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THREE FORMS OF LEGAL PRAGMATISM

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Within any discipline there are said to be lumpers and splitters, hedgehogs and foxes.¹ My inclinations run to lumping, but in this essay I aim to do some splitting. Specifically, I seek to distinguish among three distinct forms of legal pragmatism. Although my sympathy for one of the strands will likely become clear, my purpose is mainly to identify and distinguish them, not to assess their relative virtues and vices.

In embarking on such an effort, I join company not only with Professor Tamanaha, but also with another of my co-participants, Gerald Postema. Both Professor Tamanaha and Professor Postema have articulated approaches to, or theories of, Anglo-American law that they characterize as a “third way” or as an effort to reconcile competing traditions of legal thought.² In his latest book, Professor Tamanaha endorses what he calls “social legal theory” as a rival to the analytic and natural law traditions.³ Similarly, Professor Postema has defended common law theory as an alternative to natural law and legal positivism.⁴ Though not identical, both

1. ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX* (1951).

2. Professor Haack defends a third way in epistemology, offering “foundherentism” as an alternative to foundationalism and coherentism. I suspect that there are interesting affinities between her account and some of the jurisprudential third ways, but I leave that question aside. SUSAN HAACK, *EVIDENCE AND INQUIRY: A PRAGMATIST RECONSTRUCTION OF EPISTEMOLOGY* (2009).

3. BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* 27–30 (2017).

4. Gerald J. Postema, *Philosophy of the Common Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 588, 599 (Jules Coleman & Scott Shapiro eds., 2002).

of these “third ways” look for intellectual inspiration to the common law tradition, to philosophical pragmatism, or to both.⁵

It would be possible to view my own account as a rival to those just mentioned because it shares their pragmatist and common law affinities but offers another interpretation of what fidelity to those traditions requires. Professor Tamanaha, for instance, characterizes social legal theory as “empirically oriented” (rather than “normative” or “analytic”) and cites William James for support for his view.⁶ In my view, though, James understood pragmatism as a means of reconciling empiricist, normative, and conceptual demands.

But it is equally plausible, and probably more useful, to see the following account as an effort to draw further distinctions *within* these other “third ways.” That is, I aim to distinguish among three different ways in which one might seek—and judges and legal scholars in fact have sought—a reconciliation of, or alternative to, some of the traditional dichotomies in legal thought. That does not mean that my interpretation is perfectly consistent with the others I have mentioned. It is not. For instance, it produces different judgments about how to classify particular legal theorists, such as Lon Fuller, Hart and Sacks, and Ronald Dworkin.⁷ And indeed, part of my purpose is to show that some legal thinkers not typically thought of as part of the pragmatist tradition in fact belong to it. Still, I seek to further refine some of the themes in common with these other accounts rather than offer an innovative account of their meaning or importance. I am following in their paths, substantively and methodologically.

Take, for instance, Professor Postema’s work on the philosophy of the common law. Postema explains how common law theory differs from traditional positivism this way: “Common law conventionalism shifts theoretical attention from laws—the authoritative directives produced by lawmaking institutions—to the process of practical reasoning with and within law. Law, on this view, is a matter of convention, but it is a convention of a special sort, namely a practised discipline of practical reasoning.”⁸ That is just the shift I welcome. I am less interested in the

5. See Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. OF JURIS. 315, 317 (1996) (arguing that philosophical pragmatism provides a foundation for “sociolegal studies”).

6. TAMANAHA, *supra* note 3, at 2–3 (citing James), 30 (empirical); see also Tamanaha, *supra* note 5, at 318–19 (arguing that philosophical pragmatism provides a basis for drawing the fact-value distinction).

7. See TAMANAHA, *supra* note 3, at 29 (assigning Fuller and Dworkin to the natural law tradition).

8. Postema, *supra* note 4, at 601. I understand Postema’s alternative conception of the task of jurisprudence to be consistent with the understandings of law Tamanaha and Posner offer. See TAMANAHA, *supra* note 3, at 73 (defining law as “whatever people identify and treat through their social practices as ‘law’”); see also RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 225 (1990)

question “what is law?” than in the question, “how do, and should, judges practically reason with and about legal materials?”

Those are not the only philosophical questions one might ask about law and legal practice. They may not even be the most important ones. But they are the ones I take up here, albeit at a very high level of generality. My central thesis is that there are three distinct ways of answering these questions and that each of them has its intellectual roots in an early twentieth-century understanding of the common law method that was informed by philosophical pragmatism. In other words, there are three distinct forms that third-way legal pragmatism can take. I dub them *instrumentalist*, *quietist*, and *holist* versions of pragmatism.

The purpose of this essay is to explain what I mean by each of these labels and assign them to a few well-known figures in the Anglo-American legal tradition. The portrait drawn will necessarily be sketchy and its argument skeletal. But I hope to show how each type offers its own distinct solution to the same fundamental problem—one initially raised and confronted by early twentieth-century pragmatist philosophers, judges, and legal scholars and then again, in a slightly modified form, at mid-century. In this way, my approach may be seen as a version of the genealogical approach to studying law Professor Tamanaha endorses and practices in his recent book.⁹

Why bother with such an endeavor? Here is one answer. At the end of the last century, the modern philosopher perhaps most associated with philosophical pragmatism, Richard Rorty, suggested that legal pragmatism had become “banal” because virtually all legal theorists were some sort of pragmatist.¹⁰ He recognized differences between, say, the views of Judge Posner and those of Ronald Dworkin. But he considered the differences to be mainly political. According to Rorty, there were no interesting *philosophical* differences between them.¹¹

This essay is a response to Rorty on that question. In my view, Rorty is right to apply the label “pragmatist” widely to diverse legal scholars, but he is too quick to lump them all together. There remain interesting philosophical differences among those legal theorists who fit under the

(defending an “activity theory of law,” which treats law as “something that licensed persons, mainly judges, lawyers, and legislators, do, rather than a box they pull off the shelf when a legal question appears, in the hope of finding the answer in it.”).

9. TAMANAHA, *supra* note 3, at 82 (employing and endorsing an approach that “trace[s] law backward—thence forward—looking for earlier manifestations, continuities, variations, and growths”).

10. Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811 (1990).

11. *Id.* at 1813 (“I find it hard to discern any interesting *philosophical* differences between Unger, Dworkin, and Posner; their differences strike me as entirely political, as differences about how much change and what sort of change American institutions need.”).

umbrella of pragmatist legal thought, even if—especially if—that umbrella is a large one, as I will argue. They are differences about the nature of practical reasoning—in particular, about how judges reason about facts and values.

I. PRAGMATISM, SOCIOLOGICAL JURISPRUDENCE, AND REALISM

Before we can distinguish among the three branches of pragmatist legal theory, we must locate their common origin. Two of the best known early twentieth-century jurists, Roscoe Pound and Benjamin Cardozo, both described the view of law they endorsed as “pragmatist,” and, in the same works, each cited William James’s *Pragmatism*.¹² There James offered a resolution to a dilemma analogous to one Pound and Cardozo sought to resolve in the context of adjudication. The ambiguities latent in both the philosophical and jurisprudential versions of these solutions help explain the first major divide within legal pragmatism—one we will see accentuated by two well-known legal realists.

A. William James’s *Pragmatism*

James frames his *Pragmatism* lectures as an effort of reconciliation. Specifically, he aims to reconcile two broad philosophical traditions, empiricism and rationalism. James famously characterizes these two competing traditions in psychological terms, as representing two sorts of intellectual temperaments. Empiricism is the philosophy of the “tough-minded,” who are skeptical and materialistic and focus on facts. “Tender-minded” philosophers, on the other hand, are optimistic and intellectualistic and are devoted to the discovery of principles.¹³ James’s point is that most people “have a hankering for the good things on both sides of the line”—they care about facts *and* principles.¹⁴ The modern person lives in the age of science and admires its achievements. But the view of the world—and of man’s place within it—is “materialistic and depressing.”¹⁵ Many of us do not want to abandon “the old confidence in human values and the resultant spontaneity, whether of the religious or of the romantic type.”¹⁶ So the question is, how can we hang on to both?

12. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608–09 (1908); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12, 102 (1921).

13. WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* 12 (1907).

14. *Id.* at 13.

15. *Id.* at 16.

16. *Id.* at 20.

James offers pragmatism as a method for providing answers to that question.¹⁷ It is capable of identifying genuine metaphysical disputes and then resolving them in a manner congenial to both philosophical traditions. Or, more precisely, it offers a way of justifying traditional rationalist doctrines on empiricist grounds. The pragmatist asks, of any given metaphysical controversy, “What difference would it practically make to any one if this notion rather than that notion were true?”¹⁸ If it makes no difference in the world, then the dispute is senseless; but if it does make a difference, then there is a genuine question as to its existence. Citing the work of Charles Peirce, James insists that in order to get clear about some concept, we must ask “what sensations we are to expect from it, and what reactions we must prepare.”¹⁹ As any good empiricist would demand, *experience* provides the ultimate test.

James then takes the further step of suggesting that pragmatism offers a way of determining whether a belief in some idea, concept, or doctrine is *true*. The test again is one of concrete experience. The pragmatist asks whether a given doctrine or idea is “good in the way of belief,”²⁰ where “good” means that believing in it enables us to experience life in a better way. So, for instance, if believing in God “prove[s] to have a value for concrete life,” then such a belief qualifies as true.²¹ In this way, the approach represents the “empiricist attitude,” but it does so, according to James in “a more radical and in a less objectionable form,” because it harbors no “materialistic bias.”²² Thus does pragmatism reconcile the two competing traditions in philosophy: “Rationalism sticks to logic and the empiricist. Empiricism sticks to the external senses. Pragmatism is willing to take anything, to follow either logic or the senses and to count the humblest and most personal experiences.”²³

James acknowledges the obvious objection to this view. If the test is merely whether a belief is “good” for us, then pragmatism seems to authorize belief in all sorts of “sentimental superstitions.”²⁴ The response to this worry is that the test of experience applies to *all* our beliefs as well, so if adopting a new belief would clash with our other, previously held beliefs—which are themselves “vital” for living—then it may be properly

17. *Id.* at 33.

18. *Id.* at 45.

19. *Id.* at 46–47 (citing C.S. Peirce, *How to Make our Ideas Clear*, 12 POPULAR SCI. MONTHLY 286–302 (1878)).

20. JAMES, *supra* note 13, at 76.

21. *Id.* at 73.

22. *Id.* at 51, 72.

23. *Id.* at 80.

24. *Id.* at 77.

rejected for that reason.²⁵ Such rejection frequently happens, James explains, because we tend to be “extreme conservatives” about our beliefs, saving as many of the ones we already hold as possible.²⁶ That does not mean they can never be revised, but it does mean that they are revised infrequently and slowly. The result is that we tend only to take on new ideas when doing so enables us to “preserve[] the older stock of truths with a minimum of modification, stretching them just enough to make them admit the novelty.”²⁷

Now there are lots of potential objections to this method of validating beliefs, but instead of raising those objections, I want to distinguish between a narrow and a wide way of interpreting the pragmatist test of “experience.” The narrow view limits the sort of experience that can validate beliefs to *sensory* experience—to what we can see, smell, hear, feel, or touch. The wide view includes sensory experience *and* the “emotional” reactions that we often experience simultaneously with our sensory perception of some phenomena and that incline us to judge it as attractive or repulsive, good or bad, right or wrong, transcendent or commonplace. I am tempted to use the phrase “lived experience” to convey this wider sense of experience, though that term sometimes takes on a more specific connotation not intended here.²⁸

Both views flow from understandable pragmatist motivations. On the one hand, pragmatism’s emphasis on what works in practice seems plausible in part because it fits so nicely with a naturalist, Darwinian picture of the world and of man’s place within it—a picture that was (presumably) arrived at by distinguishing carefully between sensory experience and the “emotional” reactions that accompany it, as traditional empiricism demands. On the other hand, if *all* our beliefs are in theory revisable, and we genuinely cannot make sense of an “objective” account of the world to which our knowledge “corresponds,”²⁹ then why not revise the Darwinian picture itself in light of our lived experience?

25. *Id.*

26. *Id.* at 60.

27. *Id.*

28. In particular, it is sometimes used to describe the lived experience of oppressed or marginalized groups. See, e.g., Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology*, 18 *YALE J. L. & HUMAN.* 1, 2 (2006) (“It has become something of a commonplace—too much of one—that legal storytelling has the virtue of presenting the lived experience of marginalized groups or individuals in a way that traditional legal reasoning doesn’t.”). Although, as I say, that connotation is not intended here, the fact that people’s lived experience can vary widely depending on their race, sex, class, or sexual orientation no doubt bears on our assessment of its proper role in judicial decision-making.

29. JAMES, *supra* note 13, at 64 (“Purely objective truth, truth in whose establishment the function of giving human satisfaction in marrying previous parts of experience with newer parts played no role whatever, is nowhere to be found.”).

Which of these two routes the pragmatist chooses to follow will make a big difference as to the sort of inquiry the pragmatic method entails. So it is a fair and important question to ask of any purported pragmatist. James himself seems clearly to have taken the wide view of experience.³⁰ But I am less interested in defending that claim than in showing how an analogous interpretive question arises for the legal pragmatist.

B. Roscoe Pound's critique of "Mechanical Jurisprudence"

Pound is famous for criticizing what he called "mechanical jurisprudence." He used that term to describe a formal style of reasoning in which courts decide cases by resorting to broad principles like "liberty of contract."³¹ Just as James criticized the rationalists' use of "solving names," like God, Matter, and Reason, to resolve metaphysical disputes, Pound (citing James), criticized courts for invoking solving words like estoppel, privity, or malice to decide concrete cases.³² The problem with that approach was that such concepts often failed to describe accurately the actual facts courts confronted. The liberty-of-contract doctrine, for instance, treated parties as if they were two individuals freely engaging in an exchange, whereas in fact at least one party (and sometimes both) were not individuals at all, but large organizations, such as corporations or unions.³³

But, like James, Pound did not seek to eliminate such solving words; instead, he sought to provide them with a new foundation. The aspiration to make law a "science" remained, in Pound's view, a worthy one, so long as the notion of science was properly understood. The test of adequacy for any doctrine must be the effects it produces in the real world: "Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure."³⁴ The test, in other words, is the pragmatic test of experience.

Also like James, Pound recognized that this willingness to revise doctrines in light of their "results" seemed vulnerable to the objection that it was too permissive. He thus criticized those judges who "fix their gaze upon the raw equities of a cause and forage in the books for cases to sustain the desired result."³⁵ Instead, legal science, properly understood, required

30. *Id.* at 80 (explaining that pragmatism "will count mystical experiences if they have practical consequences"). See also CHERYL MISAK, *THE AMERICAN PRAGMATISTS* 70 (2013) ("James's empiricism is in step with very early American philosophy and with his pragmatist contemporaries in trying to make the concept of experience go beyond the physical senses.").

31. Pound, *supra* note 12, at 615–16.

32. *Id.* at 621.

33. *Id.* at 616.

34. *Id.* at 605.

35. *Id.* at 622.

that the judge attempt to render decisions consistent with the legal analogue to James's "stock of truths," namely the body of principles contained in the legal corpus. Judges, in Pound's view, should attempt to give "a fresh illustration of the intelligent application of the principle to a concrete cause, producing a workable and a just result."³⁶

C. Benjamin Cardozo's Method of Sociology

As the title of his lectures indicate, in *The Nature of the Judicial Process*, Cardozo sought to give an account of the "judicial process." More specifically, he devotes the bulk of his lectures to explaining the various methods by which judges, having identified the rule or principle potentially applicable to the case at hand, then sought to "fix the bounds and the tendencies of development and growth" of that principle.³⁷ Although he announces four such methods, it soon becomes clear that his main concern is reconciling the demands of two of these: the "method of philosophy" and the "method of sociology."³⁸ It is in elaborating that second method that we see Cardozo come up against the same interpretive issue just identified in James's *Pragmatism*.

The "method of philosophy" refers to both the process of deductive reasoning from general rules to particular cases and that of reasoning by analogy from one case to another. Cardozo emphasized that this method is not necessarily the most important one, but it does enjoy "a certain presumption in its favor" because a principle capable of rationalizing many cases has a "tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize."³⁹ For that reason, when Cardozo insisted that most cases that come before him as a judge have one clear right answer, the method employed is implicitly the method of philosophy.⁴⁰

The problem for judges is that sometimes multiple principles bear on the same case, making reliance upon the method of philosophy insufficient to determine the outcome. When that occurs, the judge's most useful tool is the "method of sociology," which is the "greatest [method] of them all." This method takes as its guiding assumption that "the final cause of law is

36. *Id.*

37. CARDOZO, *supra* note 12, at 30.

38. *Id.* at 30–31. Cardozo devotes only six pages to the method of history, six more to the method of tradition, and then acknowledges that the method of tradition and that of sociology "have their roots in the same soil." *Id.* at 51–64. The primacy of the methods of philosophy and sociology is also implied by the facts that he treats the method of sociology as the "arbiter" of the other methods and that (as mentioned in the main text) he considers most cases to be easily decided (by the method of philosophy). *Id.* at 66, 164.

39. *Id.* at 31.

40. *Id.* at 164.

the welfare of society.”⁴¹ That means that it requires judges to weigh the various “social interests” implicated in a given case.⁴² One of the most important social interests is the interest in having a law that is “uniform and impartial,” but so, too, is “the social interest served by equity and fairness or other elements of social welfare.”⁴³ That is why the method of sociology ends up being “the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all.”⁴⁴

For Cardozo, the dominance of the sociological method showed that “the juristic philosophy of the common law is at bottom the philosophy of pragmatism.”⁴⁵ The reason is that the sociological method depends on the twin assumptions that (1) the purpose of law is to improve social welfare and (2) such a goal provides the proper standard by which to understand its terms and guide its growth. It thus treats concepts and abstractions *instrumentally*, in the same way we have seen both Pound and James advocate. Like them, Cardozo sees the common law as guided ultimately by experience on the model of the natural sciences. “Its method is inductive,” Cardozo explains, “and it draws its generalizations from particulars.”⁴⁶

That is all well and good, but when it comes to describing what that “inductive” process of reasoning actually looks like, Cardozo has difficulty pinning it down with precision. A few representative passages suffice to illustrate the point:

- “[T]he thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.”⁴⁷
- “My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.”⁴⁸
- “[The judge] must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking

41. *Id.* at 65–66.

42. *Id.* at 112.

43. *Id.* at 112–13.

44. *Id.* at 98.

45. *Id.* at 102 (citing Pound, *supra* note 12, at 609).

46. *Id.* at 23.

47. *Id.* at 89.

48. *Id.* at 112.

out a little there, must determine, as wisely as he can, which weight shall tip the scales. If this seems a weak and inconclusive summary, I am not sure that the fault is mine.”⁴⁹

The ambiguities in Cardozo’s various formulations of the “judicial process”—how one might “balance” utility against social mores or one’s “sense of right” as against “history”—reveal the fundamental difficulty at the heart of sociological jurisprudence of the sort both he and Pound endorsed: How, exactly, is a judge to “weigh” social “interests”?⁵⁰ What is the nature of such a task? Is it an empirical inquiry that requires gathering facts about social conditions? An ethical one that requires an analysis of, or introspective inquiry into, the significance of competing values? Despite the title of Cardozo’s lectures, he never quite gives a satisfying answer to such questions. “If you ask how [the judge] is to know when one interest outweighs another,” Cardozo admits, “I can only answer that he must get his knowledge as the legislator gets it, from experience and study and reflection; in brief, from life itself.”⁵¹

It is tempting to chart a middle course by saying that the pragmatist should look to society’s norms or value judgments, not the judge’s own, to determine the weight of the interests at stake. The common law method has long been interpreted as requiring such an inquiry into societal mores.⁵² At times, Cardozo suggests it is the right one to take—one of the four judicial methods is, after all, the “method of tradition” or custom. “It is the customary morality of right-minded men and women,” he explains, “which [the judge] is to enforce by his decree.”⁵³ But as his use of the modifier “right-minded” reveals, this move just pushes the issue back: one must still ask whether the task is an essentially empirical one, or whether, instead, the judge must rely on her own intuition to discover what “right-minded men and women” think.

The point here is not to criticize Cardozo for being confused or contradictory, it is merely to show that his ambiguities revolve around the jurisprudential analogue to the question, mentioned above, of how to interpret pragmatism’s test of “experience.” In the philosophical context, we distinguished between a pragmatist who treats only sensory experience

49. *Id.* at 162.

50. *See, e.g.*, Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 344 (1915) (“Strictly the concern of the law is with social interests, since it is the social interest in securing the individual interest that must determine the law to secure it.”).

51. CARDOZO, *supra* note 12, at 113.

52. *See, e.g.*, Postema, *supra* note 4, at 602 (explaining that a view Postema dubs “common law conventionalism” holds that law “depends for its existence on substantial congruence and continuity with broader practices in the community”).

53. CARDOZO, *supra* note 12, at 106.

as the sort of experience that may validate one's belief in a moral or metaphysical doctrine ("narrow view") and one who also allows her emotional or "lived" experience to inform her pragmatic judgments ("wide view"). In the adjudicatory context, we can similarly distinguish between a pragmatist judge who, when the law is unclear, concerns herself exclusively with gathering as many facts as possible about the social and economic conditions potentially relevant to a case and one who allows her intuitions about the "just" outcome or the proper "balance" of values to govern. Both judges are pragmatist in the sense that they do not consider themselves strictly bound by their stock of legal truths (i.e., the doctrines and principles of the legal corpus) and so feel free to adjust them in light of new experience. But, as the analogy to the philosopher-pragmatist reveals, they proceed on very different assumptions about the nature of the practical and theoretical inquiry the judge faces. That difference can be seen even more starkly by comparing two works of legal theory published shortly after Cardozo's lectures.

D. Walter Wheeler Cook's Scientific Method

As the title of his short essay, *The Scientific Method and the Law*, suggests, Walter Wheeler Cook sought to improve law by making its method more scientific.⁵⁴ For Cook, that meant recognizing that the concepts of *any* science were merely tools for manipulating the environment and achieving certain goals.⁵⁵ James and others had shown, Cook argued, that any effort to classify phenomena can only be justified by reference to some purpose for which the classification is intended. Thus, the scientist's real task is "to determine whether the differences involved which make us think of it as new, are as a practical matter, i.e., as tested by their consequences, important for the purpose we have in view."⁵⁶

He then went on to explain what this meant for the judge. Only a few judges, such as Holmes and Cardozo, recognized that judges really impose meaning on legal terms, rather than extract it from them. In order to figure how best to "legislate" in this way, Cook insisted that the judge must look to "considerations of social or economic policy." Thus, he must know two things: "(1) what social consequences or results are to be aimed at; and (2) how a decision one way or other will affect the attainment of those results."⁵⁷ The legal scholar, who aims to gauge the effectiveness of law, must engage in a similar kind of reasoning: "we must know what at any

54. Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927).

55. *Id.* at 305.

56. *Id.* at 306.

57. *Id.* at 308.

given period these ends are and also whether the means selected, the given rules of law, are indeed adapted to securing them.”⁵⁸

E. Jerome’s Frank’s “Scientific Spirit”

A few years later, Jerome Frank published *Law and the Modern Mind*, in which he took a very different view of the nature of the problem and its solution.⁵⁹ Frank agreed with Cook that lawyers and judges were too dogmatic in their attachment to formal rules, doctrines and practices.⁶⁰ But he disagreed with Cook that the solution required a more rigorous assessment of how best to achieve particular goals.⁶¹ Instead, Frank drew a different lesson from James. The important thing was to give up on the goal of certainty itself, even if that certainty is about how best to achieve a particular outcome.⁶² Life is chaotic and our knowledge of the world uncertain. Once one comes to grip with those facts, one should abandon, or at least reduce the significance of, the goal of establishing classifications in the first place. Being “scientific,” for Frank, meant adopting a particular stance or attitude—one he called the “scientific spirit”—not applying a particular analytic method.⁶³ The stance is that of the “creative scientist,” who devotes himself “to new ways of manipulating protean particulars and not to the quest of undeviating universals.”⁶⁴ The process required to attain that attitude was largely an emotional, rather than an intellectual, one. It required, above all, that judges and lawyers free themselves of the “emotional blocking” that results from their need for security and fatherly authority. Once they have done so, they will stop projecting certainty onto the law and be more comfortable in using its rules, doctrines, and concepts to achieve justice.⁶⁵

Frank thus envisions a quite different role for the judge than does Cook. According to Frank, we need judges “with a touch in them of the qualities which make poets,” who will “administer justice as an art,” so we should “encourage, not . . . discountenance, imagination, intuition, [and] insight.”⁶⁶ Because what judges and lawyers think the law ought to be “constitutes, rightfully, no small part of the thinking of lawyers and judges. Such thinking

58. *Id.*

59. JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

60. *Id.* at 100.

61. *See id.* at 101–03.

62. *Id.* at 17.

63. *Id.* at 98–99. For a longer discussion of Frank’s notion of the scientific spirit, see Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 *BUFF. L. REV.* 1127 (2010).

64. FRANK, *supra* note 59, at 98 (emphasis omitted).

65. *Id.* at 167.

66. *Id.* at 168–69 (internal quotations omitted).

should not be diminished, but augmented.”⁶⁷ If we are able to cultivate such sensibilities in judges, we might then encourage a “more constructive type of speculating” in which judges imagine “possibly useful rearrangements of experience.”⁶⁸

* * *

One can see, then, that Cook and Frank interpret the pragmatist test for judges differently and that they do so in ways that map onto the ambiguity identified in Cardozo’s lectures. Cook interprets it as requiring judges to test the value of legal doctrines by reference to the observable social and economic consequences they produce. Therefore, the key is for judges to be clear in their thinking about goals and rigorous in trying to predict the consequences of their decisions.⁶⁹ Frank, meanwhile, has a more expansive understanding of the kind of “experience” that validates a decision. It includes the judge’s own emotional reactions and felt experience. So the goal is to cultivate judicial sensibilities in such a way as to produce the right sort of reactions to the particular facts in a case—reactions that would produce legal certainty in a “deeper sense.”⁷⁰

We can also see how each approach carries its own difficulties or challenges. Cook’s vision of the judge who limits herself to gathering (observable) facts about the world must bring to bear some criterion, or establish some goal, by which to measure success. Does it require a utilitarian balancing, as Cardozo’s phrase “social welfare” would connote today? If so, what values should be maximized? And how do we measure them? Finally, where does the criterion come from? If it comes from the legal corpus itself, then the judge’s pragmatism is doing no work—she is simply applying settled law deductively. But if it does not come from there, where does it come from? New sensory experiences alone seem incapable of themselves providing such a standard.

Frank’s more inclusive or “wide” approach, however, carries its own problems. It has a better answer to the question of where its evaluative judgments come from. They come from the judge’s own (emotional) reactions to the world – that is, from experience (broadly conceived), as they should for a pragmatist. But then the question is why the judge should *trust* such reactions. Indeed, Frank famously gives plenty of reasons for thinking

67. *Id.* at 168.

68. *Id.* at 168.

69. Cook was aware that judges are typically not provided with such information by counsel, but that was a fact he lamented. *See id.* at 129–30.

70. *Id.* at 134.

that, in general, the intuitions of judges should *not* be trusted—they are all too often in the grip of a childish need for fatherly authority.⁷¹

The source of the difficulties just described is the same problem to which James offered pragmatism as a solution: how to make sense of “human values” in a world that science tells us includes only matter in motion.⁷² Put more crudely, the problem is how to reconcile fact and value. The failures of Cook and Frank show how, in trying to solve that problem, the pragmatist can easily get caught on the horns of a dilemma: Her empiricism directs her attention outward and demands that she observe the actual consequences of some concept, rule, or system of belief. But she cannot literally *see* injustice or injustice, good or evil. Rather, the source of value seems to somehow come from within. And yet the scientific understanding of the world gives us no reason to trust the introspections on which we rely to discern such values.

II. HART AND SACKS (AND FULLER): TOWARD A NEW RECONCILIATION?

The famous teaching materials, *The Legal Process*, by Henry Hart and Albert Sacks, constitute perhaps the most ambitious effort, at the time of their writing, by legal scholars to resolve the dilemma just described.⁷³ Hart and Sacks’s solution had two key elements. First, they ascribed to law and legal institutions an overriding social purpose, thereby providing a criterion both for those tasked with making decisions within legal institutions (i.e., lawyers and judges) and for those who analyze and evaluate those institutions (i.e., legal scholars).⁷⁴ Second, as a methodological matter, they insisted that judgments of fact and value—or, as they put it “means” and

71. *Id.* at 21.

72. JAMES, *supra* note 13, at 20. It is one instance of what philosophers today sometimes call “placement problems.” See David Macarthur, *Naturalizing the Human or Humanizing Nature: Science, Nature and the Supernatural*, 61 ERKENNTNIS 29, 30 (2004) (“[T]he problem is to attempt to find a place for the mind, and all its aspects and contents, within the-world-as-described-by-the-sciences. Call these scientific naturalism’s placement problems.”) (emphasis omitted); see also Huw Price & Frank Jackson, *Naturalism and the Fate of the M-Worlds*, 71 PROC. ARISTOTELIAN SOC’Y 247, 247 (1997) (“[T]he regions under threat are some of the most central in human life—the four Ms, for example: Morality, Modality, Meaning and the Mental. Some of the key issues in contemporary metaphysics concern the place and fate of such concepts in a naturalistic world view.”). It is also what Professor Edward Purcell calls the “problem of value.” See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973). One implication of this essay is that Purcell’s fascinating history of how theorists and social scientists in a variety of disciplines dealt with the “problem of value” fails to accord sufficient attention to a solution to that problem (or, more accurately, an approach to a set of attempted solutions) that grew out of the pragmatist tradition, spanned most of the twentieth century, and was particularly influential among legal scholars.

73. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

74. For a more extended argument that is similar, though not identical, to the one developed in this Part, see Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013).

ends”—are interdependent on one another. This latter, methodological conviction is what reveals the pragmatist roots of their solution.

A. The (Social) Purpose of (Legal) Institutions

Hart and Sacks begin by explaining that one of the “basic conditions of human existence” is that human beings have desires or “wants.” These wants vary, from the basic needs of survival, to the desire to “achieve some sense of oneness with the universe.”⁷⁵ Because at least some of these wants are revisable in light of “external suggestion” and “internal reflection,” a human life itself is “an unceasing process of fixing upon those [wants] on which time and effort are to be expended, and trying to satisfy them.”⁷⁶ But because satisfying wants often requires the work or support of others, human beings choose to live in groups. Once they do so, they inevitably form interests in common. At the very least, people living in groups share an interest in maintaining the conditions that make group life possible. Those conditions include having an agreed-upon set of procedures for settling disagreements about the “understandings” on which social life will be conducted, procedures for deciding what happens when people violate one of those understandings, and, finally, a procedure for changing the understandings.⁷⁷

Given the need for such procedures, Hart and Sacks conclude that the “constitutive or procedural understandings . . . are obviously more fundamental than the substantive arrangements in the structure of a society, if not in the realization of its ultimate aims.”⁷⁸ They are more fundamental, again, because they serve an interest in which all share, namely maintaining group life. That is why, for Hart and Sacks, the “central idea of law” is what they call the “principle of institutional settlement,” which expresses the judgment that “decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.”⁷⁹

One of the corollaries of the principle of institutional settlement is that the rules determining the scope and limits of the various institutions tasked with “duly” making such decisions—courts, legislatures, private ordering, and administrative agencies—come to be seen as “the most significant and enduring part of the whole legal system, because they are the matrix of everything else.”⁸⁰ This is one (but only one) reason why the course for

75. HART & SACKS, *supra* note 73, at 1 (emphasis omitted).

76. *Id.*

77. *Id.* at 3.

78. *Id.* (emphasis omitted).

79. *Id.* at 4.

80. *Id.* at 6.

which the materials were written was called the *The Legal Process*. On the view it offers, law is primarily concerned with determining how decisions get made and who is properly tasked with making them.

One way, then, that Hart and Sacks resolve the dilemma we saw in Cardozo's lectures is by scaling back the ambitions of courts. They are no longer tasked with balancing "social interests" directly so much as they are tasked with policing the process by which those interests are given protection by other institutions, whether private parties, legislatures, or administrative agencies. According to Hart and Sacks, adjudication is only appropriate where it can be conducted "rationally," by which they meant pursuant to some commonly agreed-upon standard.⁸¹ That standard may be found in the purpose of a legislature's statutory enactments or, when those run out, in the fundamental purposes of the law and society. But because the purposes most likely to enjoy sufficient consensus to qualify as "social purposes" are process-based ones about how to settle substantive disagreements, the purposes that guide adjudication are likely to be procedural in nature as well.

This turn to "process" over "substance" is one reason why Hart and Sacks came under attack by a younger generation of legal scholars. According to these scholars, Hart and Sacks responded to skeptical attacks on the rationality of adjudication only by accepting a value relativism for questions of "substance" (relegated to the legislature) while insisting that courts could "neutrally" decide questions of "procedure."⁸² But, according to this criticism, Hart and Sacks were mistaken because deciding questions of procedure necessarily requires making judgments about whose interests get counted and how. Questions of procedure are just as inescapably political as those of "substance."⁸³

B. The (Pragmatic) Method of Institutional Analysis

That characterization is accurate insofar as Hart and Sacks thought courts were on firmer ground when deciding procedural questions. But it is wrong to suggest that Hart and Sacks claimed that one could make such judgments without reference to values. To the contrary, they repeatedly emphasized

81. *Id.* at 148.

82. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 36 (1996) (explaining that process theorists attempted "to separate law from politics, process from substance, fact from values"); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 590 (1988) (observing that for legal process theorists "in the realm of procedure, neutral, value-free reasoning was possible").

83. Peller, *supra* note 82, at 608 ("The very same issues that the fifties scholars thought they were avoiding through the geographical delineation between a relativist, policy-based substantive realm and a normative, but neutral and determinate, procedural realm reemerged in the actual application of the proceduralist solution.").

that even to describe an institution required making reference to the purpose for which it exists. And since such descriptions or analyses might be used to make decisions about or within these institutions, it followed that offering such accounts required making judgments of value.⁸⁴

This is the second way in which Hart and Sacks sought to reconcile the ambiguity identified in Cardozo—and the way in which they reveal themselves to be legal pragmatists as well. In their view, what they called the “science of society” required both empirical study *and* introspection—or, as they put it “experience and reflection.”⁸⁵ A judge does not simply stipulate what the purpose of some statute or body of case law is and then figure out what decision or doctrine would best achieve it. Instead, she looks to the law itself and tries to infer what its underlying purpose is.⁸⁶ So, too, then, when a judge or legal scholar must discern the underlying purposes of some legal institution, she does not simply stipulate a social goal and then figure out the most efficient means to achieve it. Instead, she looks to the conditions under which the institution seems to function well and to be generally accepted as legitimate. As Hart and Sacks put it, such experience and reflection on actual practices “tells the social scientist . . . a good deal about the ultimate aims of the institutional system with which he is concerned.”⁸⁷

Hart and Sacks, following their colleague, Lon Fuller, described this method of analysis as the “interaction between social ends and social means.”⁸⁸ It was a pervasive theme of their materials and in Fuller’s work.⁸⁹ Both were likely influenced by John Dewey, who explored the philosophical issues implicit in such a form of practical reasoning more extensively.⁹⁰ The approach may properly be classed as *pragmatic* in the Jamesian sense because it tests the adequacy of abstractions—whether concepts, rules, principles, or whole legal institutions—by reference to how well they work in practice.⁹¹ But—and this is the important point—it

84. HART & SACKS, *supra* note 73, at 107–08.

85. *Id.* at 111.

86. Of course, my use of “she” as a generic pronoun is highly anachronistic. Hart and Sacks were clearly writing for a male audience. *See, e.g., id.* at 7 (“Consider, first, some simple but typical problems of human life as they present themselves to the individual in his private and individual capacity . . . Shall I marry this girl?”).

87. *Id.* at 111.

88. *Id.* (citing Lon L. 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, 480 (1954)).

89. *See, e.g.,* Fuller, *supra* note 88; Lon L. Fuller, *Means and Ends*, in THE PRINCIPLES OF SOCIAL ORDER 61, 61–65 (Kenneth I. Winston ed., 2001).

90. JOHN DEWEY, *THEORY OF VALUATION* (1939). *See also* Elizabeth Anderson, *Dewey’s Moral Philosophy*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 17–18 (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/archives/spr2014/entries/dewey-moral/>.

91. *See* HART & SACKS, *supra* note 73, at 147 (“The necessity [of consistency in the application of a rule] is an outgrowth of the necessity of employing abstractions in general arrangements, and of the

depends on what I have called the “wide” interpretation of experience. After all, the judge facing a decision cannot *see* the purposes of the institution whose jurisdiction she is tasked with expanding or delimiting. So empirical information alone does not suffice, even for “procedural” matters. Law is “judgmatical” or “prudential” social science precisely because it requires the lawyer, judge, or legal scholar to attend to her own intuitions as to what is “sound” or “workable”—intuitions that the law school course for which the materials were written was intended to inculcate.⁹²

III. THE CRITIQUE OF LEGAL PROCESS THEORY AND THREE RESPONSES TO IT

This tendency of process theory to treat fact and value as interdependent may be what led to the attacks on it. Even if values could not be read directly off practices, it seemed to offer few moral resources for condemning *en masse* whole categories of social and legal institutions. So at a time when stark moral conflicts began to emerge in American society, around both the civil rights movement and then the Vietnam War, the legal process approach came to seem complacent and conservative.⁹³

Process theory also came under attack from two different quarters for having too rosy a view of how legal institutions work. First, economists and political scientists challenged the assumption that legislatures and courts actually pursued social purposes of the sort Hart and Sacks ascribed to them. Building off the insights of Kenneth Arrow’s work, public choice theorists sought to expose and explain the difficulty—indeed, under certain conditions, the impossibility—of using voting procedures to generate collective decisions.⁹⁴ Moreover, according to the models employed by such theorists, institutional actors pursued their own self-interest, which in the context of legislators typically meant reelection.⁹⁵ Thus, the idea that one

inescapable indeterminateness which results. The formulation of an abstraction is in itself a rationalizing—an organizing or patterning—of experience. As already emphasized, human life and social life could not be thought about or managed in any way if this effort were not made.”)

92. *Id.* at 107, 179 (“A lawyer’s training is needed for a sound appreciation of the appropriate scope of judicial creativeness.”).

93. Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 23, 36–38 (David Kairys ed., 1998). See also PURCELL, *supra* note 72, at 272 (“The relativist theory [of postwar intellectuals generally], with its prescriptive-descriptive ambiguity, provided the logical passageway that allowed the normative concept of America to walk in and take over most of academic social and political thought. It also helped explain why so many scholars—themselves intelligent, honest, humane, and democratic—could accept an ideology that in fact served to justify a quite imperfect status quo.”).

94. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951). For an overview of the relevant literature, see DENNIS C. MUELLER, *PUBLIC CHOICE* (1979).

95. See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1398–99 (1996) (citing and discussing such critiques).

could discern coherent and public-regarding purposes in the actions of legislatures, or even courts,⁹⁶ seemed naïve.

At the same time, critical legal scholars offered historical critiques, which showed how legal regimes and institutions had served to maintain the power of particular classes. Morton Horwitz, for instance, argued that appellate judges in the nineteenth century had manipulated various private law doctrines in order to prevent the railroads and other businesses from having to bear the costs that rapid industrialization imposed on society.⁹⁷ Professor Gordon generalized the point, arguing that what he called “historicist” arguments posed a significant threat to traditional forms of legal scholarship, not only because they gave the lie to the idea that law responded adequately to “social needs,” but because there were no, naturally occurring “social needs” in the first place; instead, there were only conflicting interests—interests that were themselves the product of law.⁹⁸

Although launched with different ideological motivations and from different methodological perspectives, both of these critiques effectively aimed to undermine the assumptions of process theory by explaining *what was really going on* in American legal practice. I will therefore refer to them together as the *explanatory critique*.

In what follows, I aim to identify three sorts of responses to the explanatory critique. My claim is not that each was consciously conceived of, or formulated as, such a response (though at least one was). Instead, my purpose is to show how each offers a model of judicial reasoning (and practical reasoning generally) that in some way takes account of the sort of historical and social-scientific criticisms just mentioned. Because the explanatory critique presents another version of the same underlying dilemma with which pragmatism was conceived to deal—trying to square fact and value—it should come as no surprise that each response makes use of familiar pragmatist strategies. I call them the instrumentalist, quietist, and holist versions of pragmatism.

96. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 823–31 (1982) (applying Arrow’s impossibility theorem to the Supreme Court in order to show that, under certain plausible conditions, it is impossible for the Court to decide cases in a consistent, principled manner over time).

97. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

98. Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1035 (1981) (explaining how critical historians could show “how legal texts participate in the construction of the social world, populating it with creatures of law’s own devising, abstract self-determining individuals and artificial corporate persons, ascribing ‘interests’ to them and deciding when their sufferings are recognizable ‘harms’” and further explaining that “[t]he social needs usually postulated, besides being partly a construct of the legal system rather than somehow objectively present in society apart from law, are frequently in contradiction with one another”).

A. *The Instrumentalist*

I call the first version *instrumentalist* because that term is already used to describe it in the philosophical literature on practical reasoning.⁹⁹ The instrumentalist takes what I have called the “narrow” interpretation of the sort of experience that can validate beliefs, limiting it to sensory experience. Under this model, ends and means are to be treated separately because whereas beliefs about means are verifiable by experience, ends are “desires” incapable of such verification.¹⁰⁰ Thus, once an individual sets an end, she may then reason about how best to achieve that end. But one can neither derive nor discover the ends themselves. This is more or less the same model of reasoning as the one we saw in Cook. If we want to go further back, we could probably find something similar in Holmes, perhaps the most famous legal pragmatist of all.¹⁰¹ In any case, today instrumentalism remains the standard model of reasoning assumed in many of the social sciences.¹⁰²

The instrumentalist response to the explanatory critique is to embrace it. Indeed, as already stated, the critique was in part launched by economists, who thought that the legal-process effort to ascribe general social purposes to legal institutions failed precisely because it did not offer a sufficiently realistic account of how human beings reason about what to do.¹⁰³ Individuals typically have very concrete goals, and they try to maximize their chances of achieving them.

The best known modern-day exponent of judicial instrumentalism is Judge Posner, though I quickly want to qualify that claim. Judge Posner has written much on the subject of legal pragmatism, and, in my view, not all of it fits instrumentalism.¹⁰⁴ But I am more interested in distinguishing among ideal types, and Judge Posner has at least in some places given a clear articulation of the instrumentalist view. He has stressed, for instance, the relative futility of reasoning about “ends” as compared to means.¹⁰⁵

99. See Elijah Millgram, *Practical Reasoning: The Current State of Play*, in VARIETIES OF PRACTICAL REASONING 1, 4–5 (Elijah Millgram ed., 2001); R. Jay Wallace, *Practical Reason*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 11 (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/archives/sum2014/entries/practical-reason/>.

100. See Millgram, *supra* note 99, at 5 (observing that instrumentalism is often tied to a “belief-desire psychology”).

101. Oliver Wendell Holmes, *The Path of the Law*, BOS. L. SCH. MAG., Feb. 1897, at 11.

102. Wallace, *supra* note 99, at 11; Millgram, *supra* note 99, at 4.

103. See Rubin, *supra* note 95, at 1398–99.

104. See, e.g., Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838–39 (1988) (approving of a form of reason, which he calls “practical reason,” which is constituted by a “grab bag of methods, both of investigation and persuasion” and which often “yields as high a degree of certainty as logical demonstrations do”).

105. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 28 (2003) [hereinafter POSNER, LAW, PRAGMATISM] (explaining that “means are relative to ends, and to choose an end must require a different kind of reasoning. But the choice of an end need not, perhaps cannot, be a product of reasoning”); Richard A. Posner, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111

According to Judge Posner, knowledge is a “tool for coping,” which means the questions for which humans are best suited are ones that assume some antecedent goal.¹⁰⁶ But disputes over what the proper goals are, or what the most important values are, cannot be rationally adjudicated. Instead, “the sort of reasoning that moves the ball down the field, is deliberation over means.”¹⁰⁷ Under this view, the only basis for criticizing moral principles rationally is by showing that they are ineffective tools for accomplishing certain social goals.¹⁰⁸

Posner also grounds his instrumentalism on the same sorts of considerations that motivate the explanatory critique. He embraces a naturalistic, Darwinian picture of the world, in which human nature is the product of *homo sapiens*’ success in the process of natural selection.¹⁰⁹ From that fact we can infer some further facts about the kind of reasoning of which humans are capable. It suggests, for instance, that our “intellectual capabilities [are] oriented toward manipulating our local physical and social environment.”¹¹⁰ It is for that reason that “we cannot be optimistic about our ability to discover metaphysical entities, if there are any (which we cannot know), whether through philosophy or any other mode of inquiry.”¹¹¹

For similar reasons, Posner puts as little stock in moral reasoning as he does in metaphysical theorizing, particularly in the context of adjudication. His sort of pragmatist judge is primarily concerned with achieving a reasonable result in the particular context in which the case arises and has little faith in the power of general principles, such as “fairness, justice, autonomy, and equality” to offer helpful guidance in doing so. Posner makes the point colorfully:

Pragmatists think that if the constitutional issue is, say, whether the children of nonnaturalized immigrants should be entitled to a free public education, or whether per-pupil expenditures on public school education should be equalized across school districts, or whether prayer should be allowed in public schools, the constitutional lawyer should study education, immigration, public finance, and religion

HARV. L. REV. 1796, 1803 (1998) (“The relevant distinction is between reasoning over ends and reasoning over means. I argue in my Lectures that the latter is productive and the former unproductive.”).

106. POSNER, LAW, PRAGMATISM, *supra* note 105, at 42, 52.

107. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1680 (1998). *See also id.* at 1669.

108. *Id.* at 1668 (“What scholars can do—but this owes nothing to moral theory—is to criticize moral codes by showing that they lack functionality, instrumental efficiency, or rationality.”).

109. POSNER, LAW, PRAGMATISM, *supra* note 105, at 4 (“The first and perhaps most fundamental thesis of philosophical pragmatism, at least of the brand of philosophical pragmatism that I find most congenial . . . , is that Darwin and his successors in evolutionary biology were correct that human beings are merely clever animals.”).

110. *Id.* at 4.

111. *Id.* at 5.

rather than inhale the intoxicating vapors of constitutional theory the better to manipulate empty slogans (such as “the wall of separation [between church and state]” and question-begging vacuities (such as “equality” and “fundamental rights”). What sensible person would be guided in such difficult, contentious and fact-laden matters by a philosopher or his law-professor knock-off?¹¹²

Instead, Posner encourages judges to make decisions at a relatively low level of generality, with an eye towards their likely consequences. For that reason, social sciences that aid in predicting those consequences offer far more useful resources with respect to both general theory and empirical information than does normative theorizing.¹¹³ At the same time, Posner also thinks history offers a useful way to expose the irrationality of certain legal doctrines or practices—again, just as the critical legal historians did against legal practice in general.¹¹⁴

A. *The Quietist*

The quietist takes what I have called the “wide” view of experience, mentioned above, allowing one’s emotional reactions or moral intuitions to contribute to the justification of a set of moral and legal commitments. But the quietist does not rely on that wide conception of experience to challenge the instrumentalist’s naturalistic ontology in which man’s moral and cognitive capacities are understood to be the product of natural selection. For the same reason, the quietist does not feel compelled to deny the explanatory critique of the legal process assumptions. Instead, the quietist simply treats such explanatory claims—whether metaphysical or causal—as irrelevant to practical questions of the sort judges face.¹¹⁵ Such claims are reinterpreted as normative ones about what to do.

One can trace the origins of the quietest response back to at least Lon Fuller and Henry Hart. Fuller, for instance, repeatedly emphasized that the proper test of adequacy for a theory of law lay in the consequences it would have for those who rely on or invoke it.¹¹⁶ In his contribution to the so-called Hart-Fuller debate, he praised Hart for acknowledging that “definitions of

112. *Id.* at 79–80.

113. *Id.* at 76–79.

114. *Id.* at 6. See also Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 579–606 (2000).

115. In this way, I am using the term in a broader sense than those philosophers who use it to refer to the specifically meta-*metaphysical* position denying the intelligibility or profitability of engaging in metaphysical debate. For a discussion of quietism, see Charles Barzun, *Metaphysical Quietism and Functional Explanation in the Law*, 34 LAW & PHIL. 89, 92 (2015).

116. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 2–3 (suggesting that jurisprudential controversies should be adjudicated by asking, “[w]ould the adoption of the one view or the other affect the way in which the judge, the lawyer, the law teacher, or the law student, spends his working day?”)

‘what law really is’ are not mere images of some datum of experience, but direction posts for the application of human energies.”¹¹⁷ In a similar vein, Henry Hart criticized Holmes’s heuristic of the “bad man,” by asking, “Why that helps, unless to make us more effective counsellors [sic] of evil, I have never understood. . . . Is a lawyer serving either his client or his profession well if he predicates his advice simply on the likelihood of the client’s being caught, and on what would happen if he were?”¹¹⁸

Fuller referred to his own conception of jurisprudence as “pragmatic,” and with good reason. It seems to make good, for instance, on James’s hope that theories become “instruments, not answers to enigmas, in which we can rest,” so that we may “move forward, and, on occasion, make nature over again by their aid.”¹¹⁹ It tests the adequacy of a theory by reference to its effect on practice and action. And it was on the basis of such a conception of theory that both he and Hart developed the purposivist interpretation of legal institutions so emblematic of *The Legal Process* teaching materials—one they each defended as an explicit response to legal-realist assumptions about human behavior.¹²⁰

Today, the most articulate modern-day quietist is the late Ronald Dworkin.¹²¹ Interestingly, Dworkin sought to disassociate himself from the “instrumentalist” view of law he found in Hart and Sacks, and he labeled one of his chief jurisprudential targets “pragmatism.”¹²² But it is not hard to see how his “interpretive” methodological approach is a close cousin of the Fullerian one just described. In *Law’s Empire*, Dworkin argued that judges engage in acts of “constructive interpretation,” in which they impose order on legal materials relevant to the case at hand in order to make the best moral sense of them.¹²³ And the legal philosopher does the same thing with legal practice overall, interpreting it in the way that puts it in the best light in order that the practice may be improved as a result.¹²⁴

117. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632 (1957).

118. Henry M. Hart, Jr., *Holmes’ Positivism—An Addendum*, 64 HARV. L. REV. 929, 932 (1951).

119. JAMES, *supra* note 13, at 53. This is not to suggest that James was a quietist. He quite clearly was not because he did develop metaphysical theories. See HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 22 (1995) (referring to James’s “undeniable metaphysical bent”). But the focus on the consequences of a system of belief, rather than its metaphysical credentials, is a central feature of pragmatism and is, in my view, what motivates the quietist turn—at least of the normative sort of quietism I have in mind here. For a discussion of a less normative, more descriptive or “genealogical” brand of quietism, see Barzun, *supra* note 115.

120. HART & SACKS, *supra* note 73, at 108; FULLER, *supra* note 116.

121. I am not the first to use this label to describe Dworkin. See, e.g., Tristram McPherson, *Against Quietist Normative Realism*, 154 PHIL. STUD. 223, 224 n.3 (2011).

122. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 6–7 (1977) (instrumentalism); RONALD DWORIN, LAW’S EMPIRE 151 (1986) [hereinafter DWORIN, EMPIRE] (pragmatism).

123. DWORIN, EMPIRE, *supra* note 122, at 52.

124. *Id.* at 90.

As other scholars have observed, Dworkin's substantive theory of law—his own “constructive interpretation” of legal practice—also bears the marks of legal process theory.¹²⁵ In his early work, he invoked the same distinction between “principles” and “policies” that Hart and Sacks did. And later he offered an understanding of law, which he dubbed “law as integrity,” that calls for the same sort of purposive, principled approach to judicial decisionmaking that Hart and Sacks called “reasoned elaboration.”¹²⁶ Both envision the judge's task as one of drawing deductive inferences from general principles derived from the underlying purposes of social practices.

The conventional wisdom is that Dworkin extended and deepened the Hart and Sacks analysis by giving it a more “substantive,” moral foundation. Judges, in his view, properly base their decisions on substantive moral principles, such as equality and liberty. They need not be cashed out in “procedural” terms that purport to be “neutral” as between competing moral visions or political ideologies.¹²⁷

There is some truth in this view, but it is worth recognizing that Dworkin only secured the thicker moral account by refusing to make any ontological claims about the nature of man or society. This is where his quietism kicks in. Dworkin's response to skeptical attacks on the sort of reasoning he ascribes to judges—whether skepticism of the meta-ethical sort that denies the reality of “moral facts” or of the critical-historical variety that purport to show how legal doctrines have developed to serve the interests of the powerful—is to assert their normative impotence. With respect to the meta-ethical critique, Dworkin denies that such “external skepticism” can constitute an intelligible attack on substantive moral positions.¹²⁸ And with respect to the historical critiques, he insists that they are arguments of the wrong form, because they are insufficiently practical in orientation. They purport to *explain* the legal materials when what the judge facing a decision seeks is guidance in the form of a *justification* for a decision one way or the

125. Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 470 (1987); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 731 (1991) (observing that “[t]here are some striking similarities between the legal process synthesis of the 1950s and Ronald Dworkin's theory of ‘law as integrity’”).

126. DWORKIN, *EMPIRE*, *supra* note 122, at 225–76; HART & SACKS, *supra* note 73, at 143–49.

127. See, e.g., Eskridge & Peller, *supra* note 125, at 731 (“Dworkin's work is not ‘just’ legal process, for it is self-consciously evaluative. The judge must make the legal text the ‘best it can be,’ and Dworkin realizes that this means the judge must be a substantive critic as well as a process synthesizer.”).

128. DWORKIN, *EMPIRE*, *supra* note 122, at 82 (“Since external skepticism offers no reason to retract or modify [a substantive moral view], it offers no reason to retract or modify the [assertion of objectivity of the moral view] either”). Dworkin gave a more extended defense of his meta-ethical theory (or, more accurately, his denial that one is necessary) in Ronald Dworkin, *Objectivity and Truth: You'd Better Believe it*, 25 PHIL. & PUB. AFF. 87, 88–89 (1996). For his most recent discussion of the issue, see RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 23–96 (2011) [hereinafter DWORKIN, HEDGEHOGS].

other drawn from those materials.¹²⁹ Dworkin went even further in *Justice for Hedgehogs*, arguing that the entire domain of value is “independent” from that of facts.¹³⁰

Such observations do not imply criticism. In some ways, they only further burnish Dworkin’s pragmatist credentials. Indeed, for Richard Rorty—himself someone with quietist inclinations—Dworkin’s rejection of the demand for “objectivity” is precisely what warrants including him within the pragmatist fold.¹³¹

But it does illustrate well how Dworkin’s account of legal practice differs from that of Fuller and Hart. In order to justify assigning to judges the task of applying principles and interpreting statutes purposively, Fuller and Hart felt compelled to give an account of human nature and of society that rejected the view they saw implicit in legal-realist critiques. They sought to ground liberal and democratic institutions on the basis of some “basic facts of human existence”—in particular, on the common interest that people have in maintaining the institutions holding society together, even as it changes and evolves to meet new demands (the other meaning of process in “legal process”).¹³² Now Fuller and Hart may not have been successful in generating values from the ground up, on the basis of such “basic facts,” and they may have taken for granted the level of political consensus that existed in the United States during the postwar period in which they wrote. But they at least recognized the gap between fact and value as a *problem*, even if one they ultimately failed to solve.¹³³

Dworkin the quietist, on the other hand, denies that there is any such problem. Instead, he ultimately describes efforts to “‘reconcile’ the moral and the natural worlds” or “to align the ‘practical’ perspective we take when living our lives with the ‘theoretical’ perspective from which we study ourselves as part of nature” as “entirely bogus philosophical projects.”¹³⁴

129. DWORKIN, *EMPIRE*, *supra* note 122, at 13, 273 (arguing that such critical histories, “describe law genetically,” and in so doing, “may reflect a serious misunderstanding of the kind of argument necessary to establish a skeptical position: the argument must be interpretive rather than historical.”).

130. DWORKIN, *HEDGEHOGS*, *supra* note 128, at 17.

131. Rorty, *supra* note 10, at 1811 (“It is true that Ronald Dworkin still bad-mouths pragmatism and insists that there is ‘one right answer’ to hard legal questions. On the other hand, Dworkin says that he does not want to talk about ‘objectivity’ anymore.”). For evidence of Rorty’s own quietism, see Richard Rorty, *Naturalism and Quietism*, in *NATURALISM AND NORMATIVITY* 44 (Mario De Caro & David MacArthur eds., 2010).

132. HART & SACKS, *supra* note 73, at 1–2. See Barzun, *supra* note 74, at 44.

133. Perhaps this is why Hart and Sacks re-wrote the first chapter of the Legal Process teaching materials more often than any other chapter and why they never felt sufficiently confident in them to publish them. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, *supra* note 73, at li, xc (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

134. DWORKIN, *HEDGEHOGS*, *supra* note 128, at 9.

B. *The Holist*

The holist, like the quietist, takes the “wide” view of experience. For that reason, also like the quietist, she believes that our moral experience can serve as a genuine guide for practical decisionmaking. But unlike the quietist, she does not dismiss possible metaphysical or causal explanations as irrelevant to practical reasoning. Instead, she considers such explanations as potentially relevant to moral justification and, more controversially, vice versa. Her reasoning is *holistic* because it sees factual and evaluative considerations as interdependent.¹³⁵

Like the quietist, one can find roots of holism in Hart and Fuller. Indeed, their talk of the “interaction of means and ends,” already mentioned, reflected such holistic inclinations.¹³⁶ The idea was that we could rationally reevaluate our values or ends in light of the means required to achieve them, either because the means are too burdensome or, more interestingly, because the means indicate a new, previously unseen or unappreciated value worth pursuing. In analyzing the nature of adjudication, for instance, Fuller reflected on the fact that two facts both seemed to be true: (1) In order for adjudication to be rational, there must be some standard that the adjudicator applies to the facts of the case in determining a party’s responsibility or the validity of her claim (value premise) but that (2) parties seemed to accept the results of adjudications even when there was no clearly established rule (fact premise) available to serve as the standard.¹³⁷ From these premises, Fuller inferred that courts could rationally decide cases according to principles derived from the underlying purposes of a community even when those principles themselves were not known or recognized by all of those within that community.¹³⁸

Now of course this reasoning depends on some additional premises, namely (3) that what explains the parties’ acceptance of the verdicts of adjudication is their belief in the rationality of the process and (4) that such a belief is in fact warranted. Fuller recognized these premises and acknowledged that they might be false.¹³⁹ But the point is that he continually looked for ways to make sense of *both* his (moral) intuitions about what constitutes fair procedures and legitimate legal institutions and his

135. The use of the phrase “holism” may mislead here, because Dworkin uses the term “value holism” in JUSTICE FOR HEDGEHOGS to describe his own view. See DWORKIN, HEDGEHOGS, *supra* note 128, at 120. The sort of holism I have in mind is more holistic because it understands both evaluative and factual propositions to be interdependent. See MORTON WHITE, A PHILOSOPHY OF CULTURE: THE SCOPE OF HOLISTIC PRAGMATISM (2002).

136. Lon L. Fuller, *The Forms and Limits of Adjudication* (Henry Hart Papers, Box 35, Folder 8) (on file with the Harvard Law School Library).

137. *Id.* at 9–12.

138. *Id.* at 12.

139. *Id.*

(descriptive) explanations of how those procedures and institutions actually function.

In my view, a modern-day representative of the holistic strand of pragmatism is former Justice David Souter. I will not offer a full defense of that characterization, because I have done that elsewhere.¹⁴⁰ But the basic claim is that Justice Souter sees history as relevant to judicial reasoning in a way that only makes sense under a holistic approach. In particular, as a Justice, he sometimes looked to historical circumstances to either buttress or undermine the legal reasoning of a past decision.

Compare, for instance, Justice Souter's dissent in *Seminole Tribe v. Florida*¹⁴¹ and the stare decisis analysis in the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁴² In his *Seminole Tribe* dissent, Souter argued that the Court should not treat *Hans v. Louisiana*, an 1896 case in which the Court held that Louisiana was immune from suit brought by one of its bondholders, as an authoritative precedent because that decision was best explained as the result of the Court's concern with its own institutional power.¹⁴³ Conversely, in *Casey*, the joint opinion, in deciding to uphold *Roe v. Wade*, distinguished *Roe* from *Lochner v. New York* and *Plessy v. Ferguson* on the ground that in the years between those cases and the decisions that overruled them there had been a "change in the facts" or the "perception of facts" such that the earlier cases rightly came to be seen as wrongly decided. Even if separate-but-equal seemed tolerable in 1896, for instance, by 1954 it had become clear that it was inconsistent with equality under the law, thus warranting a principled reversal of doctrine. But no such comparable change in facts had occurred in the years since *Roe*. Therefore, according to Souter, the decision should stand.¹⁴⁴

Judges rarely invoke social, political, or other "external" historical explanations of past cases in the way that Souter did in these cases.¹⁴⁵ Whether that is a cause for regret or rejoicing is not my concern. The point is instead to show that its use implies a holism about facts and values, about history and political philosophy, and that it does so in a way which points to a third, distinct response to the explanatory critique.

Recall that the instrumentalist accepts the explanatory critique and endorses the skepticism about social purposes and moral principles it seems

140. I develop this argument further in Charles L. Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. (forthcoming 2018).

141. 517 U.S. 44, 76 (1996) (Souter, J., dissenting).

142. 505 U.S. 833, 843 (1992).

143. *Seminole Tribe*, 517 U.S. at 121 (Souter, J., dissenting).

144. *Planned Parenthood*, 505 U.S. at 861–64.

145. Hence Chief Justice Rehnquist's accusation in *Seminole Tribe* that Justice Souter's "undocumented and highly speculative extralegal explanation . . . is a disservice to the Court's traditional method of adjudication." 517 U.S. at 68–69.

to imply, whereas the quietist treats the explanatory critique as normatively inert, and then goes on to assert moral principles as part of something like Dworkin's "constructive interpretation." The holist, though, treats both normative *and* historical or explanatory argument as relevant to the ultimate practical assessment of a legal doctrine or regime.¹⁴⁶ Therefore, her response is to acknowledge the force of the explanatory critique but remain alive to the possibility that, on the particular facts of a given case, the more benign story of social purposes and moral principles may offer a better overall explanation of the practice. It seeks an account, in other words, that reconciles factual beliefs and normative judgments.¹⁴⁷

I recognize that I have not described precisely how the holistic style of reasoning proceeds. Above I criticized Cardozo for his ambiguous characterizations of the judicial process, and yet I have not offered anything better on behalf of the holistic view. Its only offsetting virtue may be that it expresses in somewhat stark terms an "antinomy" of the sort Cardozo himself thought pervaded the common law.¹⁴⁸ In this case, it is the antinomy between the demands of practical justification and that of theoretical explanation—precisely the tension Dworkin dismisses as "bogus."

For the same reason, the holist also has a plausible claim to being an heir to the pragmatist tradition.¹⁴⁹ In a sense, she takes even more seriously than do the other two sorts of pragmatist the difficulty posed by James' original dilemma—between empiricism and rationalism, optimism and pessimism, idealism and materialism, "free-willism" and determinism.¹⁵⁰ The instrumentalist adopts a naturalistic ontology as both the product of, and justification for, her privileging of sensory experience over what we have called emotional or "lived" experience. The quietist adopts a practical stance (that nominally accepts a naturalistic ontology but treats it as irrelevant to moral inquiry) as both the product of, and justification for, according weight to lived experience—requiring only that it cohere with her other moral commitments.

146. See, e.g., *id.* at 122 n.17 (Souter, J., dissenting), (explaining that it is "just because *Hans* is so utterly indefensible on the merits of its legal analysis that one is forced to look elsewhere in order to understand how the Court could have gone so far wrong").

147. For other examples of this sort of reasoning, see Barzun, *supra* note 140, (manuscript at 33–41).

148. BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 4 (1928) ("The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law.").

149. PUTNAM, *supra* note 119, at 19 ("If James's views evoked hostility, both in his lifetime and after, they have always attracted adherents as well. And if I may hazard a guess, the very feature of James's world view I have been pointing to—the vision of fact, theory, value, and interpretation as all interdependent—is one of the sources of that attraction.").

150. JAMES, *supra* note 13, at 12.

The holist, meanwhile, takes the wide view of experience, recognizes the tension between the practical and theoretical stances she might adopt towards that experience, and does not rule out in advance which one will triumph when it comes to making any particular practical decision. It is a pragmatism that “devoted though she be to facts,” as James put it, “has no such materialistic bias as ordinary empiricism labors under” and so “has no objection whatever to the realizing of abstractions, so long as you get about among particulars with their aid and they actually carry you somewhere.”¹⁵¹ Even if the holist is never able to “solve” that dilemma, she may be more willing than the others to do as Lon Fuller suggested and “accept frankly a state of unresolved conflict or tension in our reasoning.”¹⁵²

CONCLUSION: PRAGMATISM AND LAW

The purpose of this essay has been mainly descriptive. I have sought to show both that some views (like those of Hart and Sacks and Dworkin) not typically dubbed “pragmatist” can plausibly be seen as part of the pragmatist tradition and that other views that are often lumped together under that label encourage different sorts of practical reasoning. I have supported this thesis by showing how each view responds to difficulties raised and articulated by earlier jurists and legal theorists. Each of the three forms of pragmatism discussed above rejects legal formalism, and all see judicial reasoning as in some way purposive or “instrumental,” broadly conceived. But they differ in ways that are not merely political, as Rorty alleged. They differ with respect to how judges should properly reason about facts and values.

Let me conclude by responding to a methodological objection, which will allow me to make one last, admittedly speculative suggestion. One might object that the interpretive approach taken in this paper simultaneously manages to produce bad history and bad philosophy. It is bad history because not only have I ignored all of the existing historical literature on the figures I discuss, my own account is threadbare. It focuses only on a handful of legal thinkers, ignores their intellectual influences, strips them out of their social and political context, and in general treats them anachronistically. It is Whiggish, law-office history of the worst sort.

It is bad philosophy because not only have I ignored all of the existing philosophical literature on the many and deep metaphysical, epistemological and jurisprudential issues, my own discussion of them is crude and superficial. I have ignored crucial distinctions and failed to define terms with the sort of precision necessary to move the philosophical debates

151. *Id.* at 72.

152. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 377 (1946).

forward. It is the work product of, to steal Judge Posner's line, a "law professor knock-off" of a real philosopher.¹⁵³

To some extent, I plead guilty as charged. The objection on both fronts has some truth to it. But there is also an ulterior motive at work, which in part explains the approach taken. Although I have framed each form of pragmatism as one that implies a particular model of practical reasoning for the *judge*, it is not hard to see that each also roughly correlates to the sort of theoretical reasoning employed by different sorts of legal *scholars*. The instrumentalist describes the method of legal economists and political scientists (at least those of a certain, rational-choice stripe). The quietist adopts a method not unlike moral philosophers who ignore meta-ethical questions as well as doctrinalists who defend their scholarly endeavors as taking an "internal" point of view of legal practice. And the holist's approach may underwrite the methods of various historians, sociologists, and "law and humanities" scholars—at least those who seek to extract some sort of normative implication from their studies.

That an account of practical reasoning could also serve as a model of theoretical reasoning is not particularly surprising because arguably one of the central lessons of pragmatism is that the two cannot be cleanly separated.¹⁵⁴ But I omitted mention of any of those disciplinary influences not because they have not had an impact on legal thinking; surely they have. The reason, rather, was to avoid a certain picture of legal theory today, which I believe is both deeply entrenched and distorting.¹⁵⁵ That picture portrays law as a social practice that has its own distinctive "internal" sources, methods and values but which must constantly face threats from "external" disciplines, whether history, economics, psychology, philosophy or literary theory.¹⁵⁶ According to this view, although law is sometimes able to absorb the insights of these disciplines, it only does so when it is able to serve its own professional and prescriptive demands.¹⁵⁷ Efforts by judges or legal theorists to make use of other disciplines thus represent a sort of

153. POSNER, LAW, PRAGMATISM, *supra* note 105, at 79–80.

154. *See id.* at 4 ("Theoretical reasoning is continuous with practical reasoning rather than a separate human faculty."). Christopher Hookway, *Pragmatism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), <http://plato.stanford.edu/entries/pragmatism/> ("All the pragmatists, but most of all Dewey, challenge the sharp dichotomy that other philosophers draw between theoretical beliefs and practical deliberations.").

155. I have attempted to make this point before, at greater length, in Charles Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015).

156. *See* Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 165 (2006).

157. *Id.* at 183–84 ("Our central argument . . . is that the success of interdisciplinary studies in law is strongly shaped by the professional orientation of law schools and the prescriptive nature of legal normativity.").

corruption of those disciplines. Hence the historians' frequent lament that law professors are doing "law-office history."¹⁵⁸

I have instead sought to show how the sorts of reasoning described above, while they may well have been developed and refined by scholars in other fields, nevertheless arise naturally as responses to fundamental and enduring philosophical problems at the heart of law and adjudication. That is why I have drawn on some well-known and influential works of legal theory from the past century or so but have not treated them the way an historian might, as products of particular intellectual and political contexts. Instead, I have consciously framed them as participants in a common dialogue about the same core problems raised by legal decisionmaking.

Lest I be misunderstood, I should emphasize that my point in doing so is *not* to suggest that these methods of practical reasoning properly belong within the province of law, or that lawyers and legal theorists have some special insight or skill, justifying their dismissal of insights and criticisms offered by those with backgrounds in other disciplines. It is only to suggest that the law's tendency to place prescriptive demands on intellectual contributions from any quarter may be—to use a trendy phrase—a feature, not a bug. And by that I mean an *intellectual* feature. That is because it is not just the law that is in the business of constantly trying to reconcile theoretical and practical demands; so, too, is every scholar and every human being.

Which brings us back to William James and pragmatism. Although I framed this essay as one in which James's philosophical speculations influenced subsequent legal thinkers, it is worth remembering that the disciplinary influence also ran the other way. It may not have been an accident that four of the eight members of the "Metaphysical Club" in which pragmatism was born were lawyers;¹⁵⁹ or that Charles Peirce considered one of them, Nicholas St. John Green, to be "the grandfather of pragmatism."¹⁶⁰ And it may not be merely coincidental that James used the figure of the common law judge to illustrate his pragmatist conception of truth.¹⁶¹ If not,

158. *Id.* at 165.

159. Jerome Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 427 (1954). The four were Holmes, John Fiske, Nicholas St. John Green, and Joseph B. Warner.

160. *Id.* at 428.

161. JAMES, *supra* note 13, at 240–41.

Common-law judges sometimes talk about the law . . . in a way to make their hearers think they mean entities pre-existent to the decisions . . . determining them unequivocally and requiring them to obey. But the slightest exercise of reflexion [sic] makes us see that, instead of being principles of this kind, [the law is] . . . [a] result[.]. Distinctions between the lawful and the unlawful in conduct . . . have grown up incidentally among the interactions of men's experiences in detail; and in no other way do distinctions between the true and the false in belief ever grow up. Truth grafts itself on previous truth, modifying it in the process, just as . . . law on previous

then the common law tradition may have yielded not just a distinctive, third philosophy of law, but a family of related views about how to acquire knowledge about the world for use within it.¹⁶²

law. Given previous law and a novel case, and the judge will twist them into fresh law.

162. Cf. Lee Epstein & Gary King, *A Reply*, 69 U. CHI. L. REV. 191, 192 (2002) (contrasting the merely persuasive goals of legal scholarship with that of empirical research, which aims to “learn about the world”).