016).

he says this about the decisional philosophy he generally embraces:

Judicial pragmatism at its narrowest sense would equate to cost-benefit analysis, but it is not exhausted by that or any other economic concept. The balancing done by judges faced with having to decide a case in what I've called the "open area" is often . . . inflected by "the personal, the emotional, and the intuitive." It is not measurement, this "balancing," but . . . "moral intuition." Few judges are willing to acknowledge that it influences any of their decisions. Many are unaware that it does.<sup>115</sup>

This Essay suggests that a fair attempt to give an account of what "moral intuition" involves would bring one into the sphere that White describes and that Arendt called "reflective judgment." This occurs within a community of judgment where

I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent . . . . The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion.<sup>116</sup>

Judgment's impartiality comes from "enlarging" its understanding in a distinctive manner:

The greater the reach—the larger the realm in which the enlightened individual is able to move from standpoint to standpoint—the more 'general' will be his thinking. This generality, however, is not the generality of the concept . . . . It is, on the contrary, closely connected with particulars, with the particular conditions of the standpoints one has to go through in order to arrive at one's own general standpoint.<sup>117</sup>

Unger ends his study with these words:

The search for this latent and living law—not the law of prescriptive rules or of bureaucratic policies, but the elementary code of human interaction—has been the staple of the lawyer's art whenever this art was practiced with the most depth and skill. What united the great Islamic "*ulama*," the Roman juriconsults, and the English common lawyers was the sense they shared that the law, rather than being made chiefly by judges and princes, was already present in society itself. Throughout history there has been a bond between the legal profession and the search for an order inherent in social life. The existence of this

115. *Id.* at 180–81.

116. HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 241 (1977).

117. HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 44 (1989).

bond suggests that the lawyer's insight, preceded the advent of the legal order, can survive its decline.<sup>118</sup>

This spirit survives in our legal order, more in the legal practice than in the popular political culture (decisions as “calling balls and strikes”) and some doctrinal elaborations. Consider Linda Meyer's description of a good judge, one that is derived from observation as well as imagination:

[A] thoughtful judge is one who listens (a court proceeding is called a “hearing,” after all), who responds to possibilities opened up by past practices, who is more silent than loquacious, who is focused on the case, who is humble, and who is not trying to apply any theory of adjudication, grind any political axes, or control the future. The thoughtful judge, like the thoughtful draftsman, looks for the shapes of justice that are slumbering in the case.<sup>119</sup>

Or, as Unger put it, lawyers have always represented the idea that there were in our practices implicit ideals—customary law if you will—that could be raised to the level of explicitness and extended to new issues.<sup>120</sup> Finally, the legitimacy of a legal order that is not bureaucratic depends on the ability of legal proceedings to actualize a common sense that actually is common. Some “natural law” theories have tried to give an account of such a common sense. It may be that in a “post-modern” era, however, our courts' task will be “less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and tensions and their friction with one another.”<sup>121</sup> Of course, we do not need to await a philosophical justification for a non-bureaucratic legal order before we cultivate one. The theoretical justification for a non-bureaucratic order would have to rely on a critique of instrumental reason itself, the notion that a purely instrumental stance “cuts us off from the world, from nature, from society, even from our own emotional nature.”<sup>122</sup> And it would have to elaborate a plausible form of contemporary realism, such as the ones Taylor describes in the essay cited and in his other work.<sup>123</sup> Our practical issue is whether such a normative perspective can survive and flourish in a bureaucratic legal culture that has so pervasively embraced an instrumental rationality. Perhaps it will continue to exist only in small, though, I believe, innumerable, small

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118. UNGER, *supra* note 13, at 242.

119. Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 665 (1998).

120. UNGER, *supra* note 13, at 242–45.

121. DAVID KOLB, *THE CRITIQUE OF PURE MODERNITY: HEGEL, HEIDEGGER, AND AFTER* 259 (1986).

122. Charles Taylor, *Retrieving Realism*, in *MIND, REASON, AND BEING-IN-THE-WORLD: THE MCDOWELL-DREYFUS DEBATE* 61, 79 (Joseph K. Schear ed., 2013).

123. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1992).

oases in the larger bureaucratized world. For that, I suppose, we should be grateful.