

THE SWISS ARMY KNIFE OF GOVERNANCE

Roderick A. Macdonald
F.R. Scott Professor of Constitutional and Public Law
McGill University

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INTRODUCTION: THE GOVERNANCE OF CANADA'S THIRD NATIONAL POLICY

I should like to begin with a brief reflection on the idea of the *polis*. The *polis* (the 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 the form we now recognize it) dates only from the middle of the last (20th) century.

Of course, the *polis* has in some measure always been concerned with 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 for reasons 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 is 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.¹ This is not to say that matters of governance had not earlier been present in British North American politics. Twice previously there have been discrete National Policies in Canada. Twice previously -- in the 1870s and in the 1940s -- a particular constellation of economic and social forces have been interwoven with political ideology to generate policy. That is, Conflicts between Macdonald and Mackenzie in the 1870s and 1880s about the first National Policy and the building of the pacific railway were in large measure disagreements about governance.² But there is something more intriguing

¹See ROYAL COMMISSION OF INQUIRY INTO DOMINION-PROVINCIAL RELATIONS (1937). For contemporary critical commentary see H. Innis, "Rowell-Sirois Report" (1940) VI CANADIAN JOURNAL OF ECONOMICS AND POLITICAL SCIENCE 562, and reflections a generation later also incorporating an assessment of Quebec's REPORT OF THE ROYAL COMMISSION ON CONSTITUTIONAL PROBLEMS (the Tremblay Report) (1957) see D.V. Smiley, "The Rowell-Sirois Report, Provincial Authority and Post-War Canadian Federalism" (1962) XXVIII CANADIAN JOURNAL OF ECONOMICS AND POLITICAL SCIENCE 54.

²See Donald Creighton, THE EMPIRE OF THE ST. LAWRENCE, (Toronto: MacMillan, 1937, 1956). Creighton argues that a national policy cannot be simply the policy of the national government, nor can any national government have only one policy over a period of many years. In fact it means a policy for building a nation, and that in rough form the first National Policy pre-dates Confederation. Indeed, 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

about policy debate that explicitly frames itself as instrumental or technical, and is intensive rather than extensive.³

If the period from the 1940s through the 1980s was marked by a particular form of National Policy known as "welfare-statism", let us 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 post-War welfare-statism existed, but through the particular phenomenon of massive defence spending by the federal government.) Still the second National Policy had policy characteristics that privileged certain forms of government action, forms we recognize today in the epithet the administrative state.

For the past 50 years, driven by the twin impulsion of government programming to stave off the socialist threat,⁴ and by the discovery by the U.S. legal academy following Roosevelt's 1930s New Deal of a way of theorizing politics as expertise, ends have been taken as relatively unproblematic.⁵ What is now known as the "legal process" approach was symptomatic of the idea that law could be cast as the "enterprise of discovering and deploying processes of social ordering to promote ends accepted as valid by society."⁶

The architects of the process conception of law were professors at the Harvard Law School. For 30 years after World War II, Lon Fuller pursued the idea of *eunomics* -- the theory of "good and workable social arrangements".⁷ 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 societies⁸. Fuller was not the only legal scholar at Harvard to puzzle about

as early as 1840 and Confederation was simply one more instrument for its pursuit.

³See, for example, D.V. Smiley, "Canada and the Quest for a National Policy," (1975) 8 CANADIAN JOURNAL OF POLITICAL SCIENCE 40-62; the Symposium "Canada's National Policies: Reflections on 125 Years," (1993) 19 CANADIAN PUBLIC POLICY 232 *et seq.*; and T.J. Courchene, "Proposals for a New National Policy," in Kent, Tom, ed. IN PURSUIT OF THE PUBLIC GOOD (Montreal and Kingston: McGill-Queen's University Press, 1997), 65-92.

⁴See notably the 1952 article by V. Fowke, "The National Policy? Old and New," reprinted in W.T.Easterbrook and M.H.Watkins, eds, APPROACHES TO CANADIAN ECONOMIC HISTORY: A SELECTION OF ESSAYS (Toronto: McClelland and Stewart, 1988), 237-58.

⁵See N. Duxbury, PATTERNS OF AMERICAN JURISPRUDENCE (Oxford: The Clarendon Press, 1995), c. 4.

⁶A good intellectual history of the legal process approach is presented in K. Roach, "What's New and Old About the Legal Process" (1997) 47 UNIVERSITY OF TORONTO LAW JOURNAL 363.

⁷The first iteration of this idea was set out in Chapter VI of L.L. Fuller, THE PROBLEMS OF JURISPRUDENCE (temp. ed.) (Brooklyn: Foundation Press, 1949).

⁸Fuller's several essays on the *eunomics* theme were collected in 1983 in a posthumous

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 organisation.⁹ 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 so as to best achieve desired social purposes.¹⁰

Two decades later, under the combined *Civil Rights Act* and efficiency impulses of the "access to justice" movement, scholars of civil disputing at Harvard began to consider alternative sites besides courts and alternative modes besides adjudication of resolving conflict -- conciliation, negotiation, mediation, arbitration, *etc.* For alternative dispute resolution (ADR) enthusiasts, the central idea was that finding and deploying the right disputing process to manage conflict will inevitably produce socially preferred outcomes.¹¹ In a similar vein, the criminal law regime came under critical scrutiny. New procedural models like "sentencing circles" and substantive conceptualisations like "restorative justice" took their place beside traditional adversarial hearings and repressive sanctions.¹² At about the same time, public law scholars took up the challenge of theorising procedural fairness across a wide range of legal and social administrative settings.¹³ Achieving effective and just governance in diverse agency

volume, *THE PRINCIPLES OF SOCIAL ORDER* (K.I. Winston, ed.), first edition (Durham: Duke University Press, 1983); second revised edition (Oxford: Hart Publishing, 2001).

⁹See H.M. Hart and A. Sacks, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (unpublished tentative edition, 1958), as revised and edited by W. Eskridge and W. Frickey (St. Paul: West Publishing, 1993). For an interpretation of the legal process school see W. Eskridge and P. Frickey, "The Making of *The Legal Process*" (1994) 107 *HARVARD LAW REVIEW* 2031.

¹⁰For many followers of Hart and Sacks, and contrary to the *economics* ideas advanced by Fuller, the logic of legal process also compelled the search for non-political "neutral principles" to constrain judicial activity. See, for example, G. Peller, "Neutral Principles in the 1950s" (1988) 21 *MICHIGAN JOURNAL OF LAW REFORM* 561. Compare K.I. Winston, "Three Models of Law" in V. van der Burg and W. Witteveen, eds. *REDISCOVERING FULLER* (Amsterdam: Amsterdam University Press, 2000).

¹¹The pathbreaking work on models of civil disputing was S. Goldberg, E.D. Green and F. Sander, *DISPUTE RESOLUTION* (Boston: Little Brown, 1985).

¹²See H. Packer, *THE LIMITS OF THE CRIMINAL SANCTION* (Stanford: Stanford University Press, 1968). The literature on restorative justice is extensive. For an overview see W. Cragg, *THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE* (New York: Routledge, 1992).

¹³See A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *HARVARD LAW REVIEW* 1281. A thoughtful summary of contemporary theorising of procedural fairness may be found in M.D. Bayles, *PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS* (Dordrecht: Kluwer, 1990).

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 "law and economics"-inspired literature focused on the "choice of governing instrument".¹⁴ In like manner, for 30 years students of public administration have been pursuing numerous new paradigms of governance; they have been puzzling about how best to organize collective action to address public problems¹⁵. More recently, this reflection has been reoriented and reinvigorated by the burgeoning set of institutions, procedures and norms of international legal regulation.¹⁶

And yet, this renewed interest in regulatory matters remains captured by the logic and the preoccupations of governance as developed in Canada during the Second National Policy: the creation of the social welfare state through intensive governmental programmes.¹⁷ Governments are still seeking to deploy traditional instruments in a universe increasingly constrained by globalisation and new trade agreements, and increasingly dominated by knowledge and intellectual property rather than tangibles and discrete services.

Let me add a final thought to this Introduction. If there is to be a continuation of Canada as a "triumph of hope over experience" it will be found more in identity and symbol, in virtual citizens negotiating their way through multiple virtual communities, than in either government infrastructure (the Information Superhighway, the twinning of the Trans-Canada Highway) or social welfare (medicare, millennium scholarships) programmes. At one and 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 that human agency. Prescriptively, therefore, governance is taken to be the endeavour of identifying and managing both aspiration and

¹⁴An extended review of this literature in Canada is presented in R.A. Macdonald, "Understanding Regulation by Regulations" in I. Bernier and A. Lajoie, eds. REGULATIONS, CROWN CORPORATIONS AND ADMINISTRATIVE TRIBUNALS (Toronto: University of Toronto Press, 1985) 81, especially at footnotes 2-13.

¹⁵See, for an iteration of these themes, C. Hood, THE TOOLS OF GOVERNMENT (New Jersey: Chatham House, 1986); and L. Salamon, ed. BEYOND PRIVATIZATION: THE TOOLS OF GOVERNMENT (Washington: Urban Institute Press, 1989).

¹⁶See for an illuminating discussion, R.D. Wolfe, "See You in Geneva? Democracy, the rule of Law and the WTO" (unpublished paper dated August 2002 on file with the author).

¹⁷Some have, in my view unpersuasively, argued 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, L. and Appel Molot, M. "Canada's National Policies: Reflections on 125 Years" (1993) 19 CANADIAN PUBLIC POLICY 232 (September 1993).

action in a manner than affirms and promotes human agency. The shape, meaning and mistakes of "choice of governing instrument" thinking for the pursuit of this new National Policy are the focus of this paper.

I. AN INSTRUMENT CHOICE RETROSPECTIVE (1977-2002): EFFICIENCY AND OTHER RECIPES

These above reflections bring me directly to the theme of "instrument choice". The whole idea of instrument choice is a motif for a certain conception of public policy. No-one in the 1930s would have used such language to describe the actions of Macdonald, Laurier and Borden over the previous half-century. Yet it does capture the meaning and methods of welfare-statism.

The ideological challenge to Canada's second National Policy 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 to particular forms of state-building, not to state-building as a political project itself. The creation of national markets and the deployment of the state to sustain a capitalist economy were never part of the "deregulatory agenda". Third, it presumed that there was a natural hierarchy of social-political values and 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.¹⁸ A first iteration (1977-1985) perhaps best reflected in the analysis set out in the paper by Michael Trebilcock *et al.*, THE CHOICE OF GOVERNING INSTRUMENT¹⁹ on the one hand, and several of the critical Research Studies published for the Macdonald Royal Commission on Canada's Economic Prospects²⁰ on the other, was framed around the meaning of regulation and the usefulness of an efficiency criterion in assessing different forms of governance.

¹⁸For a slightly different periodization see M. Hill, A HISTORICAL PERSPECTIVE ON REGULATORY REFORM: INSTITUTIONS AND IDEAS AFTER THE REGULATORY REFERENCE (Ottawa: Treasury Board Secretariat, 1996).

¹⁹M.J. Trebilcock, D. Hartle, R. Prichard and D. Dewees, THE CHOICE OF GOVERNING INSTRUMENT: A STUDY PREPARED FOR THE ECONOMIC COUNCIL OF CANADA (Ottawa: Supply and Services Canada, 1982)

²⁰I. Bernier and A. Lajoie, coordinators, LAW, SOCIETY AND THE ECONOMY (Toronto: University of Toronto Press, 1986), being volumes 46-51 of the collected research studies for the Royal Commission on the Economic Union and Development Prospects for Canada. See especially volumes 46 and 48.

During a second period (1988-1995) 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 a 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.²¹ During this period the Canadian Institute for Advanced Research funded an interdisciplinary Law and Society Programme that generated two collections of essays²² meant to explore the legal challenges of contemporary regulatory management.

A third periodization (1995-) may be understood as both more subtle and more overtly ideological, in that it participants came recognize and articulate the theoretical underpinnings of positions being taken. Four central characteristics of this contemporary reflection are that : it purports to understand governance as a collaborative endeavour between state, citizen and intermediaries; it acknowledges that governance is not self-executing; it recognizes that government often works best by indirection; and it recognizes the large place that "social norms" play in effective regulatory governance.²³ 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.²⁴

It is the burden of this section of the paper to argue that "choice of governing instrument" perspectives were impoverished "process" renditions of Fuller's *economics* insights²⁵, and that

²¹The lead paper on this theme was that of Robert Howse, J. Robert S. Prichard & Michael J. Trebilcock, "Smaller or Smarter Government?" (1990) 40 UNIVERSITY OF TORONTO LAW JOURNAL 498.

²²M.L. Friedland, ed., SANCTIONS AND REWARDS IN THE LEGAL SYSTEM: A MULTIDISCIPLINARY APPROACH (Toronto: University of Toronto Press, 1989); and M.L. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (Toronto; University of Toronto Press, 1990).

²³L. Salamon, ed. THE TOOLS OF GOVERNMENT (Oxford: Oxford University Press, 2002).

²⁴Of course, the model of the tools of government 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 non-governmental mechanisms of governance. For discussion of "regulatory absence" as a legitimate policy option see S. van Praagh, "The Chutzpah of Chasidim" (1996) 11 CANADIAN JOURNAL OF LAW AND SOCIETY 193. I have attempted to apply the this type of analysis in a recent paper analyzing legal policy options that was prepared for the Senate Committee on Illegal Drugs. See R.A. Macdonald, THE GOVERNANCE OF HUMAN AGENCY (unpublished, March 31, 2002).

²⁵The parallels between the theoretical concerns of this collection and the institutional design preoccupations of the Harvard legal process approach are apparent in several of the essays published in W. Witteveen and W. van der Burg, eds., REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN (Amsterdam: Amsterdam University Press, 2002).

only now, in this third period are the implications of Harold Innis and William Fowke's analysis of the "Second National Policy" of the 1930s being fully appreciated.²⁶ In developing the dialectic I rely on standard sources, using essays by Michael Trebilcock in particular as touchstones.²⁷

A. First Thoughts (1977-85)

In retrospect it would seem that the initial framing of "instrument choice" concerns involved a transposition of the insights of the "legal process" school about institutional design to the realm of public regulation. Three ideas predominated: how one understands the relationship of means to ends; how one understands the meaning and scope of the regulatory-governance endeavour; and how one understands the central purposes of regulation. In my view, along all three dimensions the "choice of governing instruments" approach did not fully grasp the "principles of social ordering" thesis.

1. 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 U.S. administrative law literature of the 1930s,²⁸ that there can never be, in any purely mechanical sense, a "best" regulatory instrument in any given situation. In the language of civil disputing, "making the forum fit the fuss" misapprehends the extent to which the fuss is defined by the forum.²⁹

The more elastic ends are taken to be, that is, the more that they can be redefined and shaped, the less meaningful rankings of instruments would 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

²⁶See, in addition to the famous 1952 article by V. Fowke, "The National Policy? Old and New," reprinted in W.T.Easterbrook and M.H.Watkins, eds, *APPROACHES TO CANADIAN ECONOMIC HISTORY: A SELECTION OF ESSAYS* (Toronto: McClelland and Stewart, 1988), 237-58; V. Fowke, *THE NATIONAL POLICY AND THE WHEAT ECONOMY* (Toronto: University of Toronto Press, 1957). For a modern proposal see T.J. Courchene, "Proposals for a New National Policy," in Kent, Tom, ed. *IN PURSUIT OF THE PUBLIC GOOD* (Montreal and Kingston: McGill-Queen's University Press, 1997), 65-92.

²⁷In addition to those essays already cited, see M. Trebilcock, *THE PROSPECTS FOR RE-INVENTING GOVERNMENT* (1994), and "Journeys Across the Divides" (unpublished paper dated February 5, 2001).

²⁸A fine overview of regulatory history is presented in T. McCraw, *PROPHETS OF REGULATION* (Cambridge: Harvard University Press, 1984), being biographical studies of Charles Francis Adams, Louis D. Brandeis, James Landis, and Alfred Kahn.

²⁹See *PROSPECTS FOR CIVIL JUSTICE* (Toronto: Ontario Law Reform Commission, 1996).

instrument) will change the rules of the game.³⁰

Because means shape the end, and so make the end a moving target?not simply a question of choosing the appropriate means for a given end. Fuller often spoke of "circles of interaction", and held that "a social end takes its ?character and colour? from the means by which it is realized".³¹ More recently, scholars have noted that goals are meaningless without institutions.³²

2. The Scope of Regulation

Initially reflection on instrument choice was connected with two prior postulates about law. The first is that law is official product of the political state as expressed in artefacts and institutions of government. The second is that regulation is a problem of understanding constraints upon markets. In other words, 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.

By contrast, some critics of instrument choice rhetoric contested both of these initial postulates. First of all, the problem as much more broadly-based, with a multiplicity of sites of governance, none necessarily privileged over the others.³³ Top-down views of regulation not only ignores a great deal of actual (though informal) regulatory behaviour, but it also privileges and so legitimates public action and regulatory activity that looks like public action.

The second issue has to do with the modes of regulation. Regulation must be more than visible institutions so that it includes tacit and implicit processes of social ordering as well. In this sense, once the regulatory endeavour is seen as a problem of social ordering, there is

³⁰See, for an elaboration of this idea, B. Guy Peters, "The Politics of Tool Choice" in Lester M. Salamon, ed., with the special assistance of Odus V. Elliott, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (New York: Oxford University Press, 2002) 552.

³¹Lon L. Fuller, "Means and Ends" in Kenneth I. Winston, ed., *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER*, rev. ed. (Oxford: Hart, 2001) 61-78.

³²Compare however Neil K. Komesar, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (Chicago: University of Chicago Press, 1994): "Reform is not the embracing of goals. Reform is the designation of the means of achieving them" (at 274).

³³Roderick A. Macdonald, "Understanding Regulation by Regulations" in Ivan Bernier & Andrée Lajoie, eds., *REGULATIONS, CROWN CORPORATIONS AND ADMINISTRATIVE TRIBUNALS* (Toronto: University of Toronto Press, 1985), 81-154.

never any such thing as deregulation. Deregulation is simply the choice of the constructed markets of the "common law" as a regulatory strategy. Like ADR, deregulation substitutes a different locus for the exercise of discretion, and a different modality of social organization.

B. Second Opinions (1988-1995)

From this initial conceptualization of the ambitions and strategies of "choice of governing instrument" analysis, the next decade saw the development and nuancing of these positions. Again, two themes can be seen to emerge in the literature. First, those who initially proposed instrument choice analysis began to incorporate into their perspectives the notion of public values; and second, the dynamic and shifting character of the policy process came to be recognized.

1. Public values and governance

One of the catch phrases of the new theme of instrument choice was the notion of smarter government: it is not enough to seek raw efficiency alone, but must choose/design instruments in such a way that wider public values are promoted as well.³⁴ 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. This idea picks up the theme of the initial critique and builds it into the instrument choice critique: efficiency can be deceiving, as private actors not subject to same human-rights constraints as government, so there is a hidden community cost to privatization. In the public management literature, the idea of public values as part of the regulatory calculus came to be more present.³⁵

Yet once again, the attempt to recapture in a logic of instruments the problem with efficiency missed the central challenge. Critics pointed out that this refinement nonetheless continued to rest on relatively controversial distinctions that legal scholarship in most other domains rejected. Most notable among these are dichotomous distinctions: between state (public) and voluntary (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.³⁶

³⁴See Robert Howse, J. Robert S. Prichard & Michael J. Trebilcock, "Smaller or Smarter Government?" (1990) 40 UNIVERSITY OF TORONTO LAW JOURNAL 498.

³⁵Steven Rathgeb Smith & Helen Ingram, "Policy Tools and Democracy?" in Lester M. Salamon, ed., with the special assistance of Odus V. Elliott, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (New York: Oxford University Press, 2002) 565.

³⁶For one allegorical attempt to show the bearing of a rejection of these dichotomies on questions of public governance, see Roderick A. Macdonald, "Office Politics?" (1990) 40 UNIVERSITY OF TORONTO LAW JOURNAL 419.

2. The Dynamic Nature of the Policy Process

A second development in the literature flows from the recognition that all these factors interact, and are changed in this interaction. A simple one-to-one mapping is not possible. Much of the choice of governing instruments literature assumes that regulation is an activity that governments do for instrumental purposes. They conceive law as the lever of action, in which the object is to change or control specific behaviour with prescriptions. On such a view, all social action is hypostatized as a market. That is, the market is not just an economic market, and the wealth that once seeks to maximize can be non-monetary interests as well as money.

On this view, the correction of market failures is the sole legitimate ground to regulate human conduct. Of course, aside from regulating to ensure that a market can function according to the presumed postulates, the rest is inefficient. Efficiency is sole legitimate criterion against which to judge regulatory action. Of course, the problem is that idea of a naturally-occurring market lying behind the classical view of regulation is an assumption only.

A contrasting ethic is one that sees regulation as the symbolic construction of social solidarity through institutions recognizing and legitimating the identities by which people come to express who they are. In this conception of regulation, instrumental efficiency calculations are irrelevant, and redistributive, social, or cultural purposes take pride of place.

C. Contemporary Trends (1995-)

Over the past six years, as theorizing about neo-liberalism 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 depends on one's perspective as an optimist or a pessimist about the perfectibility of society. Moreover, all now see instrument choice and governance as dynamic.

1. Optimism vs. pessimism about human self-regulation

The question of regulatory governance often can 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 detail of everyday life?

In principle, most who explore "instrument choice" issues using the lens of public choice theory have a strongly pessimistic view of human nature.³⁷ In his 1982 essay, Michael Trebilcock also aligned himself with the pessimists, although in the 1990 essay with Prichard and Howse, the position seems to have moderated.³⁸ Not surprisingly, of course, in his most recent work,

³⁷See, for example, Daniel A. Farber & Philip P. Frickey, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (Chicago: University of Chicago Press, 1991).

³⁸For an excellent study reflecting this moderate pessimism, see Robert C. Ellickson, *ORDER WITHOUT LAW: HOW NEIGHBOURS SETTLE DISPUTES* (Cambridge, Mass.: Harvard University

Professor Trebilcock arrives almost at a position of optimism on this score, and assumes that indirect and third-party governance is a viable regulatory strategy.³⁹

These perspectives translate into views about the capacity of people to imagine new 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; there is a closed class of instruments with costs associated with each one, and so an "optimal" choice should be discoverable in any situation. By contrast, others in the "processes of social order" approach to governance believe that there is there is an almost infinite variety of instruments and social ordering processes to choose from, and a more dynamic view of choice is called for -- the end depends on how one chooses to get there.⁴⁰

2. Instrument choice and governance as dynamic

To view 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 literature of legal pluralism posits the various sites of regulatory governance as mutually constitutive and interdependent. If one posits a particular policy as deregulation, this is to assume that the primary site of regulation of human activity is the state and its instruments. Modern 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 with the site of normative activity under consideration.⁴¹

As for feedback loops, the point is equally important. Modern assessments seek to define tools, describe patterns of their use, how the tool is selected, and the management challenges inherent in each tool.⁴² Even traditional public choice literature now seems to be pointing more

Press, 1991).

³⁹See, for an elaboration of a strongly optimistic perspective, Lon L. Fuller, "The Case Against Freedom" in Kenneth I. Winston, ed., *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER*, rev. ed. (Oxford: Hart, 2001) 315-27.

⁴⁰See Henry M. Hart, Jr. & Albert M. Sacks, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, ed. by William N. Eskridge, Jr. & Philip P. Frickey (Westbury, N.Y.: Foundation Press, 1994).

⁴¹I have tried to explore this point in R. A. Macdonald, *LESSONS OF EVERYDAY LAW* (Montreal & Kingston: McGill-Queen's University Press, 2002).

⁴²See notably, Lester M. Salamon, "The New Governance and the Tools of Public Action:

towards a dynamic view.⁴³ 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 theory today presumes that the metric of evaluation can be applied along a single dimension -- whether of efficiency or of predetermined single ends.

D. Back to the Future?

The development of the more nuanced "choice of governing instrument" discourse in the late 1970s and early 1980s was, despite claims to the contrary, also ideologically loaded. Those who expressed scepticism, even in regard to the moderate, thoughtful positions taken by Michael Trebilcock *et al.* focused on two ideas.

First, they argued that deregulation was a misleading descriptor for a new regulation that was neither democratic (or enfranchising) nor just. Even though efficiency was acknowledged as only one of a number of intermediate ends that governments pursue, we noted that the assumption remains that ends can be fixed in advance without regard to means. In other words, we presumed that the state is not the enemy of citizens. 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" focusing 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, acting through its iterated National Policies, is meant to facilitate the just achievement of individual and collective purposes in a manner that enhances human agency.

Twenty years on, these are still live issues. But although the "deregulatory and privatization" critique is now somewhat attenuated, the logic of "governing instruments" persists. So, for example, we have been asked today to consider governance in the globalized world order; and to focus on how governments can deploy their policy instruments more effectively in co-opting private sector actors into partnerships, joint ventures and third party governance strategies so as to recognize both social and economic interests; and to reflect on how we engender better risk management in state action.

At the peril of re-stating the obvious, let us remember that it is the very logic of instrument choice that is problematic -- not 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

An Introduction? in Lester M. Salamon, ed., with the special assistance of Odus V. Elliott, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (New York: Oxford University Press, 2002) 1, and Lester M. Salamon, "The Tools Approach and the New Governance: Conclusion and Implications?" in *ibid.*, 600.

⁴³See, for example, Jon Elster, *LOCAL JUSTICE: HOW INSTITUTIONS ALLOCATE SCARCE GOODS AND NECESSARY BURDENS* (New York: Russell Sage Foundation, 1992), and Eric A. Posner, *LAW AND SOCIAL NORMS* (Cambridge, Mass.: Harvard University Press, 2000).

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 (like the parallel language of "alternative dispute resolution") simply begs the question: instrumental to what?

II. A GOVERNANCE PROSPECTIVE (2002-): PLURAL MODES AND MULTIPLE SITES

In this section of the paper 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. Let me 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 use; they are also hypotheses about what human acts are valuable enough to have 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 the Wenger or the Victorinox companies -- 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 instructions, 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.

A. "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?"

1. 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; now 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 the governance of the state and ultimately governance of the world.

The multiplicity metaphor does not imagine the state as primary, as the institution charged not only with taking governance decisions, but the with allocating governance decisions among other actors. It is a perspective that sees the possibility of other social institutions -- family, neighbourhood, religious organisation, socio-ethnic group, 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 (of a profession or agricultural producers, for example) is an instrument (a means) it is also an end -- a consequence of a conception of local democratic decision-making.

2. 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-punch 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, 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-punch 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 cork-screw and the reamer-punch 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, or whittle a toy-boat, or carve an 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 disgorging" or the "fish scaler" may turn out to be ideal woodworking implements for roughing up the block so as 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 a indispensable component of a plumb-bob if the weight of the knife itself is being used to serve that end.

B. 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 34 features (gadgets); the most modest -- the Soldier -- has 12. (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 not 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 a Victorinox Swiss Army Knife model name to identify a specific governance thesis.

1. 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 the best choice to be.

A related problem is that people's preferences might blind them to a more effective choice that they didn't think of. A person might naturally think 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 the writing in (particularly if the tree has particularly rough or thick bark).

Governance: There is no best response for 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 anti-terrorism 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.

2. The Victorinox Handyman: over-inclusiveness

"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 pocket-knives, pen-knives or hunting knives. Though 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.

3. 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.

4. **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). Though 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 the small space, so can opening tends to be somewhat awkward. Notice that this is not a problem of insufficiency knowledge or inadequate skill-level by the user. 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 being deployed within their design specifications, some regulatory solutions can have unforeseen negative consequences. Regulation is an interaction between the situation and the solution: the peculiarities of the situation can force the solution to behave in strange and unpredictable ways.

5. **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 case. This limits both the size, the shape, and the number of the 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 the *Criminal Code* and the *Income Tax Act* are both already groaning under the weight of the multiple policy objectives they are being asked to serve.

6. 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 multi-purpose blade, and is close to the length of the knife case. The small blade began life as (and is still sometimes called) a pen knife, 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, and so there is a large degree of overlap between the functions of these two blades. And 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 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 a further specification of more particular purposes on the other.

7. The Victorinox Time-keeper: 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, though 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), which tend to suggest a single use for each (though 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 disgorging 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 Bürgerlichesgesetzbuch) with the detailed quasi-regulatory provisions of the new Civil Code of Québec.

8. The Victorinox Explorer: design tradeoffs

"Should I bring my Swiss Army Knife on the canoe-trip, or my toolbox?"

Problem: There are inevitable tradeoffs in tool design, sometimes driven by use, sometimes functionality. There are tradeoffs involved: 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 an 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.

9. The Victorinox Soldier: cultural limits

"Why doesn't the U.S. army carry Swiss army knives?"

Problem: Cultural factors influence the design of tools, their use, their non-use, and even their characterisation. 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, though for cultural reasons the opposite implement from that one usually deploys is, at least initially, hard to use.

Governance: A Canadian-style health care regime, which (regardless of the economic and administrative facts) raises the spectre of "socialized medicine" and is unlikely to be adopted in the United States, with its hostility towards anything smacking of socialism. So too, the creation of Crown Corporations. And yet, the number and scope of "government-owned enterprises" in the U.S., 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 programmes and tax-subsidized *ex ante* tuition charges. Cultural predispositions limit at the outset the possible range or character of regulatory solutions available.

10. 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 other situations 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 is the converse of the idea that we can often (usually) find other uses for tools than the obvious ones. In some situations, our preconceptions of what a tool is intended to be used for 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 pocket knife. For it shows us that ends are not simply servants of the means we employ, but develop interactively and through system of feedback loops. Camping as a cultural practice developed in response to many factors -- not meaningfully limited by the range of tools in a Swiss Army Knife. For the knife to integrate a cork-screw suggests how the knife reflects changed social practices, since corked wine would hardly have been the drink of choice of those who initially were 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.

11. 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 vs. secondary characteristics tends to deflect from intelligent judgement. 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 judgement: a feature is one or the other depending on why one is choosing the implement in question (for example, actually using the knife on a canoe-trip, or 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 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.

12. The Victorinox Huntsman: relations between uses

"I used the hook disgorging 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.

13. The Victorinox Swiss Champ or the Wenger Highlander: political ideology

"Should I buy one of the Victorinox or 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 (<http://www.wengerasi.com>), and the Victorinox company, in the German speaking canton of Schwyz (<http://www.victorinox.com>). 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 both.

Governance: In all governance matters ideology looms large. Sometimes this is merely labelling and can be traced to small-scale partisan ideology: one wonders if 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) were there not 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 tax deduction (or even 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 -- for example, Ontario Hydro and Hydro Québec.

14. The Wenger Brushed Stainless Steel Cigar-Cutter: 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 deploy them properly, and often demand a good sense of the purposes for which the particular 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 than 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 against wrongdoers hard to identify, costs can be disproportionate. Even with procedural streamlining through class actions, and market-share liability presumptions, litigation may be cost-ineffective. A similar problem arise 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 shortchanged), administrative compensation schemes (whether or not combined with no-fault regimes) can be administered for 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.

15. 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 judgement and maturity by users in order to avoid dangerous misdeployment. Of course, these difficulties multiply the more gadgets there are. 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* ought not to 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 case 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.

16. 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 tie 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, *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 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 judgement that is 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 characterisation of a particular situation (as, for example, terrorism) that gives them a particular instrument they deem to be most efficient.

17. The Wenger Standard Issue: if it is too complex it will be used for something else

"You know this 34 gadget thing is just the perfect paper-weight. 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 was a photo in old editions of the *Guinness Book of World Records* of the world-record pocket knife, 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. Interesting, it appears that almost no Standard Issue models are given as gifts, but that 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

dresser drawers as keep-sakes. The remarkable success of the Nokia-brand cell-phone 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.

18. The Wenger Esquire: multiple regulatory sites

"I thought 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 20 models and Wenger has nine. But Wenger also has thirteen sub-models 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 -- that makes a similar product to Victorinox and Wenger. Indeed, Leatherman enthusiasts claim that their 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. In such an optic, 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 lie when it comes to the spending power. Moreover, while some constitutional limitations are still present in respect of taxation, to all intents and purposes both provinces and the federal government can tax whatever of their residents they choose and in whatever

manner. Still, some forms of regulation, especially when delegate 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, whether certain regulatory instruments are constitutionally located in one jurisdiction or another. It also points to 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 Group.

19. 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 instructions, 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 her 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 a 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 programme; nor 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 leash, and even then, with no guarantee of success, agency enhancing regulatory choices typically have for corollary, enhanced collateral policy risks.

CONCLUSION: THE GOVERNANCE OF HUMAN AGENCY

I should now like to return to my primary substantive point. 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 National Policy we wish to achieve, what conception of human beings does such a National Policy presuppose, and what kinds of social, economic, and political institutions are coherent with such a vision of society.

It is not my objective here to describe what a third National Policy for Canada might be, although I do want to describe certain phenomena that may be indicative of its general outlines. After doing so, I will raise four governance issues that to me are at least as important as the subjects that are explicitly developed in the various break-out sessions of this conference.

The key feature of the new National Policy is to put the citizen into the centre of the policy debate. As I have argued elsewhere, citizens are not merely law-abiding; they are law creating.⁴⁴ What we have experienced as "identity politics" is nothing short of the claim that identity is an iterative endeavour between structures and agents, not the creation of structures alone. The invention of the Canadian *Charter of Rights and Freedoms* is important less for the impoverished "rights discourse" it promotes than for the "Charter patriotism" 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? The Canadian government today needs to ask: what equipment and what resources does the citizen as regulator need?

What then, are the central issues of governance that should be preoccupying us right now? The three I have selected are meant to highlight three themes in the symbolic construction of the "identity" of the new National Policy. I had initially included a fourth, equally as important -- namely, immigration and citizenship policy. But I leave that aside for the moment since I want to focus here on the "included" moral community, rather than on our unjustifiable policies directed to "exclusion" from that moral community.

First, the way in which we symbolize and seek to regulate "illegal" drugs. We treat this as a moral question to be decided by the criminal law. Surprisingly, at the time of the first National Policy, we took a similar position about alcohol, gambling and the sex-trade. Now the first two of these are practically government monopolies. Are there not other ways of symbolizing drugs? As a public health problem? As a problem of regulatory governance (like alcohol)? As a problem of resource expenditure? As a problem of corrupting citizens by forcing them into intercourse with organized crime? How does it help to begin reflection here as an "instrument choice" matter?

⁴⁴For an extended development of this idea, see Martha-Marie Kleinhans & Roderick A. Macdonald, "What Is a *Critical* Legal Pluralism?" (1997) 12 CANADIAN JOURNAL OF LAW AND SOCIETY 25.

Second, 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 well-being of all Canadians, why does it hang significant social policy on 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?

Third, the way we understand the present "other" as a matter of history and policy. On what basis do we continue to think about aboriginal peoples as "wards of the state"? The lessons of the "residential schools" policies, are not lessons about residential schools *per se*. They are lessons about identity, agency and community. Have we learned anything about governance issues here? Can we move beyond choosing the appropriate "governing instrument" as a vehicle of continued colonization?

Fourth, the way we have understood privatisation and deregulation has tended to downplay many significant positive features of the exercise. Today, a richer 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 involves establishing constraints on pathological action so as to make human agency possible. At its core, however, governance through law is the iterative endeavour of identifying goals and objectives, designing policies, selecting processes and instruments, deciding particular programmes, targeting sites and systems, and identifying actors by and through which human aspirations and actions may be rendered into achievements and accomplishments.

And so to conclude. 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.⁴⁵ Those who speak the language of "instrument choice" are the *philosophes* of the welfare state. They now talk of increased social regulation, in order to announce the new millennium. In fact, a failure to acknowledge the foundations of what must be Canada's new, and third, National Policy means that they are simply "saving the appearances."

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

⁴⁵See THE HEAVENLY CITY OF THE XVIII CENTURY PHILOSOPHERS(New Haven: Yale University Press, 1932).

prescriptions and programmes, 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", "privatisation" and "smaller" government that imagine the possibility of a pre-political 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 particular programmes, 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 ought law and legal institutions 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 one and 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 that human agency. Prescriptively, therefore, governance is taken to be the endeavour of identifying and managing both aspiration and action in a manner than affirms and promotes human agency.

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