The Problems of Jurisprudence

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A Pragmatist Manifesto

I have endeavored to use the methods of analytic philosophy to guide a critical appraisal of modern American law. My focus has been on the twin preoccupations of the legal establishment in its rationalizing moods. One is a preoccupation with the autonomy of legal reasoning as a methodology of decision making. The other is a preoccupation with objectivity—here used in the strong sense that persons with different political or ideological commitments can nevertheless be brought to agree on the answer to even the most testing, the most politically charged, legal question—as a goal of the legal enterprise. I have emphasized the precarious position of the judge, forced to make unpopular decisions—every judicial decision is unpopular with one of the parties and with those in the same position as that party—without the intrinsic authority of the more “organic” (popular, authentically sovereign) branches of government from which the judiciary has studiously and even ostentatiously separated itself in an effort to secure political independence. The creation of an independent judiciary involves a substitution of professionalism, of expertise, for political legitimacy and sets up the eternal tension between law and politics in the discharge of the judicial function, a tension mirrored on the jurisprudential plane in the age-old dispute between Legalists and Skeptics.

What I have just said is familiar enough. Any novelty is in the bill of particulars that I have drawn up against the defenders of law’s autonomy and objectivity—the formalists, as one might call them, because the essence of formalism is to conceive of law as a system of relations among ideas rather than as a social practice. I do not reject formalism *tout court*; not only are there immensely worthwhile formal systems such as logic, mathematics, and art, but logic has an important role to play in legal
decision making. I reject the exaggerated legal formalism that considers relations among legal ideas to be the essence of law and legal thought. Formalism in this sense is sometimes thought a discredited position in law. This is far from true. Many of the most powerful minds in the profession are formalists, whether or not they use the label; and at this writing the formalist style is resurgent in the Supreme Court and in the lower federal courts as well. Formalism is the official jurisprudence of lawyers and laypeople alike, and of both positivists and natural lawyers, although not of all individuals in either camp.

Let me review very briefly the main points of the analysis. I began with the epistemological and ontological dimensions of adjudication and searched for keys that might enable cogent answers, offered from within the conventions of legal argument and evidence, to be given to difficult questions, both legal and factual. No keys were found. The constructive as distinct from the critical role of logic in law (the critical role being to expose inconsistencies), though important, is limited. For while rules have a logical structure, legal rules are often vague, open-ended, tenuously grounded, highly contestable, and not only alterable but frequently altered. From the judge's standpoint they are more like guides or practices than like orders. The role of scientific inquiry in law is also limited, partly because of attitude and tradition but partly too because of essential characteristics of the legal enterprise, in particular the value rightly placed on the stability, certainty, and predictability of legal obligations.

Unable to base decision in the difficult cases on either logic or science, judges are compelled to fall back on the grab bag of informal methods of reasoning that I call “practical reason” (using the term in a slightly unorthodox sense). These methods often succeed but sometimes fail; in any event they owe less than one might think to legal training and experience. In particular, reasoning by analogy has been oversold as a method of reasoning at once cogent and distinctively legal. It is neither. The power of an analogy is as a stimulus to thinking. The law seeks a logic of justification rather than merely or primarily a logic of discovery. As a method of justification, reasoning by analogy is really either enthymematic (that is, deductive) or weakly inductive, rather than being its own kind of thing; and whatever it is, there is nothing distinctively legal about it. Precedents that are squarely on point do have authority in a court of law, but their authority is political—that is, rooted ultimately in force—rather than epistemic in character. Judges follow the previous decisions of their court when they agree with them or when they deem
legal stability more important in the circumstances than getting the law right.\(^1\) But a precedent’s analogical significance means simply that the precedent contains information relevant to the decision of the present case.

Many changes of legal doctrine owe nothing either to analogies (except insofar as they operate as similes or metaphors—powerful though alogical modes of persuasion) or to logically or empirically powerful arguments or evidence. Instead they are the result of gestalt switches or religious-type conversions. Indeed, of such limited power are the tools of inquiry available to courts that the highest realistic aspiration of a judge faced with a difficult case is to make a “reasonable” (practical, sensible) decision, as distinct from a demonstrably correct one—the latter will usually be out of the question. The ingredients of reasonableness include, but are not exhausted in, conventional legal materials such as precedents and the principles for using precedents. Often the judge will have no choice but to reason to the outcome by nonlegal methods from nonlegal materials, and sometimes he will have to set inarticulable intuition against legal arguments.

I have emphasized the difficulties, in the forensic setting, of factual as well as of legal analysis and noted that often the legal system settles for “formal” rather than “substantive” accuracy—that is, settles for procedural rules (such as rules on burden of proof) that force determinacy on outcomes notwithstanding irresolvable factual uncertainties. Uncertainty about matters of fact pervades efforts not only to determine what happened in the dispute that gave rise to the litigation but also to measure the consequences of legal doctrines, and as a result the factual substrate of those doctrines often is tenuous. And, partly for evidentiary reasons, partly for deeper philosophical ones, the law’s ostensible commitment to a rich mentalist ontology of free will, intent, and the like turns out to be superficial. As Holmes said, the law deals with externals. The operative model of human action in such fields as criminal law is a behaviorist (determinist) one; even the concept of a “voluntary” confession is seen to be determinist in character.

Law itself is best approached in behaviorist terms. It cannot accurately or usefully be described as a set of concepts, whether of positive law or of natural law. It is better, though not fully, described as the activity of

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1. Obviously “rightness” here is being used in the second of two senses relevant to law: that is, with reference to substantive justice, justice in the individual case, rather than formal justice, which emphasizes systemic concerns such as adherence to precedent. The disvaluing of the second sense is a defining feature of critical legal studies and other radical theories of law.
the licensed professionals we call judges, the scope of their license being
limited only by the diffuse outer bounds of professional propriety and
moral consensus. Holmes was on the right track in proposing the pre-
diction theory of law, which is an activity theory; his critics have been
too quick to dismiss it. Redescribing law in activity terms tends to erase
the distinction between natural law and positive law, and the distinction
has indeed outlived its usefulness. Judges make rather than find law, and
they use as inputs both the rules laid down by legislatures and previous
courts ("positive law") and their own ethical and policy preferences.
These preferences are all that remains of "natural law," now that so
many of us have lost confidence that nature constitutes a normative
order.

If epistemology and ontology will not save the law's objectivity and
autonomy, neither will hermeneutics. Neither interpretive theory in the
large nor the rich literature on legal interpretation (a real embarrassment
of riches) 2 will underwrite objective interpretations of common law,
statutes, or the Constitution. Of course one can go too far with interpe-
tive skepticism. Communication works—verifiably so—and statutes
and constitutional provisions are efforts at communication. But often in
dealing with statutes and the Constitution the channels of commu-
nication are obstructed, and when that happens the concept of interpretation
is altogether too loose and vague to discipline legal inquiry. We see this
when we ask what the goal of legal interpretation is and discover that
there is no agreed-upon answer to the question and no rational means
of compelling agreement, that it all depends on the interpreter's political
theory. We might do best to discard the term "interpretation" and focus
directly on the consequences of proposed applications of statutory and
constitutional provisions to specific disputes.

The situation for the defenders of law's autonomy and objectivity is
not improved when the searchlight is trained on overarching principles
that might organize and discipline legal inquiry. Natural law as the name
for ethical and policy considerations that bear on the exercise of judicial
discretion—considerations such as those encapsulated in the equity
maxims (for example, no man shall profit from his wrongdoing and
pacta sunt servanda)—is in fine shape. But natural law as a system of

2. And one mirrored on the practical level in the extraordinary diversity of interpretive
approaches found in judicial opinions. It is difficult for even a supreme court to bring about
uniformity of interpretive approach, because ordinarily the interpretive theory in a judicial
opinion is just dictum. The case would, or at least plausibly could, have come out the same
way on a different theory, making the particular theory articulated dispensable, and there-
fore dictum.
thought that generates definite answers to difficult moral and legal questions is hopeless in a society that is morally heterogeneous, as ours is. Distributive justice cannot replace natural law, for it too is riven by unbridgeable political disagreements. Although corrective justice, which is rooted in our deep-seated retributive emotions, and wealth maximization—especially, I think, the latter—have significant domains of application, particularly to common law, neither can provide a complete framework that will enable adjudication to be made determinate. Nor can the literary, feminist, and communitarian perspectives that are receiving increasing attention or the nostalgia-soaked movement to return to traditional legalism via philosophy that I call neotraditionalism provide comprehensive frameworks for adjudication. The cat is out of the bag. Efforts in this scientific and pluralistic age to regain a confident sense in the law’s autonomy and objectivity seem futile. Yet the radical skepticism and vague communitarian yearnings of critical legal studies are a dead end too.

The underlying problem can be stated simply. Law uses a crude methodology to deal with extremely difficult questions. The crudeness is concealed when no other inquirers have a powerful methodology, and now they do, thanks to advances in natural and social science. The difficulty is concealed when the legal establishment is homogeneous, for then its priors and prejudices fix the necessary premises for confident decision. As a result of social and political changes, America no longer has a homogeneous legal establishment. The more diverse the judiciary, the more robust are the decisions that command strong support within it—but the less likely is a given decision to command such support and the more exposed, therefore, is the contingency of legal doctrine. Some lawyers and judges believe that a diverse judiciary is bad, because it makes law uncertain, unpredictable. They have a point. But from the standpoint not of order but of knowledge, they are wrong. A diverse judiciary exposes—yet at the same time reduces—the intellectual poverty of law, viewed as a method not just of settling disputes authoritatively but also of generating cogent answers to social questions.

A diverse judiciary must be distinguished from a judiciary selected on the basis of racial and sexual politics. Of course persons of a different race or sex from that of most judges may have relevant life experiences that contribute to the moral and intellectual diversity of the bench, but this is also true of individuals of different religious and professional background, different temperament, different health, and even different hobbies. A machinery of judicial selection that merely seeks a balance
among clamoring, politically effective interest groups will not generate an optimally diverse judiciary.

The concept of law that has emerged here can be summarized in the following theses. First, there is no such thing as "legal reasoning." Lawyers and judges answer legal questions through the use of simple logic and the various methods of practical reasoning that everyday thinkers use. In part because of the law's (salutary) emphasis on stability, the scientific attitude and the methodology of science are not at home in law.

Second, partly for the reason just given, partly because many methods of practical reason are inarticulate (for example, tacit knowledge), partly because "prejudgment" in the sense of resistance to rational arguments that contradict strong priors often is itself rational, partly because there is little feedback in the legal process (that is, the consequences of judicial decisions are largely unknown), the justification (akin to scientific verification) of legal decisions—the demonstration that a decision is correct—often is impossible.

Third, a closely related point is that difficult legal cases can rarely be decided objectively if objectivity is taken to mean more than reasonableness. The more uniform the judiciary is, however, the more agreement there will be on the premises for decision, and therefore the fewer difficult cases there will be. I have stressed both the costs of this uniformity and the degree of disuniformity in the contemporary American judiciary. But it should be borne in mind that even within a judiciary as diverse as ours, there will be many shared intuitions (of course, it could be more diverse, and then there would be fewer), which will provide premises for objective decision making. Moral and legal nihilism is as untenable as moral realism or legal formalism.

Fourth, large changes in law often come about as a result of a non-rational process akin to conversion. Rhetoric in the sense of persuasion not necessarily addressed to the rational intellect (the sense famously criticized by Plato in Gorgias) may change the law as much as hard reality does.

Fifth, law is an activity rather than a concept or a group of concepts. No bounds can be fixed a priori on what shall be allowed to count as an argument in law. The modern significance of natural law is not as a body of objective norms that underwrite positive law but as a source of the ethical and political arguments that judges use to challenge, change, or elaborate positive law—in other words to produce new positive law. There are no moral "reals" (at least none available to decide difficult
legal cases), but neither is there a body of positive law that somehow preexists the judicial decisions applying, and in the process confirming, modifying, extending, and rejecting, the “sovereign’s” commands. The line between positive law and natural law is no longer interesting or important and the concepts themselves are jejune.

Sixth, there is no longer a useful sense in which law is interpretive. This is true of statutory and constitutional law as well as common law. Interpretation butters no parsnips; it is at best a reminder that there is a text in the picture (and there is not even that in common law fields). The essence of interpretive decision making is considering the consequences of alternative decisions. There are no “logically” correct interpretations; interpretation is not a logical process.

Seventh, there are no overarching concepts of justice that our legal system can seize upon to give direction to the enterprise. (This point is related to the earlier one about the absence of moral “reals.”) Corrective justice and wealth maximization have important but limited domains of applicability, the former reflecting the residue of vengeance thinking in law and society, the latter the persistent utilitarian, instrumentalist, pragmatic spirit of American society. Distributive justice seems quite hopeless, however, and it has yet to be shown that the literary, feminist, or communitarian perspectives have much to contribute to the legal enterprise that is both new and useful. The prudentialism of a Burke has cautionary value in law, but that may be all.

And eighth, law is functional, not expressive or symbolic either in aspiration or—so far as yet appears—in effect. Hence in areas where the social function is the efficient allocation of resources, law appropriately takes its cue from economics. The law is not interested in the soul or even the mind. It has adopted a severely behaviorist concept of human activity as sufficient to its ends and tractable to its means. It has yet to be shown that law changes people’s attitudes toward compliance with social norms, as distinct from altering their incentives.

All this is not to deny the indispensability of law or the importance of its contributions to civilized society. But it amounts to a less than thrilling vision of law. It is remote from “law day” rhetoric and even from most academic views of law.

Yet a pragmatist might ask what all this nay-saying, this carping, this harping on dubiety, this heaping on of wet blankets, is good for. I am not claiming that the condition of law spells a crisis for capitalism or the liberal state. I have not presented dramatic proposals for improvement. Although I can imagine radical changes in the legal system that would imbue legal institutions with greater respect for scientific methodology,
I am not sure they would be justified, given the competing social functions that law serves. Have I, therefore, ended at dead center, violating Voltaire’s dictum (improving on Socrates) to be moderate in everything, including moderation?

My colleagues in the legal profession will not consider the picture of law that I have painted merely a dull monochrome; some of them will even say that I have announced “the death of law.” And the approach has practical as well as conceptual or atmospheric implications, only a few of which I have tried to draw out in this book. A moment ago I remarked the pros and cons of a diverse judiciary, and the remark bears on the perennial proposal for an Intercircuit Tribunal that would on reference from the Supreme Court resolve conflicts among the federal courts of appeal that the Supreme Court lacks the time to resolve. At first glance it might seem that the resolution of conflicts that generate legal uncertainty would be an unequivocal good, so that the only question about the proposal would be its cost (principally delay), the difficulties of staffing such a tribunal, and so forth. But from a pragmatic perspective the main concern is with the danger of premature closure of legal debate. Intercircuit conflict provides a method of unforced inquiry in the nation’s most important judicial system. Of course debate continues after the judges have ruled, and sometimes their decision is overruled. But once a national precedent is laid down and begins to accrete reliance and interest-group support, it may be difficult to overrule, however powerful the criticisms of it. So intercircuit conflict has epistemic value that must be traded off against the undoubted loss in legal certainty from the absence of a method for prompt resolution of all intercircuit conflicts. My analysis also suggests a more hospitable attitude toward judicial dissents than is found in some circles. They are not only, as they so often seem to be, a nuisance (my frequent reaction as a judge). They compromise the authoritarian character of law, but in doing so they exemplify unforced inquiry, of which American law could perhaps use more. To quote William Blake, “without contraries is no progression.”

I would stress the implications of my analysis for research—in the suggestions, for example, in Chapter 2 that a careful study would show that specialized courts are less rather than more attentive to precedent

than generalist courts, in Chapter 3 that we ought to study the effects of an inefficient state legal system on the state’s welfare and the feedback effect on the legal system, and in Chapter 6 that conviction of the innocent is less rather than, as one might think, more common in a society in which the crime rate is high. There are implications, too, for teaching (it is a scandal that law students are not instructed in the fundamentals of statistical inference), for practice (legal advocates should place much greater emphasis on facts and on policy than they do), and for judging (judges should at long last abandon the rhetoric, and the reality, of formalist adjudication). I have proposed a new explanation of the pattern of the coerced-confession cases—that under the rubric of “involuntariness” some voluntary confessions are excluded from evidence in criminal trials because they are unreliable and some reliable confessions are excluded because they are involuntary on a determinist account of “free will”—and a new approach to statutory interpretation. And I have embraced (or rejected, which comes to the same thing) both legal positivism and natural law.

But the most important implications have to do with attitudes. The traditional—and neotraditional, and liberal, and radical—pieties of jurisprudence should be discarded, and the legal enterprise reconceived in pragmatic terms. Once this is done the dichotomy between legal positivism and natural law collapses, with no loss. But I do not suggest that it is easy to change attitudes.

The attack on foundations, on certitudes, on tradition, on Grand Theories owes much, as I have emphasized throughout, to the pragmatist tradition. It is a pity that it is so hard to define the tradition, both generally and in relation to law. Conventional histories of pragmatism begin with Charles Sanders Peirce, although he himself gave credit for the basic idea to a lawyer friend, Nicholas St. John Green. From Peirce the baton was handed to William James, then to John Dewey, George Mead, and the British pragmatist, F. S. C. Schiller. The pragmatic movement gave legal realism much of its intellectual shape and content. But with the coming of World War II, both philosophical pragmatism and legal realism seemed to expire, the first superseded by logical positivism and other “hard” analytic philosophy, the second absorbed into the legal mainstream and particularly into the “legal process” school that was to reach its apogee in the 1950s. Then, beginning in the 1960s with the waning of logical positivism, pragmatism came charging back in the person of Richard Rorty, followed in the 1970s by critical legal studies—the radical child of legal realism—and in the 1980s by a school of legal
neopragmatists, including some feminists. In this account pragmatism, whether of the paleo- or the neovariety, stands for a progressively more emphatic rejection of Enlightenment dualisms such as subject and object, mind and body, perception and reality, form and substance, these dualisms being regarded as the props of a conservative social, political, and legal order.

This picture is too simple by far. The triumphs of science, and particularly of Newtonian physics, in the seventeenth and eighteenth centuries persuaded most thinking people that the physical universe had a uniform structure accessible to human reason; and it began to seem that human nature and human social systems might have a similarly mechanical structure. This emerging worldview cast humankind in an observing mold. Through perception, measurement, and mathematics the human mind would uncover the secrets of nature—including the mind as a part of nature and the laws of social interactions: laws that decreed balanced government, economic behavior in accordance with the principles of supply and demand, and moral and legal principles based on immutable principles of psychology and human behavior. The mind was a camera, recording activities both natural and social and alike determined by natural laws.

This view, broadly scientific but flavored with a Platonic sense of a world of order behind the chaos of sense impressions, was challenged by the Romantic poets (such as Blake and Wordsworth) and Romantic philosophers. They emphasized the plasticity of the world, and especially the esemplastic power of the human imagination. Institutional constraints they despised along with all other limits on human aspiration, as merely contingent; science they found dreary; they celebrated the sense of community—of oneness with humankind and with nature—the sense of unlimited potential, that an infant feels. They were Prometheans. The principal American representative of this school was Emerson, and he left traces of his thought on Peirce and Holmes alike. Emerson’s European counterpart (and admirer) was Nietzsche. It is not that Peirce, or Holmes, or even Nietzsche was a “Romantic” in a precise sense (if there is a precise sense). It is that they wished to shift attention from a passive, contemplative relation between an observing subject and an objective reality, whether natural or social, to an active, creative relation between striving human beings and the problems that beset them and that they seek to overcome. They believed that thought was an exertion of will instrumental to some human desire (and we see here the link between pragmatism and utilitarianism), and that social institu-
tions—whether science, law, or religion—were the product of shifting human desires rather than the reflection of a reality external to those desires.

This account should help us see why “truth” is a problematic concept for a pragmatist. Its essential meaning, after all, is observer independence, which is just what the pragmatist is inclined to deny. It is no surprise, therefore, that the pragmatists’ stabs at defining truth—truth is what is fated to be believed in the long run (Peirce), truth is what is good to believe (James), or truth is what survives in the competition among ideas (Holmes)—are riven by paradox. The pragmatist’s real interest is not in truth at all but in belief justified by social need.

This need not make the pragmatist unfriendly to science—far from it—but it shifts the emphasis in the philosophy of science from the discovery of nature’s laws by observation to the formulation of theories about nature (including man and society) on the basis of man’s desire to predict and control his environment, both social and natural. The implication, later to become explicit in the writings of Thomas Kuhn, is that scientific theories are a function of human need and desire rather than of the way things are in nature, so that the succession of theories on a given topic need not produce a linear growth in scientific knowledge. Science in the pragmatic view is a social enterprise.

The spirit of pragmatism is not limited to the handful of philosophers who have called themselves pragmatists (and a tiny handful it is—Peirce himself, the founder, having renounced the term because he disagreed with William James’s definition of it). Rival of pragmatism though it is thought to be, logical positivism, with its emphasis on verifiability and its consequent hostility to metaphysics, is pragmatic in demanding that theory make a difference in the world of fact, the empirical world. Popper’s falsificationist philosophy of science is close to Peirce’s view of science, for in both philosophies doubt is the engine of progress and truth an ever-receding goal rather than an attainment. Wittgenstein’s emphasis on the “sociality” of knowledge marks him as pragmatist, while Habermas has acknowledged the influence of the pragmatists on his own theory of “conversational” rationality. Plainly we are dealing with an immensely diverse tradition rather than with a single, coherent school of thought.

Latterly pragmatism has come to be thought a left-wing ideology, a celebration of the plasticity of social institutions. The discussion in Chapter 12 of a recent article by Richard Rorty shows why, and Rorty is not even on the left of the neopragmatist movement. But the connec-
tion between pragmatism and socialism is adventitious. Rorty is a Romanticist, and this is only one of the flavors that pragmatism comes in. Pragmatism in the sense that I find congenial means looking at problems concretely, experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the "localness" of human knowledge, the difficulty of translations between cultures, the unattainability of "truth," the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves. These dispositions, which are more characteristic of scientists than of lawyers (and in an important sense pragmatism is the ethics of scientific inquiry), have no political valence. They can, I believe, point the way to a clearer understanding of law. Law as currently conceived in the academy and the judiciary has too theocratic a cast. There is too much emphasis on authority, certitude, rhetoric, and tradition, too little on consequences and on social-scientific techniques for measuring consequences. There is too much confidence, too little curiosity, and insufficient regard for the contributions of other disciplines. Jurisprudence itself is much too solemn and self-important. Its votaries write too marmoreal, hieratic, and censorious a prose. Law and religion were long intertwined, and many parallels and overlaps remain.4 Law, too, has its high priests, its sacred texts and sacred cows, its hermeneutic mysteries, its robes and temples, rituals and ceremonies.

Admittedly, much that I am complaining about is surface rather than substance, for on the whole the law has been shaped by practical needs (the same may be true of religion). Influential judicial decisions as diverse as Farwell (the fellow-servant case) and Barnette (the second flag-salute case)—one conservative, the other liberal, as these terms are used today; one common law, the other constitutional law; one decided in 1842, the other in 1943—are quintessentially pragmatic. Still, law needs more of the scientific spirit than it has—the spirit of inquiry, challenge, fallibilism, open-mindedness, respect for fact, and acceptance of change. I use "spirit" advisedly. I am not referring to the particulars of scientific

discourse, although economics and other social sciences have a large role to play in any modern system of law. 5

I find pragmatism bracing; others may find it paralyzing. Pragmatist skepticism about “truth” might, for example, be thought to undermine the nation’s commitment to free speech. If there is no truth “out there,” how can free speech be defended by reference to its efficacy in bringing us nearer to truth? 6 Actually that is not such a difficult question. If there is no truth out there, this should make us particularly wary of people who claim to have found the truth and who argue that further inquiry would be futile or subversive and therefore should be forbidden. If there is no objective truth, moreover, this makes it all the more important to maintain the conditions necessary for the unforced inquiry required to challenge and defeat all those false claims to have found the truth at last. There is knowledge if not ultimate truth, 7 and a fallibilist theory of knowledge emphasizes, as preconditions to the growth of scientific and other forms of knowledge, the continual testing and retesting of accepted “truths,” the constant kicking over of sacred cows—in short, a commitment to robust and free-wheeling inquiry with no intellectual quarter asked or given.

Such a theory is wary of proposals to give less protection to scientific than to political freedom of expression on the ground that scientific truth is objectively determinable and therefore need not be left to the hurly-burly of the marketplace of ideas, or to limit protection of artistic expression on the superficially inconsistent ground that fiction is parasitic on and therefore less important than fact. 8 If, consistent with the

5. Holmes’s prophecy of 1897 is in process of being fulfilled at long last: “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics . . . I look forward to the time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious [historical] research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics . . . In the present state of political economy . . . we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.” “The Path of the Law,” 10 Harvard Law Review 457, 469, 474 (1897).


8. These are views propounded by Frederick Schauer. See Free Speech: A Philosophical Inquiry 32–33 (1982); “Liars, Novelists, and the Law of Defamation,” 51 Brooklyn Law
skepticism of the pragmatist, we reject essentialist ideas of art and moral-realist ideas of offensiveness, we deny the competence of courts to condemn expressive works on the ground that their offensiveness outweighs their artistic value.9 The emphasis in this book on the importance of metaphor and other forms of "warm" argument for legal change supplies a further argument against sharply distinguishing rational from emotive expression and can even be thought to argue for defining speech more broadly than courts have as yet done, so that it would encompass the burning of draft cards and other expressive activity now classified as "action" rather than as "speech."10 The danger of warm rhetoric is that it will become hot—by which I refer not to burning one's draft card but to attacking one's opponents physically. Violence is a way of getting people to alter their perspectives, and despite all its emphasis on unforced inquiry pragmatism has difficulty drawing and defending the line between peaceable and forcible means of changing the way people think. But the pragmatist will not be insensitive to the costs of free speech, including the costs of providing police protection at public expense to speakers who desire to provoke violence.

Although American lawyers have made significant contributions to the theory of free speech, their attitude toward law itself is pious and reverential rather than inquiring and challenging. Law is not a sacred text, however, but a usually humdrum social practice vaguely bounded by ethical and political convictions. The soundness of legal interpretations and other legal propositions is best gauged, therefore, by an examination of their consequences in the world of fact. That is a central contention of this book. In making it I do not mean to deny that the legal tradition includes insights and sensitivities of great social value. The rule of law is a genuine, indeed an invaluable, public good, and one to which formalists like Coke have made great contributions. The refusal to acknowledge these contributions is one of the flaws of critical legal studies. But there is a tendency in law to look backward rather than forward—to search for essences rather than to embrace the experiential

Review 233, 266 (1985). Schauer does note with approval that fallibilist theories of science support the epistemic case for a free market in ideas. See Free Speech: A Philosophical Inquiry, above, at 25. But on the whole he is skeptical about that case.


10. While adhering to its earlier ruling upholding punishment of draft-card burning, the Supreme Court has now ruled that flag burning is constitutionally protected. See Texas v. Johnson, 109 S. Ct. 2533 (1989).
flux. The consequences of law are what are least well known about law. The profession’s indifference to studies that cast doubt on the lawyer’s faith in the expressive, symbolic, and norm-reinforcing consequences of law is appalling.

The situation is unlikely to be changed (to continue the religious metaphor) by preaching. It is deeply rooted in the nature of legal education, which in turn reflects the age-old practices and traditions of the profession. Judges and lawyers do not have the leisure or the training to conduct systematic investigations of the causes and consequences of law. That is work for the academy. But the law schools conceive their function to be the training of legal professionals rather than legal scientists. (There are good economic reasons for this.) The emphasis is on imparting the skills, knowledge, and folkways most essential to the effective practice of law, and that means the skills of doctrinal analysis and legal argumentation, knowledge of legal doctrines, and the folkways of the judge and practicing lawyer.

I mentioned in the Introduction that the study of law is begun in medias res, and here I add that this procedure forestalls the emergence of a critical, an external, perspective. It presents law as something not to be questioned, as something that has always existed and in approximately its contemporary form. Within a few months of entering law school the law student has lost the external perspective. There is very little postgraduate legal education in this country other than for foreigners, and little effort is made to equip the law student who may one day become a law professor with the skills, knowledge, and attitudes requisite for studying the causes of law, the direct and indirect consequences of law on behavior, the experience of other nations with law, and the scientific laws of the legal system. Skills of mathematical modeling, statistical analysis, survey research, and experimentation; knowledge of legal institutions here and abroad and of the pertinent parts of the disciplines (economics, political science, statistics, philosophy, psychology) that bear on law; the scientific ethic—all these are for the most part ignored. This neglect is the obverse of the law schools’ preoccupation with imparting skills of immediate use in the practice of law. It is no surprise that so much legal scholarship and judicial analysis is unoriginal, unempirical, conventional, and unworldly, overwhelmingly verbal and argumentative (indeed, verbose and polemical), narrowly focused on doctrinal questions, mesmerized by the latest Supreme Court decisions, and preoccupied with minute and ephemeral distinctions—rather than bold, scientific, and descriptive. The academy does not generate the knowledge that judges, lawyers, and legislators need in order to
operate a modern legal system, yet there is no other institution capable of generating it. Unless these grave deficiencies of academic law are overcome, ambitious programs for improving law are unlikely to succeed.

Let us begin to recognize the problems by noting that a carapace of falsity and pretense surrounds law and is obscuring the enterprise. It is time we got rid of it. I end as I began with a quotation from William Butler Yeats—this one, from “A Coat,” made apt by the importance of the robe as a judicial symbol: “there’s more enterprise / In walking naked.”
The Problematics of Moral and Legal Theory

Richard A. Posner
Chapter 4

Pragmatism

The Pragmatic Approach to Law

The key to realizing the promise of the real professionalism sketched in the preceding chapter is pragmatism, but in a distinctly low-key sense of the word—and in particular not the sense in which it is used to name a philosophical position.¹ Philosophical pragmatists and their opponents go at each other hammer and tongs over such questions as whether language reflects reality, whether free will is compatible with a scientific outlook, and whether such questions are even meaningful.² I am not interested in such issues. I am interested in pragmatism as a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.

Philosophical pragmatism and pragmatic adjudication are not completely unrelated. The tendency of most philosophical speculation—and it is what makes philosophy, despite its remoteness from quotidian concerns, a proper staple of college education in a liberal society—is to shake up a person’s presuppositions. A judge or lawyer who reads philosophy or

¹. The principal meanings of “pragmatism” are usefully distinguished in Matthew H. Kramer, “The Philosopher-Judge: Some Friendly Criticisms of Richard Posner’s Jurisprudence,” 59 Modern Law Review 465, 475–478 (1996): “Metaphysical or philosophical pragmatism is a relativist position which denies that knowledge can be grounded on absolute foundations. Methodological or intellectual pragmatism is a position that attaches great importance to lively debate and open-mindedness and flexibility in the sciences, the humanities and the arts. Political pragmatism is a position that attaches great importance to civil liberties and to tolerance and to flexible experimentation in the discussions and institutions that shape the arrangements of human intercourse . . . [T]hese three modes of pragmatism do not entail one another.”

². See, for example, Rorty and Pragmatism: The Philosopher Responds to His Critics (Herman J. Saatkamp, Jr., ed. 1995).
Philosophy, especially the philosophy of pragmatism, incites doubt, and doubt incites inquiry, making a judge less of a dogmatic, more of a pragmatic or at least open-minded, adjudicator.

More important (because the magnitude of the effect just described may well be slight) is the fact that philosophy, theology, and law have parallel conceptual structures. Christian theology was heavily influenced by Greek and Roman philosophy, and Western law by Christianity, and the orthodox versions of the three systems of thought have similar views on scientific and moral realism, objectivity, free will, responsibility, intentionality, interpretation, authority, and mind-body dualism. A challenge to any of the systems is a challenge to all three. Pragmatism in its role as skeptical challenger of orthodox philosophy encourages a skeptical view of the foundations of orthodox law because of the many parallels between orthodox law and orthodox philosophy. That is why Richard Rorty, who rarely discusses legal issues, is cited frequently in law reviews. Philosophical pragmatism does not dictate legal pragmatism or any other jurisprudential stance. But it may play a paternal and enabling role in relation to pragmatic approaches to law. To these I now turn, discussing first the pragmatic approach to administrative law—an approach that has made great strides in the academy but has not yet won over many judges—and then the pragmatic approach to adjudication.

Pragmatic Scholarship: The Case of Administrative Law

I could make life easier for myself by using as my example of the successes of pragmatic legal scholarship antitrust law rather than administrative law. The Sherman Act was enacted in 1890, at a time when economists’ understanding of monopoly and competition was limited and communication between economists and lawyers even more so. The early judicial decisions interpreting the Sherman (and later the Clayton) Act exhibited shafts of insight amidst clouds of confusion. The very goal of antitrust policy was obscure and contested—was it to promote economic efficiency or to reduce the power of big business? It is hard to do both. By the 1940s, however, the courts had devised a reasonably successful anticartel policy—the famous “per se” rule of illegality; but they remained deeply confused about mergers, monopolies, and “vertical” restrictions (for example, resale price maintenance and other restrictions on dealers and other distribu-
tors). The Warren Court, populist in antitrust matters, deepened the confusion, yet at times displayed receptivity to economic analysis of antitrust issues.\(^3\) Beginning around 1970, increased consensus and sophistication in the economic analysis of antitrust encouraged a more sophisticated judicial approach to antitrust law\(^4\) and, beginning in the 1980s, coincided with a more positive public attitude toward capitalism. The “big business” chimera was largely forgotten. Efficiency became the only generally accepted goal of antitrust.\(^5\) More judges and lawyers learned the rudiments of antitrust economics, and antitrust economists became more effective as consultants and expert witnesses. It is fair to say that at the beginning of its second century antitrust law has become a branch of applied economics, has achieved a high degree of rationality and predictability, and is a success story of which all branches of the law and allied disciplines can be proud.\(^6\)

The evolution of administrative law in the direction of rationality and interdisciplinarity, unlike that of antitrust law, is far from complete. The two systems of law began in this country at about the same time, the end of the nineteenth century. But many of the problems of administrative law have an eighteenth-century origin. The Constitution had established a system of lawmaking that was designed for a small government of circumscribed powers. An essentially three-headed legislature—Senate, House of Representatives, and President—would enact statutes, but not many, because of the transaction costs of tricameralist legislating. A tiny judiciary would make additional law by interpretation and by common law rule-making. But it would not make much law, hampered as it would be by the informational, remedial, legitimacy, and, again, transaction-cost limitations of courts.

I emphasize transaction costs as impediments to ambitious lawmaking because enlarging a legislature increases the costs of reaching agreement and enlarging a court system increases the costs of maintaining consistency and direction. You cannot have big government—the government that tries to do more than secure the nightwatchman state—with just

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6. Not all economists would agree with this rosy picture. For a pessimistic view, though one that relies primarily on old studies and on new studies of old cases, see The Causes and Consequences of Antitrust: The Public-Choice Perspective (Fred S. McChesney and William F. Shughart II eds. 1995).
courts and legislatures. So when the demand for a larger federal government arose in the late nineteenth and early twentieth century, the constitutional mold had to be broken and the administrative state invented. Opponents of big government, emphasizing the quasi-judicial powers of agencies, pointed to the constitutional illegitimacy and political menace of an administrative state that would grab power from the courts. Supporters of big government sought to allay these concerns by depicting administrative agencies as arenas for the deployment of neutral expertise. Indeed, supporters turned the tables on opponents by noting the ideological character of the judiciary and contrasting it with the scientific neutrality to which the administrative process aspired. They claimed that the administrative process would be less, not more, political than the judicial process. These “Progressives,” champions of technocratic public administration, triumphed with the coming of the New Deal.

The struggle that I have just sketched, which defined the first phase of academic thinking about administrative law, ended with the enactment of the Administrative Procedure Act in 1946. The Act signified the acceptance of the administrative state as a legitimate component of the federal lawmaking system, but imposed upon it procedural constraints that have made the administrative process much like the judicial. Even notice-and-comment rulemaking, the most conspicuous departure of administration from adjudication because it enables agencies to make binding rules other than as an incident to deciding cases (to make them, in short, the way legislatures make rules rather than the way common law courts do), is in practice more like litigation than it is like legislation, although the fault (if that is what it can be called) is not entirely that of the Act’s draftsmen.

The Administrative Procedure Act was in part a reaction to the politicization of many of the federal administrative agencies, such as the National Labor Relations Board. The Act imparted a measure of political and ideological neutrality to administrative law, just as the Taft-Hartley Act, enacted the following year, imparted a measure of political and ideological neutrality to substantive labor law, correcting to a degree the pro-union bias of the Wagner Act. World War II had created a yearning for normalcy and, incidentally, had crushed the radical right because of its prewar defeatism and isolationism; and the war’s aftermath crushed the radical left. The result of these war-induced developments was a temporary suspension of ideological conflict. This allowed administrative law to be assimilated comfortably to a post-formalist, post-realist, consensus era of American law. The focus of academic thinking shifted accordingly from the issues of politics, legitimacy, and economic policy that had dominated
the earlier literature of administrative law to issues important to completing the domestication of administration as law—such issues (all closely related to each other) as where to draw the line between questions of fact, as to which judicial review was highly limited, and questions of law; how far to circumscribe agency discretion; how much consistency, care, and reasoning to require of agency decisions; how free agencies should be to consider nontraditional forms of evidence; what types of agency order should be reviewable in what type of court and according to what form of judicial procedure; and how much emphasis should be placed on the use by agencies of rulemaking, as opposed to case-by-case adjudication, to create more definite standards and thus make administrative regulation more objective and predictable.

During this period of consensus, in which Louis Jaffe, Henry Hart, and Kenneth Culp Davis were the dominant voices in administrative law scholarship, and Felix Frankfurter and Henry Friendly in judicial review of agency decisions, few people bothered to ask whether the administrative agencies were accomplishing what they were supposed to accomplish, whether what they were supposed to accomplish was worthwhile, and whether the actual consequences of administrative regulation were good or bad and what the criteria of goodness or badness in regulation should be. As these were not procedural, doctrinal, or even constitutional questions, they were unlikely even to occur to lawyers—or to anyone, the more that agencies were conceived to be, and were in fact, like courts. No serious person asks whether we need courts. If agencies are just another form of judiciary, handling as it were the overload of cases that courts cannot handle either because of the sheer number or because some cases present issues that baffle judges, no one is likely to ask whether we need agencies.

When ideological strife resumed in the 1960s, the administrative state was caught up in it. On the left, Ralph Nader and his followers, building on an earlier but heretofore rather ignored literature on regulatory capture, began asking whether the agencies were the zealous protectors of the public interest that they pretended to be and whether there wasn’t a need both to increase citizen involvement in the existing agencies and to expand administrative regulation into new domains, such as automobile safety. On the right and eventually in the center and even the left as well, economists began to question the missions of a number of the most

7. The summa theologica of this era of administrative law scholarship is Louis L. Jaffe’s 792-page treatise, *Judicial Control of Administrative Action* (1965).
prominent federal administrative agencies. They showed that much of what the agencies did, such as limiting airlines’ entry into city pairs, regulating the prices of rail and truck transportation, awarding broadcast licenses in exchange for commitments to provide local programming, putting a ceiling on the price of natural gas, and even fostering unionization and trying to make advertising and labeling more informative, just was not worthwhile; the agencies were performing allocative functions in transportation, labor, advertising, communications, energy, and other important sectors of the economy that the market could perform more effectively and at lower cost. The real mission of the agencies, the economists showed, here converging with Nader and his academic allies such as historian Gabriel Kolko, was to cater to powerful interest groups; and no amount of procedural or operational tinkering would change the situation.

The economic critique implied that academic thinking about administrative law had missed the point by failing to understand that administrative agencies were fundamentally different from courts. Agencies belonged to the interest-group state; they were political captives and instruments; they were agents of overregulation. They could no more be improved (whether by better procedures or by better personnel) from the overall social standpoint, the standpoint of the public interest, than a private cartel or a stolen-car ring could be improved. Making them work better would simply increase the drain on society’s wealth. The Naderites, in contrast, having little faith in markets, thought that agencies weren’t doing enough, or were doing the wrong thing, or that we needed new and different agencies. But they agreed with the economists that the academic lawyers had missed the boat by focusing on the law on the books rather than the law in action—the actual operation and effects of administrative regulation.

The Naderite critique inspired reforms designed to make regulation more public-interested, for example by empowering citizens’ groups to obtain judicial review of regulatory actions and inactions. The economic critique helped to power the deregulation movement, which has achieved some remarkable successes—though probably more as a result of fortuitous technological and economic changes than of the power of economic theory and evidence. Some agencies have been abolished, such as the Civil

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9. They also produced a vast scholarly literature, which is briefly summarized, with citations to a few of the most notable studies, in Richard A. Posner, *Economic Analysis of Law* §§ 19.2–19.3 (5th ed. 1998).
Aeronautics Board, the Federal Power Commission, and the Interstate Commerce Commission. Others have become spectral, such as the Federal Trade Commission and the National Labor Relations Board. Others, notably the Federal Communications Commission and the banking agencies, have so far relaxed their grip as to become almost deregulatory agencies. Still others, including the Securities and Exchange Commission and the agencies that regulate banks and other financial intermediaries, have been marginalized by the rapid change and growing complexity of the regulated activities.

The trend toward deregulation of the American economy has been masked by the rise of agencies concerned with health and safety, such as the National Highway Transportation Safety Administration, the Department of Labor’s Benefits Review Board, and the Occupational Safety and Health Administration; with environmental amenities, such as the Environmental Protection Agency; with discrimination, such as the Equal Employment Opportunity Commission; and with retirement. Less obviously protectionist than the old-line industry-specific agencies that felt the deregulatory axe, these newer programs are legacies of Naderite and other left-liberal movements that arose in the 1960s and 1970s. But at the same time the Immigration and Naturalization Service, whose principal business is deporting people, has become busier because of heavy legal and illegal immigration and the tightening of the immigration laws. As further evidence that the administrative state is not inherently left-wing, the creation of the U.S. Sentencing Commission in the 1980s with bipartisan support marked a notable expansion of administrative at the expense of judicial authority and an overall stiffening in federal criminal penalties.

So there is still plenty of administrative regulation, probably more than ever, though possibly with less aggregate impact (but who knows?). Economists have been critical of the structure and sometimes the goals of much of the new-style regulation, in particular the regulation of pollution and of job safety and health, and the prohibition of discrimination on grounds of age. Much of that regulation appears to be regressive, ineffectual, perverse, needlessly expensive, or all four at once.10 That is not yet the consensus of legal scholars. But the success of the economic critique in so many of the older areas of regulation has induced administrative law scholars increasingly to address the merits, and not merely the procedures

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or other forms, of the new regulation. Administrative law scholarship has acquired in consequence a more substantive, a more economic, a more institutional, a more empirical, in short a more pragmatic cast. There is more interest in what works and less in the forms and formalities of the administrative process except insofar as they have consequences for the regulated activities.

The original form of the economic critique treated regulation largely as a form of cartelizing. This proved a fruitful approach to industry-specific regulatory programs, such as the control of price and entry by public utility and common carrier regulation, programs antedating or created by the New Deal. This kind of regulation confers concentrated benefits on the regulated industry (and sometimes on important customer groups as well, such as the beneficiaries of regulation-mandated cross-subsidies), while diffusing its costs much more broadly; and so is easy to explain by reference to interest-group pressures. Much of the newer regulation, however, exhibits the opposite pattern—diffuse benefits and concentrated costs (most environmental regulation is of this character)—and so cannot easily be assimilated to a model that is derived from cartel and interest-group theory. Instead economists and political scientists have tackled this kind of regulation with public-choice theory. Public-choice theory is the application of the general principles of economic theory to the political arena, as distinct from the application of such specific subtheories as cartel theory or interest-group theory. Public-choice theory is nowadays heavily infused with game theory in recognition of the strategic character of the interactions that determine public policy.

The point is that cutting-edge administrative law scholarship today looks very different from what it looked like in the 1950s. Indeed,


consistent with the supersession thesis and the experience with antitrust law, it looks a good deal less like legal scholarship. Consider what are the big issues in administrative law scholarship today. The biggest may be how best to regulate hazards to safety, health, and the environment, a question that has engaged the sustained and imaginative attention of such able economists as Kip Viscusi and such able lawyers as Stephen Breyer and Cass Sunstein. The cardinal findings of this literature are, first, that the law fails to distinguish sufficiently between situations in which transaction costs prevent risks to safety and health from being internalized, as in the case of pollution and other environmental degradation, and situations in which they do not, as in the case of job-related hazards. Administrative regulation is more easily justified in the first class of situations, in which transaction costs are likely to prevent the market from controlling risks to safety and health.

But, second, there may be subtle sources of market failure even where transaction costs appear to be low, as in the case of job-related hazards, which arise out of a contractual relation (employment). The adequacy of normative economics (cost-benefit analysis) to monetize nonmonetary costs such as reduced health or safety or a diminution in the number of animal species has also been questioned. And behavioral economists (really, economic psychologists) have identified quirks in human reasoning that they believe impede the ability of people to think sensibly about low-probability risks to health and safety.\(^\text{15}\)

Third, the actual performance of the regulatory agencies in the fields of health, safety, and the environment has often been deplorable. For example, arraying the monetary values (essentially, the cost of compliance with an agency’s safety directives divided by the number of lives saved by compliance) that different regulatory programs impute to a human life reveals enormous variance and irrational extremes.\(^\text{16}\) Allowing for some differences in antecedent pain and suffering and in the age of death, death


is death whatever the particular causal agent. The agencies that fix the value of a human life at the high end of the scale may actually be impairing human longevity. The heavy compliance costs implied by such valuations have the effect of regressive taxes, disproportionately reducing the real incomes of the poor—and income and longevity are positively correlated.\textsuperscript{17} Correlation is not causation, but it is plausible that an increase in disposable income will, up to a point anyway, increase longevity by providing access to better health care and facilitating a healthier style of living.

The current system of environmental regulation has been criticized for inflexibility, heavy-handedness, misplaced priorities, and inefficiency. Economists have pointed out that taxing emissions in lieu of prescribing ceilings on them would obviate the need for regulatory agencies to determine the costs of compliance with environmental standards, as the would-be polluter would have an incentive to optimize the control of emissions by minimizing the sum total of its tax and compliance expenses. Environmental regulation has also been criticized for insisting that all polluting sources reduce their emissions without regard to the differing costs of pollution abatement across different sources. Congress has responded to this criticism by authorizing a system of tradable pollution permits for sulphur dioxide emissions (the cause of acid rain) by electrical utilities.\footnote{\textsuperscript{18}} Each permit (called an “allowance”) authorizes a utility to emit one ton of sulphur dioxide per year. The total number of allowances has been capped well below the total annual emissions of sulphur dioxide by the nation’s electric utilities, so that the program will reduce the total emissions of the pollutant. But utilities are free to sell their allowances to each other, so a utility that can reduce its emissions at low cost can sell some of its allowances to a utility that would incur a high cost to reduce its own emissions, enabling the aggregate costs of sulphur dioxide abatement to be reduced without reducing the abatement—and in fact with more abatement. This example of the use of social science to improve administrative regulation illustrates the primarily institutional rather than doctrinal or even procedural character of the current reform movement. As does Stephen Breyer’s proposal of a high-level federal agency to coordinate the


\footnote{\textsuperscript{18}} See 42 U.S.C. §§ 7651–7651o; 58 Fed. Reg. 15634 (1993); Madison Gas & Electric Co. v. EPA, 4 F.3d 529 (7th Cir. 1993), 25 F.3d 526 (7th Cir. 1994).
risk-reduction activities of the existing agencies in an effort to iron out some of the discrepancies in their valuations of human lives and other hard-to-monetize goods.19

The administrative law scholarship that I have been sketching draws more on economics and political science than on law. But so does much of the best scholarship concerned with the purely procedural aspects of the administrative process, including the scope of judicial review and the distinction between rulemaking and adjudication.20 This scholarship has exposed a significant lag in judicial thinking relative to academic. The most important administrative law decisions of the Supreme Court during this period of growing sophistication of academic thinking about administrative law include decisions authorizing pre-enforcement review of administrative rules;21 expanding, curtailing, and then expanding again the right to attack administrative action in federal court;22 invalidating the one-house veto of agency regulations;23 insisting that agencies justify their about-faces;24 squashing intrusive judicial review of agencies’ procedures;25 allowing federal criminal sentencing policies to be consigned to an administrative agency;26 and curtailing judicial review of agencies’ interpretations of the statutes that they administer.27 The academic response to these decisions has been critical, but what is interesting is that the criticisms owe more to game theory and public choice theory than to conventional legal theory. The most influential administrative law scholars are interested in the impact of these decisions, whether on policy or on the structure of government, rather than in how they fit into a preexisting structure of legal doctrine; and for the study of consequences doctrinal analysis is useless. These scholars have pointed out, for example, that insofar as administrative agencies now exercise a substantial amount of the legisla-

tive power of the United States, and insofar as these agencies are more in the control of the President than of Congress, and insofar as federal judges are more likely to enforce original legislative deals than agencies controlled by the President are, the effect of decisions such as *Chadha* and *Chevron*, which curtail federal judicial review of agency determinations, is to displace legislative power into the executive branch. This is a paradoxical result, since the authors of these decisions defend them by reference to the allocation of powers that is prescribed in the Constitution, which endeavored to lodge the legislative and executive powers in different branches except insofar as the President’s veto power gives him a legislative role.

It is tempting to suggest that the law that has been most influential in the Supreme Court’s administrative-law decisions is the law of unintended consequences. It is unlikely that when the Court authorized pre-enforcement judicial review of administrative rules in the *Abbott Laboratories* case, it realized that it was discouraging the use of notice and comment rule-making because the agency would have to create an elaborate record in order to withstand that review. If judicial review were deferred until the agency asked a court to impose sanctions for a violation of the rule, a record confined to the issues presented by the enforcement proceeding could be developed on the spot as it were, rather than in advance. It is equally unlikely that the Supreme Court foresaw that its endorsement of the “hard look” doctrine in *Vermont Yankee* would slow down the administrative process with no offsetting gain in greater accuracy.28 One wonders whether the Court has any clue to the consequences of its administrative law decisions for society. Maybe it doesn’t think that consequences are any of its business.

Another concern of modern administrative law scholarship is the management of sheer volume. For example, as more and more federal judges were appointed in the 1960s and 1970s to handle a steeply rising federal judicial caseload, the number of different judges involved in federal criminal sentencing grew (even though the federal criminal caseload itself wasn’t growing much). This amplified the variance in sentences, the unavoidable by-product of the traditionally uncanalized discretion of sentencing judges. So we got sentencing guidelines, which alter the relation between the federal district courts and their administrative adjuncts, the

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federal probation service and parole commission; the U.S. Sentencing Commission is the probation service and parole commission writ large. By laying down rules for sentencing, the commission was able to centralize and rationalize the sentencing process to a degree that the courts could not have done by themselves. Sentencing is to an ineliminable degree arbitrary, and courts aren’t comfortable making arbitrary determinations.

Earlier the Department of Health and Human Services had done much the same thing in its domain as the Sentencing Commission was to do with sentencing. It curtailed the discretion of the hundreds of administrative law judges who make social security disability determinations by promulgating a detailed set of largely quantitative criteria (emphasizing age and education as well as employment history and the nature and severity of the disabling condition), known as the “grid,” to guide the determination of entitlements to disability benefits.29 I have urged another response to the problem of managing volume, and that is to strengthen the appellate review process within the administrative agencies in order to reduce the burden of appellate review on the federal courts. Specifically I have urged the creation of a court of disability appeals—an interagency appellate tribunal that would review disability determinations by the Social Security Administration, the Department of Labor, and other federal agencies, with further review by the federal courts of appeals limited to determinations of issues of law.30 The questions that these developments and proposals raise are, it should go without saying, institutional and managerial rather than doctrinal or procedural.

I do not want to leave the impression that antitrust law, and administrative law even when broadly construed to take in the whole area of administrative regulation, are the only promising areas of pragmatic legal scholarship. Most economic analysis of law is pragmatic, in the sense of trying to be usable by the legal profession, rather than doctrinaire or abstract; it has had dramatic effects on legal practice in fields as different as securities law and family law;31 and lately there have been some efforts explicitly to mix pragmatism and economics in approaching legal issues.32

31. For textbook-treatise coverage, see Posner, note 9 above.
Pragmatic Adjudication Defined, Distinguished from Positivist Adjudication, and Illustrated

What Is Pragmatic Adjudication?

The question whether judges should be pragmatists is at once spongy and, for me at least, urgent. It is spongy because “pragmatism” is such a vague term when used to describe a style of adjudication. Among the Supreme Court Justices who have been called pragmatists are Holmes, Brandeis, Cardozo, Frankfurter, Jackson, Douglas, Brennan, Powell, Stevens, White, and Breyer. Others could easily be added to the list. Among theorists of adjudication, the label has been applied not only to self-described pragmatists, of whom there are now quite a number, but also to Ronald Dworkin, who calls pragmatism, at least Richard Rorty’s conception of pragmatism, an intellectual meal fit only for a dog (and I take it he does not much like dogs). I will consider the justness of calling Dworkin a pragmatist later. Some might think the inclusion of Frankfurter in my list even more peculiar than that of Dworkin. But it is justified by Frankfurter’s rejection of First Amendment absolutism, notably in the flag-salute cases, and to his espousal of a “shocks the conscience” test for substantive due process, a refined version of Holmes’s “puke” test. The school of outrage, which I discussed in Chapter 2, is pragmatic in wanting to base decision in difficult constitutional cases on the untheorized “badness” of the governmental act challenged in the case, rather than on a theory that might prove that the act indeed violated the Constitution.

What makes the question whether adjudication is or should be pragmatic an urgent one for me is that my critics do not consider my theory of adjudication pragmatic at all. Jeffrey Rosen, for example, argues that my book *Overcoming Law* endorses a visceral, personalized, rule-less, free-wheeling, unstructured conception of judging. And well before I thought of myself as a pragmatist, I was criticized for being “a captive of a thin and unsatisfactory epistemology,” which is just the sort of criticism

33. See, for example, Daniel A. Farber, “Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century,” 1995 University of Illinois Law Review 163.
36. Ronald Dworkin, “Pragmatism, Right Answers, and True Banality,” in id. at 359, 360. For soberer criticism of the pragmatic approach to law, see Michel Rosenfeld, *Just Interpretations: Law between Ethics and Politics*, ch. 6 (1998).
that a purely emotive theory of judging would invite. Am I, then, backsliding? I had better try to make clear what I think pragmatic adjudication is.

I noted earlier that it cannot be equated to pragmatism the philosophical stance. It would be entirely consistent with pragmatism the philosophy not to want judges to be pragmatists, just as it would be entirely consistent with utilitarianism not to want judges to conceive their role as being to maximize utility. One might believe that overall utility would be maximized if judges confined themselves to the application of rules, because discretionary justice, with all the uncertainty it would create, might be thought on balance to reduce rather than to increase utility. Similarly, a pragmatist committed to judging a legal system by the results the system produced might think that the best results would be produced if the judges did not make pragmatic judgments but simply applied rules. Such a person might, by analogy to a rule utilitarian, be a “rule pragmatist.”

What then is pragmatic adjudication? I do not accept Dworkin’s definition: “the pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do.” 39 That is Dworkin the polemicist speaking. But if his definition is rewritten as follows—“pragmatist judges always try to do the best they can do for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past”—then it will do as a working definition of pragmatic adjudication. On this construal the difference between a pragmatic judge and a judge who is a legal positivist in the strong sense of believing that the law is a system of rules laid down by legislatures and merely applied by judges is that while the latter type of judge is centrally concerned with securing consistency with past enactments, the former is concerned with securing consistency with the past only to the extent that deciding in accordance with precedent may be the best method for producing the best results for the future.

The judicial positivist would begin and usually end with a consideration of cases, statutes, administrative regulations, and constitutional provisions—the “authorities” to which the judge must defer in accordance with the principle that judges are duty-bound to secure consistency in principle with what other officials have done in the past. If the authorities all line up in one direction, the decision of the present case is likely to be foreordained, because to go against the authorities would, unless there are com-

pelling reasons to do so, violate the duty to the past. The most compelling reason would be that some other line of cases had adopted a principle inconsistent with the authorities directly relevant to the present case. It would be the judges’ duty, by comparing the two lines and bringing to bear other principles manifest or latent in case law, statute, or constitutional provision, to find the result in the present case that would promote or cohere with the best interpretation of the legal background as a whole.

The judicial pragmatist has different priorities. He wants to come up with the decision that will be best with regard to present and future needs. He is not uninterested in past decisions, in statutes, and so forth. Far from it. For one thing, these are repositories of knowledge, even, sometimes, of wisdom; so it would be folly to ignore them even if they had no authoritative significance. For another, a decision that destabilized the law by departing too abruptly from precedent might on balance have bad consequences. Judges often must choose between rendering substantive justice in the case at hand and maintaining the law’s certainty and predictability. The trade-off—posed most starkly in cases in which the statute of limitations is asserted as a defense—will sometimes point to sacrificing substantive justice in the individual case to consistency with previous cases or with statutes or, in short, with well-founded expectations necessary to the orderly management of society’s business. Another reason not to ignore the past is that often it is difficult to determine the purpose and scope of a rule without tracing the rule to its origins.

So the pragmatist judge regards precedent, statutes, and constitutional text both as sources of potentially valuable information about the likely best result in the present case and as signposts that he must be careful not to obliterate or obscure gratuitously, because people may be relying upon them. But because he sees these “authorities” merely as sources of information and as limited constraints on his freedom of decision, he does not depend on them to supply the rule of decision for the truly novel case. He looks to sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify. As that is essentially Dworkin’s approach despite all his talk about keeping faith with the past,40 there is indeed a sense (though, as we shall see, only a loose one) in which he too is a pragmatist.

Examples

1. Hypothetical Jurisdiction. The Supreme Court and the lower federal courts used to take the position that if there are two possible grounds for dismissing a suit filed in federal court, one being that it is not within the court’s jurisdiction and the other that the suit has no merit, and if the jurisdictional ground is unclear but the lack of merit is clear, the court can dismiss the suit on the merits without deciding whether there is jurisdiction.41 This approach is illogical. Jurisdiction is the power to decide the merits of a claim; so a decision on the merits presupposes jurisdiction. The pragmatic justification for occasionally putting the merits cart before the jurisdictional horse begins by asking why federal courts have a limited jurisdiction and have made rather a fetish of keeping within its bounds. The answer is that these are extraordinarily powerful courts, and the concept of limited jurisdiction enables them both to limit the occasions for the exercise of power and to demonstrate self-restraint. As Isabel said in Measure for Measure, “It is excellent to have a giant’s strength: but it is tyrannous to use it like a giant.”42 If, however, the lack of merit of a case is clear, a decision so holding will not enlarge federal judicial power but will merely exercise it well within its outer bounds. So in a case in which the question of jurisdiction is less clear than the lack of merit, the prudent and economical course may be to skip over the jurisdictional question and dismiss the case on the merits.

The Supreme Court, however, has now rejected (or at least curtailed) this doctrine of “hypothetical jurisdiction” in a notably unpragmatic opinion by Justice Scalia.43 The only reason he gives (perhaps having exhausted himself in ingeniously distinguishing, rather than forthrightly overruling, the cases such as Norton that had seemed to establish the doctrine) is that “for a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do

41. See, for example, Norton v. Mathews, 427 U.S. 524, 532 (1976); Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996); Rekhi v. Wildwood Industries, Inc., 61 F.3d 1313, 1316 (7th Cir. 1995); United States v. Stoller, 78 F.3d 710, 715 (1st Cir. 1996).
42. Act II, scene 2, lines 792–794.
43. Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1009–1016 (1998). Actually, a rather enigmatic concurrence by Justices O’Connor and Kennedy (see id. at 1020–1021) leaves it unclear whether the doctrine has been rejected or merely confined to situations in which the reasons for reversing the usual sequence of analysis (first jurisdiction, then, if jurisdiction is confirmed, the merits) are truly compelling.
so is, by very definition, for a court to act ultra vires [beyond its power].”

44 In other words, for a court to act beyond its power is for a court to act beyond its power—a tautology unresponsive to Justice Breyer’s question: “Whom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when (assuming an easy answer on the substantive merits) the same party would win or lose regardless?”

45 Breyer added that in an era of heavy caseloads, rejection of the doctrine would mean “unnecessary delay and consequent added cost”—or, in other words, all costs and no benefits. The difference between these two judges over the doctrine of hypothetical jurisdiction is the difference between formalism and pragmatism.

2. Prospective Overruling. Sometimes a court when overruling one of its earlier decisions will announce that the new rule that it is declaring will be applied only to new suits. The implication is that the court is making new law, which could not have been anticipated, rather than rejecting the overruled precedent because the precedent violated (not applied) existing law; that, in short, the court is acting like a legislature. Prospective overruling gives legal positivists fits, because, as Patrick Devlin writes, “it crosses the Rubicon that divides the judicial and the legislative powers. It turns judges into undisguised legislators.”

46 The jurisprudential issue can be bypassed, however, by asking a practical question: Should the community’s reliance on a previous decision be a weight in the balance when the court is considering whether to overrule that decision, or should reliance be removed as a factor by authorizing courts to overrule decisions prospectively? The argument for the second position is that otherwise the courts will be unduly hampered in reexamining old decisions. The argument against is that it will make them too quick to overrule previous decisions. Resolution of the debate requires striking a balance between the values of continuity and of creativity in the judicial process, which is a pragmatic task, since the legitimacy of both values is admitted. If we decide that prospective overruling destabilizes the law unduly, we can say that Devlin must be right—when judges overrule precedents, they are creating rather than applying law. But what would be the utility of this further step?

44. Id. at 1016.
45. Id. at 1021 (concurring opinion).
46. Id.
3. *The Swift and Erie Doctrines*. The issue in *Swift v. Tyson* 48 and *Erie R.R. v. Tompkins* 49 was whether the “laws” of the various states should be understood to include the common law of the states or just their statutes. If the broader understanding was correct, as held in *Erie*, overruling *Swift*, then, under the statute that prescribes the rules of decision in cases that are in federal court solely because the parties are citizens of different states and not because the suit is based on federal law, 50 federal courts in such cases should follow state common law as well as state statutes. If the narrower understanding was correct, as the Supreme Court had thought in *Swift*, 51 federal courts should apply general common law not tethered to the decisional law of any state. The choice between these positions has been thought to be a choice between different concepts of law. Lawrence Lessig argues that when “the notion that the common law is found, not made, . . . changed . . . this [change] forced a reallocation of institutional responsibility (from federal courts to state courts). The old view [that of *Swift*] depended upon this earlier understanding of the common law; when this understanding changed, so, too, did institutional allocations have to change.” 52 Holmes had argued against the narrow understanding on the ground that all law emanates from a sovereign, and so when state courts create common law they are doing it as delegates of the state legislature. They are not taking a stab at discovering the applicable principles of “the” common law in the sense of a body of principles that is not the emanation of any identifiable sovereign, that is instead a composite of the decisional law of many different sovereigns plus principles that federal judges might invent in the very course of deciding a diversity case. 53

Had the judges in *Swift* and the other cases in its line believed that common law *could not* be thought of as being “law” in the same sense as statute law, their position would indeed have been conceptual rather than either doctrinal or pragmatic and therefore vulnerable to shifting conceptions of law. But if they merely believed that Congress had not intended

49. 304 U.S. 64 (1938).
51. The holding in *Swift* was actually merely declaratory of what was already the settled practice of the federal courts.
“laws” to include common law (or that its intentions were inscrutable or irrelevant) and were untroubled by the argument later made by Justice Brandeis in *Erie* that Article III of the U.S. Constitution does not authorize federal judges to create state rules of decision, or if they thought that it would be better on the whole if federal judges tried to create a uniform common law for use in diversity cases, then Holmes’s argument would have fallen flat. For the issue would then have been either (or both) the “legalistic” one of the intent behind the Rules of Decision Act (and behind Article III), or the practical one of trading off the additional incentive to forum-shop, and the additional uncertainty of legal obligation, created by *Swift’s* approach against the pressure that approach exerted for greater nationwide uniformity and integration of law.

4. *Oil and Gas Law.* When oil and gas first became commercially valuable, the question arose whether they should be treated like other “mobile” resources, such as wild animals, where the rule of the common law was (and is) that you have no property right until you take possession of the animal. The alternative would have been to treat these newly valuable resources like land and other “stable” property, title to which can be obtained by recording a deed in a public registry or by some other paper record without the owner’s having to take physical possession of the property. A legal positivist who was asked whether only possessory rights should be recognized in oil and gas would be likely to start with the cases on property rights in wild animals and ask whether oil and gas are enough like wild animals to justify the same legal treatment. If so, property rights in oil and gas would be obtainable only by possession, which would mean that the resource was not owned until it was pumped to the surface. The pragmatic judge would be more inclined to start with the teachings of natural-resources economists and oil and gas engineers, to use the advice of these experts to decide which regime of property rights (possessory or title) would produce the better results when applied to oil and gas, and only then to examine the wild-animal cases and other authorities to see whether they blocked (by operation of the doctrine of stare decisis) the approach that would be best for the exploitation of oil and gas. The wild-animal approach would in fact lead to too rapid exploitation of these

54. A chair, for example: it moves only when someone moves it, whereas gravity or air pressure will cause oil and gas to flow into an empty space even if no (other) force is applied. When the rules governing property rights in wild animals were first applied to oil and gas, these resources were erroneously thought to have an internal principle of motion, to “move on their own,” like animals.

55. I set to one side property that is not physical at all, i.e., intellectual property.
minerals. Oil and gas fields usually extend under more than one property owner’s land. If title to oil and gas requires actual possession of the resource, each landowner will have an incentive to pump as much and as fast as he can, whereas optimal exploitation of the field as a whole might dictate fewer wells and more gradual extraction.

The pragmatic judge may fall on his face. He may not be able to understand what the petroleum engineers and the economists are trying to tell him or to translate it into a workable legal rule. The plodding positivist, his steps wholly predictable, will at least promote stability in law, a genuine public good. The legislature can always step in and prescribe an economically sound scheme of property rights. That is pretty much the history of property rights in oil and gas. Maybe nothing better could realistically have been expected. But American legislatures, in contrast to European parliaments, are so sluggish when it comes to correcting judicial mistakes that a heavy burden of legal creativity falls inescapably on the shoulders of the judges. I do not think they can bear the burden unless they are pragmatists. But they will not be able to bear it comfortably until changes in legal education and practice make law a more richly theoretical and empirical, and less formal and casuistic, field, as I suggested in discussing the shortcomings of the Supreme Court’s opinions in the Romer and VMI cases.

5. Surrogate Motherhood. A more recent legal novelty is the contract of surrogate motherhood, which I discussed briefly in Chapter 1. In holding such contracts unenforceable, the Supreme Court of New Jersey in the Baby M case\(^\text{56}\) engaged in a labored and windy tour of legal sources and concepts, overlooking the two issues, both factual in the broad sense, that would matter most to a pragmatist. The first is whether women who agree to be surrogate mothers typically or at least frequently experience intense regret when the moment comes to surrender the newborn baby to the father and his wife. The second is whether contracts of surrogate motherhood are typically or frequently exploitive in the sense that the surrogate mother is a poor woman who enters into the contract out of desperation. If the answers to both questions are “no,” then, given the benefits of the contracts to the signatories, the pragmatist judge would probably enforce such contracts\(^\text{57}\) regardless of what moral philosophers have to say about the issue.

These five examples should help us see that although both the positivist

\(^{56}\) In re Baby M, 537 A.2d 1227 (N.J. 1988).

and the pragmatist are interested in the authorities and the facts, the positivist starts with and gives more weight to the authorities, while the pragmatist starts with and gives more weight to the facts. This is the most succinct description of pragmatic adjudication that I can come up with, and it helps incidentally to explain two features of Holmes’s judicial philosophy that seem at first glance antipathetic to pragmatic adjudication: his lack of interest in economic and other data,58 of which Brandeis complained, and his reluctance to overrule previous decisions. A pragmatic judge believes that the future should not be the slave of the past. But he need not have faith in any particular bodies of data as guides to making the decision that will best serve the future. If like Holmes you lacked confidence that you or anyone else had a clear idea of what the best resolution of some issue would be, the pragmatic posture would be one of reluctance to overrule past decisions, because the effect of overruling would be to sacrifice certainty and stability for a merely conjectural gain. This point can help us understand Holmes’s quintessentially pragmatic insistence that the Fourteenth Amendment not be used to prevent states from experimenting with different solutions to social problems. The less one thinks one knows the answers to difficult questions of policy, the more inclined one will be to encourage learning about them through experimentation and other methods of inquiry.

I have said nothing about the pragmatic judge’s exercising a “legislative” function, although the kind of facts that he would need in order to decide the oil and gas case in pragmatic fashion would be the kind that students of administrative law call “legislative” to distinguish them from the sort of facts (“adjudicative”) that judge and jury, cabined by the rules of evidence, are called upon to find. Holmes famously said that judges were “interstitial” legislators when deciding a case the outcome of which was not dictated by unquestioned authorities. The many differences between judges and legislators in respect of procedures, training, experience, outlook, knowledge, tools, timing, constraints, and incentives make this a misleading usage; scope is not the only difference, as Holmes’s formulation suggests. What he should have said was that judges are rulemakers as well as rule appliers. A judge is a different kind of rulemaker from a legislator. He does not write on a clean slate. An appellate judge has to decide in a particular case whether to apply an old rule unmodified,

58. See, for example, letter of Oliver Wendell Holmes to Harold J. Laski, May 18, 1919, in Holmes–Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, vol. 1, pp. 204–205 (Mark DeWolfe Howe ed. 1953).
modify and apply the old rule, or create and apply a new one. A pragmatist will be guided in this decision-making process by the goal of making the choice that will produce the best results. To do this the judge will have to do more than consult cases, statutes, regulations, constitutions, legal treatises, and other orthodox legal materials, but he will have to consult them, and a legislator will not.

6. Homosexual Marriage. My final illustration of the pragmatic approach to adjudication will tie the present discussion back to the discussion in Chapter 2 of moral and constitutional adjudication. It is possible to make good lawyers’ arguments that there should be a federal constitutional right to homosexual marriage. These arguments, which have been marshaled by William Eskridge, include balancing the benefits of homosexual marriage against the costs to important state interests and finding that the former predominate; distinguishing same-sex marriage from polygamous and incestuous marriage (neither of which, in the current climate of American public opinion, could remotely be thought constitutionally privileged); building bridges from the Supreme Court’s decisions striking down state laws against interracial marriage and allowing prisoners to marry—marry, but not have sex (so Bowers v. Hardwick, in allowing states to forbid homosexual sex, need not be taken as authority for rejecting a constitutional right to homosexual marriage); and claiming that “as women made gains in politics and the marketplace, middle-class anxiety about gender and the family was displaced onto another object: the homosexual”—so that a refusal to recognize homosexual marriage is a form or product of discrimination against women.59

The only thing wrong with these arguments is the tacit assumption that the methods of legal casuistry are an adequate basis for forcing every state in the United States to adopt a social policy that is deeply offensive to the vast majority of its citizens and to do so at the behest of an educated, articulate, and increasingly politically effective minority that is seeking to bypass the normal political process for no better reason than impatience, albeit an understandable impatience. (Americans are an impatient people.) A decision by the Supreme Court holding that the Constitution entitles people to marry others of the same sex would be far more radical than any of the decisions that Eskridge cites. Its moorings in text, precedent, public policy, and public opinion would be too tenuous to rally even minimum public support; it does not even have the full support of the

59. See William N. Eskridge, Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment (1996). The quoted passage is from id. at 168.
homosexual community. It would be an almost unprecedented example of judicial immodesty.

I don’t want to sound too cynical about legal reasoning. It is not just the bag of lawyers’ tricks. It employs the methods of argument that since Aristotle have been accepted as useful tools for guiding judgment in areas where exact logical or scientific methods are unusable; and public policy toward homosexuality is one of those areas. But it is a mistake to suppose that legal reasoning alone can underwrite so profound a change in public policy as Eskridge envisages. A complex argument that could not be made airtight would be required in order to derive a right to homosexual marriage from the text of the Constitution and the cases interpreting that text—a tightrope act that without a net constituted by some support in public opinion would be too perilous for the courts to attempt. Public opinion may change, but at present it is too firmly against same-sex marriage for the courts to act.

This is not to say that courts should refuse to recognize a constitutional right merely because to do so would make them unpopular. Constitutional rights are, after all, rights against the democratic majority. But as I suggested in discussing the Romer case, public opinion is not irrelevant to the task of deciding whether a constitutional right exists. Judges asked to recognize a new constitutional right must do more than consult the text of the Constitution and the cases dealing with analogous constitutional issues. If it is truly a new right, as a right to same-sex marriage would be, text and precedent are not going to dictate the conclusion. The judges will have to consider political, empirical, prudential, and institutional issues, including the public acceptability of a decision recognizing the new right—and also including, as I suggested might have been the right approach for the Supreme Court to take in the original abortion cases, the feasibility and desirability of allowing the matter to simmer for a while before the heavy artillery of constitutional rights-making is trundled out. Let a state legislature or activist (but elected, and hence democratically responsive) state court adopt homosexual marriage as a policy in one state, and let the rest of the country learn from the results of its experiment.

60. See id., ch. 3.
61. As the Supreme Court of Hawaii is poised to do. See Baehr v. Miike, 910 P.2d 112 (Haw. 1996).
62. I acknowledge the possibility that the full faith and credit clause of the Constitution (Article IV, section 1), which requires states to honor the judgments of each other’s courts (the exact language is “public acts, records, and judicial proceedings”), may make it difficult to confine the experiment to one state. Homosexuals from other states may get married in that state and then contend that their...
That is the democratic way, and there is no compelling reason to supersede it merely because intellectually sophisticated people of secular inclination find Eskridge’s argument for same-sex marriage convincing. Sophisticates aren’t always right, and judges in a democratic society must accord considerable respect to the deeply held beliefs and preferences of the democratic majority when making new law. When the Supreme Court moved against public school segregation, it was bucking a regional majority but a national minority (white southerners). When it outlawed the laws forbidding racially mixed marriages, only a few states still had such laws on their books. The constitutional right to abortion was conferred by the Court against the background of a fast-rising and already substantial number of lawful abortions. And only when all but two states had repealed their laws forbidding the use of contraceptives even by married couples did the Court invalidate the remaining laws. Were the Court to recognize a right to same-sex marriage today, it would be taking on almost the whole nation.

Most constitutional theorists would say that the task of the courts should be to do what is right, regardless of the consequences, or at least that the theorist should say what is right even if he then advises the judges, in the style of Bickel, to duck the issue because it is too hot. I don’t see the sharp line in constitutional law between what is right and what is acceptable. The judiciary is not a debating society. If most parents fear that recognizing same-sex marriage may affect the sexual development of their home state is constitutionally obligated to recognize the marriage “judgment” of the state in which they are married. But the attempt to invoke the clause may well fail. Marriage may not be a judgment (public act, etc.) within the meaning of the clause. And under traditional conflicts of law principles that are available to inform interpretation of the full faith and credit clause as well, states have not been required to recognize marriages that deeply offend their own public policies—polygamous marriages are an example—provided that the state has a significant territorial connection to the parties to the marriage, as in the case in which they are residents of the state. But whatever the difficulty the full faith and credit clause poses for experimenting at the state level with same-sex marriage, it hardly argues for immediate nationalization of the issue by the Supreme Court’s recognizing a federal constitutional right to enter into such a marriage. The choice of law issue is discussed in Andrew Koppelman, “Same-Sex Marriage, Choice of Law, and Public Policy,” 76 Texas Law Review 921 (1998). On the general issue of homosexual marriage, see Same-Sex Marriage: The Moral and Legal Debate (Robert M. Baird and Stuart E. Rosenbaum eds. 1996).

children or (otherwise) undermine the family, this is a datum that bears on a judgment whether the Constitution, which can hardly be thought to speak to the issue directly, should be interpreted to override the refusal of the states to authorize same-sex marriage. Similarly, if no other country in the world authorizes such a thing, this is a datum that should give pause to a court minded to legislate in the name of the Constitution. One would have to have more confidence in the power of reason to decide novel issues of constitutional law that lie well removed from the constitutional text and history than I do to be willing to ignore what people directly affected by the issues think about them. The converse of this point is that it is difficult for moral realists to be democrats.

Eskridge does not examine the pragmatic objections to constitutionalizing the issue of same-sex marriage. He wants the Supreme Court to require every state and the federal government immediately to confer all fifteen perquisites of the married state (fringe benefits of various sorts, testimonial privileges, and so forth) on parties to homosexual marriage, including full rights of adoption plus the symbolic crown—the name “marriage.” The nation’s unreadiness for Eskridge’s proposal should give pause to any impulse within an unelected judiciary to impose it on the nation in the name of the Constitution.

Pragmatic Adjudication: Objections and Limitations

Dworkin’s Critique

Ronald Dworkin regards the pragmatic approach to adjudication as a rival to his own, yet claims for his approach what I had described in my book Overcoming Law as the pragmatic virtues. This approach is only precariously consistent with his view of pragmatism as the dog’s dinner, a view incompatible with the idea that pragmatism has any virtues. I had said that “the adjectives that . . . characterize the pragmatic outlook—practical, instrumental, forward-looking, activist, empirical, skeptical, antidogmatic, experimental—are not the ones that leap to mind when one considers [Dworkin’s] work.” He contends that all but “experimental” describe his work as aptly as that of any pragmatist.

This is a surprise. Dworkin an activist? His critics describe him as one, but his own view is that judges who refuse to do law in the elevated

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67. See Eskridge, note 59 above, at 66–70.
69. Posner, note 34 above, at 11.
Dworkinian manner are the lawless ones, the activists. Empirical? That is not the impression conveyed by the philosophers’ brief or by the discussions in Dworkin’s books and articles of abortion, affirmative action, civil disobedience, defamation, pornography,\(^{70}\) and the environment. Practical? Instrumental? Skeptical? Antidogmatic? Dworkin is a high rationalist with a weak sense of fact.\(^{71}\) He wants judges to read Kant and Rawls, think hard about moral principles, and try to integrate this reading and thinking into their decision making. None of the pragmaticist adjectives fits him.

He says that if “forward-looking” means “consequentialist,” his approach is forward-looking because “it aims at a structure of law and community that is egalitarian” (p. 364); only if “forward-looking” is equated to utilitarian is he not forward-looking. But the term is not used in Overcoming Law to denote either consequentialism or utilitarianism. It is used to contrast an approach, the pragmatic, that aspires to make things better for the present and the future, that cares about the past only insofar as the past provides guidance to the present and the future, with an approach that values the past for its own sake—as in “the past must be allowed some special power of its own in court, contrary to the pragmatist’s claim that it must not.”\(^{72}\)

Dworkin is not unconcerned with consequences. But he is less concerned with them than I am. Although he denies that pornography contributes to crime or to discrimination against women, he would give less weight than I to any bad consequences of pornography even if they were certain. For he attaches great importance to the nonconsequentialist principle that people ought to be allowed to read what they please (government “insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions”);\(^{73}\) to me this is simply one value to be considered.

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71. See, for example, Richard A. Posner, The Economics of Justice 376–377 (1981); also Posner, note 34 above, at 187–188. In the course of defending himself against this characterization, Dworkin has shown that he lacks a clear understanding of what “statistical discrimination” means. Ronald Dworkin, “Reply,” 29 Arizona State Law Journal 432, 442 n. 33 (1997). Yet it figures prominently in the debate over affirmative action (see, for example, Posner, note 9 above, § 26.5), which he has defended in print.

72. Dworkin, note 39 above, at 167—though in practice, as I have suggested, Dworkin seems not to care about a past any more remote than the Warren Court.

73. Dworkin note 70 above, at 200.
With regard to my suggestion that he is not “experimental,” Dworkin says that I must mean that he rejects the idea that “lawyers and judges should try different solutions to the problems they face to see which works, without regard to which is recommended or endorsed by some grand theory,” that in other words the judge is “not to worry about what’s really true but just to see what works” (p. 366). He calls this advice useless if the question the judge has to decide is whether abortion should be forbidden or whether to hold drug companies in DES cases liable for the harm done by their defective product even if it can’t be determined which drug company’s DES pills were taken by which plaintiff’s mother. Dworkin says the judges would have no standard for what counts as “working” and thus for evaluating the results of the experiment unless they thought through the underlying philosophical issues, such as collective versus individual responsibility for harms or the human status of the fetus.

He is right that judges need rules or standards to guide them. But when I said that the pragmatist “is drawn to the experimental scientist, whom [the pragmatist] urges us to emulate by asking, whenever a disagreement arises: What practical, palpable, observable difference does it make to us?”74 I meant only that judges should avoid becoming entangled in disputes that have no practical significance, such as whether judges “make” or “find” law. This is not advising them to create rules of law by pure trial and error; that is not how experimental scientists proceed. To decide cases without a sense of what the purpose of the applicable law is—and so in the DES cases without asking whether the deterrent and compensatory objectives of tort law would be served by collective responsibility in the circumstances of irremediable uncertainty presented by those cases—is decidedly unpragmatic.

Yet the example of abortion shows that even the trial and error version of experimentalism has a legitimate place in the legal process. As I noted in Chapter 2, a telling criticism of Roe v. Wade is that the Supreme Court prematurely nationalized the issue of abortion rights. Had the Court either ducked the issue completely or based its decision on a narrow ground (such as that the Texas law at issue did not contain enough exceptions), the states would have been free to experiment with different approaches to the abortion question. Eventually an answer might have emerged that would have commended itself to the Court and the nation.

74. Posner, note 34 above, at 7 (emphasis in original).
as both principled and practical. To such a possibility, with its undoubted element of trial and error, Dworkin is blind.

**Causes for Concern**

I do not want to seem complacent about pragmatic adjudication. A danger of inviting the judge to step beyond the boundaries of the orthodox legal materials of decision is that judges are not trained to analyze and absorb the theories and data of social science. The example of Brandeis is not reassuring. Although he was a brilliant man of wide intellectual interests, his forays into social science whether as advocate or as judge were far from an unqualified success. His industry in marshaling economic data and viewing them through the lens of economic theory led him to support such since discredited policies as limiting women's employment rights, fostering small business at the expense of large, and subjecting to public utility and common carrier regulation markets such as the sale of ice that are not natural monopolies. Holmes had grave reservations about the reliability of social scientific theories, but his unshakable faith in the eugenics movement, an early twentieth-century product of social and biological theory, undergirds his most criticized opinion (incidentally one joined by Brandeis), *Buck v. Bell*. And recall how the majority opinion in *Roe v. Wade* tries to make the issue of abortion rights seem a medical one and the reason for invalidating state laws forbidding abortion that they interfere with the autonomy of the medical profession—a “practical” angle reflecting Justice Blackmun’s long association with the Mayo Clinic. Ignored are the effects of abortion laws on women, children, and the family—the effects that are important to evaluating the laws pragmatically.

A second and related concern about the use of nonlegal materials to decide cases is that it may degenerate into “gut reaction” judging. Cases do not wait upon the accumulation of a critical mass of social scientific knowledge that will enable the properly advised judge to arrive at the decision that will have the best results. The Supreme Court’s decisions concerning sexual and reproductive autonomy came in advance of reliable, comprehensive, and accessible scholarship on sexuality, the family, and the status of women. The Court had to decide whether capital punishment is a cruel and unusual punishment at a time when the scientific study of the deterrent effects of capital punishment was just beginning.

And when the Court decided to redistrict state legislatures according to the “one man, one vote” principle it cannot have had a clear idea about the effects, on which political scientists still do not agree more than thirty years after the Court got into the redistricting business. The examples are not limited to the Supreme Court or to constitutional law. Common law judges had to resolve such issues as whether to extend the domain of strict liability, substitute comparative negligence for contributory negligence, simplify the rules of occupiers’ liability, excuse breach of contract because of impossibility of performance, limit consequential damages, enforce waivers of liability, and so forth long before economists and economically minded lawyers got around to studying the economic consequences of these choices. When judges try to make the decision that will produce the “best results” without having any body of organized knowledge to turn to for help, they must rely on their intuitions.

A fancy name for the body of intuitions that guide legal decision making in the most difficult (in the sense of uncertain, not necessarily complex) cases is “natural law.” And so the question arises whether the pragmatic approach to adjudication is not just another version of the natural-law approach. I think not. Pragmatists do not look to God or other transcendental sources of moral principle to validate their departures from statute or precedent or other conventional sources of law. They do not have the confidence of secure foundations, and this should make them a little more tentative, cautious, and piecemeal in imposing their vision of the Good on society in the name of legal justice. If Holmes really thought he was applying a “puke” test to statutes challenged as unconstitutional rather than evaluating those statutes for conformity with transcendental criteria, this would help explain his restrained approach to constitutional adjudication. Another pragmatic Justice, however, Robert Jackson, who unlike Holmes had been heavily involved in high-level political matters before becoming a judge, was not bashful about drawing on his extrajudicial experience for guidance to the content of constitutional doctrine.76

The pragmatic judge is not always a modest judge.

The reason that using the “puke” test or one’s “gut reactions” or even

76. In his famous concurrence in the steel-seizure case, Jackson said: “That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (concurring opinion).
one’s government experience before becoming a judge to make judicial decisions sounds scandalous is that the legal profession, and particularly its academic and judicial branches, want the added legitimacy that accrues to the decisions of people whose opinions are grounded in expert knowledge. (This point is related to the discussion in Chapter 3 of professional mystique.) The expert knowledge of another discipline is not what is wanted, although it is better than no expert knowledge at all. Both the law professor and the judge feel naked before society when the positions they take on novel cases, however carefully those positions are dressed up in legal jargon, are seen to reflect intuition based on personal and professional (but nonjudicial) experiences and on character and temperament rather than on disciplined, rigorous, and articulate inquiry.

Things are not quite so bad as that. It is not as if American judges were chosen at random and made political decisions in a vacuum. Judges of the higher American courts are generally picked from the upper tail of the population distribution in terms of age, education, intelligence, disinterest, and sobriety. They are not tops in all these departments but they are well above average, especially in the federal courts because of the elaborate pre-appointment screening of candidates for federal judgeships. Judges are schooled in a profession that sets a high value on listening to both sides of an issue before making up one’s mind, on sifting truth from falsehood, and on exercising detached judgment. Their decisions are anchored in the facts of concrete disputes between real people. Members of the legal profession have played a central role in the political history of the United States, and the profession’s institutions and usages are reflectors of the fundamental political values that have emerged from that history. Appellate judges in nonroutine cases are expected to express as best they can the reasons for their decision in signed, public, citable documents (the published decisions of these courts), and this practice creates accountability and fosters a certain thoughtfulness and self-discipline. None of these things guarantees wisdom, especially since the reasons given for a decision are not always the real reasons behind it and the factual premises of the decision are often inaccurate or incomplete. But at their best American appellate courts are councils of wise elders meditating on real disputes, and it is not completely insane to entrust them with responsibility for resolving these disputes in a way that will produce the best results in the circumstances rather than resolving them purely on the basis of rules.

77. Making the statement by Justice Jackson that I quoted in the preceding footnote remarkable for its candor; but am I mistaken in sensing a faintly apologetic tone?
created by other organs of government or by their own previous decisions, although that is what they will be doing most of the time.

Nor do I flinch from another implication of conceiving American appellate courts in the way that I have suggested. It is that these courts will tend to treat the Constitution and the common law, and to a lesser extent bodies of statute law, as a kind of putty that can be used to fill embarrassing holes in the legal and political framework of society. In the case of property rights in oil and gas, a court could take the position that it had no power to create new rules and must therefore subsume these newly valuable resources under the closest existing rule, the rule governing wild animals. It might even take the position that it had no power to enlarge the boundaries of existing rules. In that event no property rights in oil and gas would be recognized until the legislature created a system of property rights for these resources. Under this approach, if Connecticut has a crazy law (as it did until the Supreme Court struck it down in the *Griswold* case) forbidding married couples to use contraceptives, but no provision of the Constitution limits state regulation of the family, then the crazy law would stand until it was repealed or the Constitution amended to invalidate it. Or if the Eighth Amendment’s prohibition against cruel and unusual punishments has reference only to the *method* of punishment or to the propriety of punishing *at all* in particular circumstances (for example, for simply being poor or an addict), then a state can with constitutional impunity sentence a sixteen-year-old to life imprisonment without possibility of parole for the sale of one marijuana cigarette—which in fact seems to be the Supreme Court’s current view,78 one that I find difficult to stomach. I don’t think a pragmatic Justice of the Supreme Court *would* stomach it, although he would give due weight to the implications for judicial caseloads of bringing the length of prison sentences under judicial scrutiny and to the difficulty of creating workable nonarbitrary norms of proportionality. The pragmatic judge does not throw up his hands and say “sorry, no law to apply” when confronted with outrageous conduct that the framers of the Constitution neglected to foresee and make specific provision for.

Oddly, this basic principle of pragmatic judging has received at least limited recognition by even the most orthodox judges with respect to statutes. It is accepted that if reading a statute the way it is written produces absurd results, the judges may rewrite it.79 Judges do not put it

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quite this way—they say that statutory interpretation is a search for meaning and Congress can't have meant the absurd result—but it comes to the same thing. And, at least in this country, common law judges reserve the right to “rewrite” the common law as they go along. A similar approach, prudently employed, could guide constitutional adjudication as well.

The approach, to repeat, is not without dangers. People can feel very strongly about a subject and be quite wrong. Certitude is not the test of certainty. A wise person realizes that even his unshakable convictions may be wrong—but not all of us are wise. In a pluralistic society, moreover, a judge’s unshakable convictions may not be shared by enough other people that he can base a decision on those convictions and be reasonably confident that it will be accepted. So the wise judge will try to check his convictions against those of some broader community of opinion, as Holmes suggested in referring in *Lochner* to “fundamental principles as they have been understood by the traditions of our people and our law.”

It was not irrelevant, from a pragmatic standpoint, to the outcome of *Brown v. Board of Education* that official racial segregation had been abolished outside the South and bore a disturbing resemblance to Nazi racial laws. It was not irrelevant to the outcome in *Griswold* that, as the Court neglected to mention, only one other state (Massachusetts) had a similar law. If I were writing an opinion invalidating the life sentence in my hypothetical marijuana case I would look at the punishments for this conduct in other states and in the foreign countries, such as England and France, that we consider in some sense our peers. For if a law could be said to be contrary to world public opinion I would consider this a reason, not compelling but not negligible either, for regarding a state law as unconstitutional even if the Constitution’s text had to be stretched a bit to cover it. The study of other laws, or of world public opinion as crystallized in foreign law and practices, is a more profitable inquiry than trying to find some bit of eighteenth-century evidence for thinking that the framers of the Constitution may have wanted courts to make sure that punishments prescribed by statute were proportional to the gravity, or difficulty of apprehension, or profitability, or some other relevant characteristic of the crime. If I found such evidence I would think it a valuable bone to toss to a positivist or formalist colleague, but I would not be embarrassed by its absence because I would not think myself duty-bound to maintain consistency with past decisions.

81. Which for these purposes, however, included the District of Columbia! See *Bolling v. Sharpe*, 347 U.S. 497 (1954).
I would even think it pertinent to the pragmatic response to the marijuana case to investigate or perhaps even just to speculate (if factual investigation proved fruitless) about the psychological and social meaning of imprisoning a young person for his entire life for the commission of a minor crime. What happens to a person in such a situation? Does he adjust? Deteriorate? What is the likely impact on his family, and on the larger society? How should one feel as a judge if one allows such a punishment to be imposed? And are these sentences for real, or are preposterously severe sentences soon commuted? Might the deterrent effect of so harsh a sentence be so great that the total number of years of imprisonment for violation of the drug laws would be reduced, making the sacrifice of this young person a utility-maximizing venture after all? Is utility the right criterion here? Is the sale of marijuana perhaps far more destructive than some ivory-tower judge or professor thinks? Do judges become callous if a large proportion of the criminal cases that they review involve very long sentences? If a defendant who received “only” a five-year sentence appealed, would the appellate judges’ reaction be, “Why are you complaining about such a trivial punishment?”

The response to the case of the young man sentenced to life for selling marijuana is bound in the end to be an emotional rather than a closely reasoned one because so many imponderables enter into that response, as my questions were intended to indicate. But emotion is not pure glandular secretion. It is influenced by experience, information, and imagination, and can thus be disciplined by fact. Indignation or disgust founded on a responsible appreciation of a situation need not be thought a disreputable motive for action, even for a judge; it is indeed the absence of any emotion in such a situation that would be discreditable. It would be nice, though, if judges and law professors were more knowledgeable practitioners or at least consumers of social science (broadly defined to include history and philosophy), so that their “emotional” judgments were better informed.

82. I again refer the reader to the striking quotation from Justice Jackson in note 76 above.
84. One wouldn’t expect, for example, a person who had become genuinely, disinterestedly convinced that the Holocaust had never occurred to feel the same concern about anti-Semitism that people who believed it had occurred would tend to feel.
My earlier reference to the ages of judges suggests another objection to pragmatic adjudication. Aristotle said, and I agree, that young people tend to be forward-looking. Their life lies ahead of them and they have only a limited stock of experience to draw upon in coping with the future, while old people tend to be backward-looking because they face an opposite balance between past and future.\(^{85}\) If, therefore, the pragmatic judge is forward-looking, and we want judges to be pragmatic, should we invert the age profile of judges? Should Holmes have been made a judge at thirty and put out to pasture at fifty? Or, on the contrary, is it not the case that judges perform an important balance-wheel function, one that requires them to be backward-looking, one that is peculiarly apt, therefore, for the aged? Have I not myself so argued?\(^{86}\) Have I not also pointed out that, contrary to the conventional view, the great failing of the German judges in the Nazi period was not their positivism but their willingness to interpret the laws of the New Order flexibly in order to further the aims, the spirit, of those laws?\(^{87}\)

These criticisms pivot on an ambiguity in the term “forward-looking.” If it is meant to carry overtones of disdain for history, origins, and traditions, then the criticisms I have mentioned are just. But I do not understand “forward-looking” in that sense. I understand it to mean that the past is valued not in itself but only in relation to the present and the future. That relation may be a very important one. In many cases the best the judge can do for the present and the future is to insist that breaks with the past be duly considered. In such a case the only difference between the positivist judge and the pragmatic judge is that the latter lacks reverence for the past, a felt duty of continuity with the past. That sense of duty would be inconsistent with the forward-looking stance and hence with pragmatism.

Pragmatism is likewise neutral on whether the law should be dominated by rules or by standards. The pragmatist rejects the idea that law is not law unless it consists of rules, because that kind of conceptual analysis is not pragmatic. But he is open to any pragmatic argument in favor of rules, for example that judges cannot be trusted to make intelligent decisions unless they are guided by rules or that decisions based on standards produce uncertainty disproportionate to any gain in flexibility.

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85. I elaborate on Aristotle’s view in my book Aging and Old Age, note 10 above, ch. 5.
86. In id., ch. 8.
87. Posner, note 34 above, at 155; see also Michael Stolleis, The Law under the Swastika: Studies on Legal History in Nazi Germany 15 (1998). I would not be inclined to swing to the other extreme and blame Nazi jurisprudence on pragmatism. National Socialism was not a pragmatic doctrine.
matic judge thus need not be recognizable by a distinctive style of judging, and it would be a travesty of pragmatic adjudication to think that a pragmatic judge must be an unprincipled, ad hoc decision maker. What would be distinctive about the pragmatic judge is that his style (of thinking—he might decide to encapsulate his thoughts in positivist or formalist rhetoric) would owe nothing to ideas about the nature of law or the moral duty to abide by past decisions or some other nonpragmatic grounding of judicial attitudes.

I leave open the criteria for the “best results” for which the pragmatic judge is striving, except that, pace Dworkin, they are not simply what is best for the particular case without regard for the implications for other cases. Pragmatism will not tell us what is best; but, provided there is a fair degree of value consensus among the judges, as I think there is, it can help judges seek the best results unhampered by philosophical doubts.

The greatest danger of judicial pragmatism is intellectual laziness. It is a lot simpler to react to a case than to analyze it. The pragmatic judge must bear in mind at all times that he is a judge and that this means that he must consider all the legal materials and arguments that can be brought to bear on the case. If legal reasoning is modestly defined as reasoning with reference to distinctive legal materials such as statutes and legal doctrines and to the law’s traditional preoccupations, for example with stability and the right to be heard and the other “rule of law” virtues, then it ought to be an ingredient of every legal decision, though not necessarily the be-all and end-all of the decision. Just as some people think that an artist must prove that he is a competent draftsman before he should be taken seriously as an abstract artist, so I believe that a judge must prove—anew in every case—that he is a competent legal reasoner before he should be taken seriously as a pragmatic judge.

To put this differently, the pragmatic judge must not forget that the role of a judge is constraining as well as empowering. Some years ago the Chicago public schools were unable to open at the beginning of the school year because the state refused to approve the school district’s budget. An injunction was sought to compel the schools to open, on the ground that their closure violated a judicial decree forbidding de facto racial segregation in the city’s public schools. The argument was not that the state’s refusal to approve the budget had been motivated by any racial animus—there was no suggestion of that—but that the ultimate goal of the judicial

decree, which was to improve the education and life prospects of black children in Chicago, would be thwarted if the schools were not open to educate them. The trial judge granted the request for an injunction, and did so on an avowedly pragmatic ground: the cost to Chicago’s schoolchildren, of whatever race, of being denied an education. My court reversed. The desegregation decree had not commanded the city to open the public schools on some particular date, or for that matter to open them at all, or even to have public schools, let alone to flout a state law requiring financial responsibility in the administration of the public school system. It seemed to us that what the trial judge had done was not so much pragmatic as lawless. The pragmatic judge may not ignore the good of compliance with settled rules of law. If a federal judge is free to issue an injunction that has no basis in federal law, merely because he thinks the injunction will have good results, then we do not have pragmatic adjudication; we have judicial tyranny, which few Americans consider acceptable even if they are persuaded that the tyrant can be counted on to be generally benign.

The judge in the Chicago school case was guilty of what might be called myopic pragmatism, which is Dworkin’s conception of pragmatism. The only consequence that the judge took into consideration in deciding whether to issue the injunction was that children enrolled in the public schools would be deprived of schooling until the schools opened. The consequence that he ignored was the consequence for the political and governmental systems of granting federal judges an uncanalized discretion to intervene in political disputes. Had the power that the judge claimed been upheld, you can be sure that henceforth the financing of Chicago’s public schools would be determined by a federal judge rather than by elected officials. The judge thought that unless he ordered the schools to open, the contending parties would never agree on a budget. The reverse was true. Only the fact that the schools were closed (until the injunction was issued) had exerted pressure on the parties to settle their dispute. And indeed as soon as the injunction was lifted the parties came to terms and the schools opened. The consequence that the judge ignored was a consequence for the schoolchildren as well as for other members of society, so that it is possible that even the narrowest group affected by the decree would, in the long run, have been hurt had the decree been allowed to stand.

89. United States v. Board of Education, 11 F.3d 668 (7th Cir. 1993).
But if intellectual laziness is a danger of pragmatic adjudication, it is also a danger of not being pragmatic. The positivist judge is apt not to question his premises. If he either thinks that “hate speech” is deeply harmful, or thinks that banning hate speech would endanger political liberty, he is not likely to take the next step, which is to recognize that he may be wrong and to seek through investigation to determine whether he is wrong. The deeper the belief—the closer it lies to our core values—the less likely we are to be willing to question it. Our disposition will be not to question but to defend. As Peirce and Dewey emphasized, doubt rather than belief is the spur to inquiry; and doubt is a disposition that pragmatism encourages, precisely in order to spur inquiry. One reason that attitudes toward hate speech are held generally as dogmas rather than hypotheses—one reason that so little is known about the actual consequences of hate speech—is that a pragmatic approach has not been taken to the subject.

Does It Travel?

I have been trying to explain and illustrate my conception of pragmatic adjudication and to defend it against its critics. But I would not like to leave the impression that I think pragmatic adjudication is the right way for all courts to go; to think it is would be to fall into the fallacy of jurisprudential universalizing. Although one can find echoes or anticipations of philosophical pragmatism in German philosophy and elsewhere (Hume, Mill, Nietzsche, and Wittgenstein are all examples), it is basically an American philosophy and one that may not travel well to other countries. The same may be true of pragmatic adjudication. The case for it is weaker in a parliamentary democracy than in a U.S.-style checks and balances federal democracy. Many parliamentary systems (notably the English) are effectively unicameral and, what is more, the parliament is controlled by the executive. The legislative branch of so highly centralized a system can pass new laws pretty easily and rapidly and word them clearly. As I noted in Chapter 2, if the courts identify a gap in existing law they can have reasonable (although not complete) confidence that it will be quickly filled by Parliament, so that only a temporary injustice will be done if the judges refrain from filling the gap themselves. The judges can afford to be stodgier, more rule-bound, less pragmatic than our judges; the cost in substantive injustice is lower.

90. The kind of investigation conducted in James R. Jacobs and Kimberly Potter, Hate Crimes: Criminal Law and Identity Politics (1998). Hate speech is discussed in id., ch. 8.
Some parliamentary systems have a federal structure; some have constitutional review; some have both. And some, the English for example, have neither. The ones that have neither have clearer law, whereas to determine someone’s legal obligation in the United States often requires the consideration of state law (and perhaps the laws of several states), federal statutory law (and sometimes federal common law), and federal constitutional law. Our government is one of the most decentralized in the world. We have effectively a tricameral federal legislature, since the President through his veto power and his role in one of the major political parties is a full participant in the legislative process. This structure makes it extremely difficult to pass laws, let alone clearly worded laws (unclear wording in a contract or a statute facilitates agreement on the contract or statute as a whole by deferring resolution of the most contentious points), and is, moreover, layered on top of similarly three-headed state legislatures. If they want “the best results,” American courts cannot leave all rulemaking to legislatures, for that would result in legal gaps and perversities galore. The lateral-entry character of the American judiciary, the absence of uniform criteria for appointment, the moral, intellectual, and political diversity of the nation (and hence, given the previous two points, of the judges), the individualistic and antiauthoritarian character of the population, and the extraordinary complexity and dynamism of the society are further obstacles to American judges’ confining themselves to the application of rules laid down by legislatures, regulators, or the framers of the Constitution.

Postmodernism Distinguished

*Duncan Kennedy: The Pied Piper*

Pragmatism and postmodernism are often confused (understandably, since the differences are subtle—but important), and likewise pragmatic adjudication and the postmodernist approach to adjudication championed by Duncan Kennedy. Kennedy occupies a niche in critical legal studies that he calls “left/mpm” (sometimes just “mpm”), which is short for “left-wing modernism-postmodernism.” Perhaps the best-known current occupant of that niche, though he is not a lawyer or identified with

critical legal studies, is Richard Rorty. And Rorty is a pragmatist. Is Ken-

dney? Does that make me a right-wing “crit”? Does our common rejection

of constitutional theory à la Dworkin make us soulmates?

The key to understanding Kennedy’s approach lies in the sense in

which he uses the word “ideology.” We usually think of an ideology as a
total—coherent and complete—system of thought; examples are commu-
nism, national socialism, Fabian socialism, and classical liberalism. Ken-
nedy uses “ideology” more narrowly, to denote “liberalism” and “conserva-
tivism” in their modern American senses in which the left wing of the
Democratic Party is “liberal” and the center and right of the Republican
Party are “conservative.” These ideologies begin in material interest and
emotional identification (whom do you like to “hang out” with?) but take
on an intellectual hue when the contestants begin to articulate their claims
in universal terms in order to win over neutrals. Because liberals and
conservatives appeal to the same basic values—the rule of law, the impor-
tance of rights and limited government, the core moral values of the
Judeo-Christian tradition, liberty, prosperity, tolerance, the family, and so
forth—these ideologies do not provide adequate tools for resolving spe-
cific issues. “Liberals and conservatives share identical major premises and
switch back and forth, as they draw lines, between identical intermediate-
level arguments” (p. 150). The parallel to the moral arguments discussed
in Chapter 1 is apparent.

The indeterminacy of ideological debate is important to Kennedy be-
cause so many legal issues cannot be resolved by reasoning from authorita-
tive legal materials. Some can be. He rejects as not “even slightly plausible”
the idea that “legal materials and legal reasoning are sufficiently plastic
that they can offer an acceptable post hoc rationalization of whatever
result the judge favors, and judges are habitual rationalizers” (p. 159).
Judges “often, often, often declare and apply rules that they would never
vote for if they were legislators” (p. 275). Often, but not always: hence
“the simultaneously structured and plastic character of legal reasoning”
(p. 285).

He thinks the plasticity bothers judges a lot. They don’t want to be seen
as reaching decisions on ideological grounds. As a result they “always aim
to generate a particular rhetorical effect through [their] work: that of the
legal necessity of their solutions without regard to ideology” (pp. 1–2,
emphasis in original). This aim is shared by law professors and interest-
group advocates, who want to help the judge reach the ideologically
motivated result that the advocate wants (whether it is abortion on de-
mand, or homosexual rights, or freedom from economic regulation, or religion in the public schools) without tipping his ideological hand.

Kennedy discusses three methods of concealing ideology as neutral legal reasoning. Together they make up “legalism”; when practiced by liberals, it is “liberal legalism.” One method, that of Dworkin, is to construct a general theory of legal rights and duties from which the correct outcome of even the most difficult case can be derived objectively. Dworkin claims that his views on the merits of the cases he discusses are generated not by his personal ideology, which is left-liberal, but by impartial reflection on the principles that are seen to be a part of law once positivism is rejected. Kennedy finds this argument laughable; Dworkin’s views on such issues as abortion, affirmative action, euthanasia, civil disobedience, and pornography obviously derive from his political beliefs. The only relation between Dworkin’s theoretical and applied work is that the rejection of legal positivism, his chief theoretical project, is a precondition to urging judges to do moral theory, which he believes will lead them to decide cases in accordance with his political preferences.

The second way in which judges’ academic trainers try to help them conceal ideological argument as neutral legal reasoning is by using notions of public policy, often nowadays informed by economic analysis, to bridge the gap between conventional legal materials and the desired outcome. Kennedy sees this as a legacy of legal realism, which killed formalism and “promoted a hybrid in which policy argument is included as a supplement to deductive reasoning in both liberal and conservative appellate opinions” (p. 94). He believes that policy is every bit as manipulable as Dworkin’s coherentist theory; “policy argument is interminably ideological, and like ideological debate, just plain interminable” (p. 177). Kennedy is wrong. Although one can always argue both sides of an issue of policy, the arguments for one side may fall completely flat. I would like to see Kennedy argue for raising the minimum wage to $50 an hour. A Critique of Adjudication has no sustained discussion of policy issues; it merely asserts, in the face of contradictory evidence to which the author does not so much as allude, the indeterminacy of policy analysis. It

92. Recall my quotation in Chapter 1 of Kennedy’s description of the happy coincidence between Dworkin’s political preferences and judicial philosophy.

93. He used not to think policy analysis indeterminate; he used to do it. See Duncan Kennedy, “The Effect of the Warranty of Habitability on Low Income Housing: ‘Milking’ and Class Violence,” 15 Florida State University Law Review 485 (1987), and, for criticism, Posner, note 9 above, § 16.6, pp. 517–518.
would be surprising if legal arguments often, often, often achieved closure, as he concedes, and policy arguments never, never, never.

The third way of disguising ideology as law, Kennedy claims, is by recasting ideological issues in the language of rights. Feminist jurists do not just say they want women to be able to obtain abortions on demand, the way a union might just say it wants its members to have a larger share of the employer’s profits. They say there’s a constitutional right to abortion on demand, thus dressing up an ideological demand in neutral legal language. “Rights reasoning, in short, allows you to be right about your value judgments, rather than just stating ‘preferences’” (p. 305). This particular method (early Dworkin, as Kennedy notes) of concealing ideology as legality is so popular that it has led to the “rights-overkill problem” (p. 327). With every interest group agitating for rights, rights pop up on both sides of most legal disputes. We saw this in discussing criminal procedure in Chapter 2. Other examples are the debate over hate speech, which confronts the right to free speech with the right to racial justice; the debate over pornography, where the right of free speech confronts the right of sexual equality; and debates over abortion and custody, where rights of fathers are asserted against rights of mothers. You get no help, as Kennedy points out, from the philosophical concept of rights—the source of what he calls “outside” rights, in contrast to the legal rights (“inside rights”) that jurists want to turn the outside rights into. The philosophical discourse of rights is as indeterminate as the legal.

To the extent that it succeeds in fooling people, the disguise of ideological issues as legal issues has three effects, which Kennedy calls empowerment, moderation, and legitimation. The disguise empowers “legal factions of intelligentsias” (p. 2) to decide ideological issues without reference to majorities. In doing so it also moderates ideological conflict. The legal-judicial community removes ideological issues from the political community, turning what would otherwise be political issues for ideologically organized majorities to decide into technical issues for decision by mandarins. At the same time, by concealing the existence of ideological conflict the reclassification of political issues as legal issues makes the political status quo, whatever it is, seem natural and necessary because ordained by law, not just by power. The “whatever it is” is important. It means that law blocks change in whatever direction, good or bad, the people might want to go. Kennedy believes that both liberals and conservatives fear the people—the “masses” as he calls them. European courts are less ideological than American ones; and, consistent with Kennedy’s mod-
eration thesis, European politics are more ideological than American politics. Europeans haven't converted as many of their ideological conflicts into legal disputes for resolution outside the democratic process.

Kennedy believes that the efforts of the judges and their academic seconds and trainers to conceal ideology as legality are beginning to fray badly. Legal liberals, for example, at the same time that they are plumping for social reform through judicial activism feel compelled to defend the idea of adjudication as neutral and objective in order to fend off conservative opponents.94

When the duplicity of legal reasoning is exposed through “internal critique” (Kennedy’s method, the identification of the internal contradictions in all efforts to bridge the gap between ideology and law), there are two reactions. One is bad faith in approximately Sartre’s sense.95 The judge or law professor senses that his effort to submerge ideology in neutral legal reasoning is phony, but, ostrichlike, he refuses to acknowledge this, pretending instead to be acting under the compulsion of neutral principles. A frank avowal would be too painful because it would take away his self-image as a serious thinker, someone “above” politics. Another reaction, however—Kennedy’s own—is loss of faith in legal reasoning. If you see all the way through the pretensions of legal analysis and don’t try to conceal your insight from yourself, you lose your enthusiasm for doing coherence theory, or policy analysis, or rights analysis.

For Kennedy, this is a personal experience at once thrilling (the mountaintop thrill of conscious possession of superior insight) and depressing. It is depressing because liberal legalism in general and rights analysis in particular have, he thinks, done a lot of good by “inducing a diffuse but pervasive, unpredictably militant ‘rights consciousness’ throughout American society that is one of the few effective checks on bureaucratic abuses in both public and private sectors” (p. 114). This makes radical feminists, critical race theorists, homosexual rights activists, and other practitioners of identity politics—Kennedy’s natural allies, one might have thought—want to extend the domain of rights to cover the activities that they consider essential to their identity. Kennedy will have none of that.

94. “There was something ‘weakening’ or ‘undermining’ about the fact that the liberals were using exactly the rhetoric they had denounced before World War II, about the failure to come up with any alternative to balancing as a methodology for protecting rights, about the very facility they began to feel at inventing new rights (privacy being the most striking case), and about the parallel facility of their opponents at inventing counterrights of one kind or another” (p. 325).
95. Well described in Mike W. Martin, Self-Deception and Morality 63 (1986).
He rejects “leftist righteousness (whether in the mode of post-Marxist ‘systematicity’ or of identity politics) and, with equal intensity, . . . the compromises of left liberalism” (p. 339). By “systematicity” he means grand historical causal theories, such as the Marxist theory once propounded by his colleague Morton Horwitz that the American common law assumed the shape it did in the nineteenth century in order to promote capitalism. But he also means efforts to go beyond critique to “reconstruction,” that is, to putting something in the place of whatever edifice, such as liberal legalism or capitalist democracy, the critique has just demolished. Kennedy thinks internal critique devastates all systems.

This relentless critiquing places Kennedy at the tip of a thin branch. Since he will have no truck with systems of thought or with totalizing theories, his own leftism is unsystematic, untheorized, and indeed undefended. It is related to anarchism (“we study state power to resist it, not to seize it” [p. 271]), but is informed by a hostility to all large institutions, not just to government; in fact the line between public and private has no significance for Kennedy. Disliking corporations especially, he is much taken with union militancy and worker ownership. This gives his leftism an archaic cast (like that of Rorty, who is still talking about the “oligarchy” and the “bosses”), and is another reason why he doesn’t like rights. Emphasis on them has caused the left to abandon the project dear to his heart of representing an oppressed majority—the working class.

He is more explicit about the modernism-postmodernism strain in his ideology. “Mpm is the search for intense experience in the interstices of a disrupted rational grid. The characteristic vehicle is a transgressive artifact or performance that ‘shatters’ the forms of ‘proper’ expression in order to express something that those forms suppressed.” The goal is to induce “the modernist emotions associated with the death of reason—ecstasy, irony, depression, and so forth” (p. 342). This is not to be confused with nihilism or even skepticism. When he says that he is “hostile to rightness in all its forms” (p. 11), he doesn’t mean that he thinks there are no right answers to legal questions; such a belief would be inconsistent with his recognition that legal materials do constrain judges. “The experience of core meanings survives the loss of its metaphysical grounding” (p. 32).

The polite word for what Kennedy is talking about is pragmatism, and “pragmatist” is indeed one of his own self-descriptions, though not his favorite (it makes one think of dull sticks like John Dewey). Remember

that pragmatism holds that people won’t reexamine a deeply held belief unless you shake them hard enough to make them doubt. You do this either by making a relentless intellectual assault on the foundations of their belief or by confronting them with violent or disturbing images that loosen their cultural and emotional moorings sufficiently to “convert” them to a new perspective. Abstract art does not argue that representation is inessential to art; it does not proceed rationally at all. Instead it presents a nonrepresentational image which, operating as a “transgressive artifact,” may incite us to reconsider our notion of what art is.

Kennedy’s mpm is more colorful, certainly, than the usual descriptions of pragmatism. He calls mpm “elitist as well as elite,” the “revenge of the nerds” “driven by aggression” (p. 354).

It aims to épater les bourgeois (rather than to nationalize their property), in the modes of aggression and exhibitionism described above. It presupposes the superiority of mpm, the “right” of mpm performers to hurt the audience, as well as to induce ecstasy and depression, in the name of higher values accessible to the artist/performer and “good for” the audience (while commonly denying—defensively and hypocritically—that it cares at all about audience reaction). (p. 354)

This is what used to be called avant-gardism—a kind of intellectual bohemianism—and helps to explain the tension between Kennedy and the practitioners of identity politics. Kennedy supports most of their proposals, but, consistent with the “mode of aggression,” he oversupports them. For example, he argues for rigid racial quotas, while identity politicians avoid the word “quota” like the plague. Those most offended by mpm, he conjectures, are neither liberals nor conservatives; they are the leaders of oppressed groups, who, themselves highly educated and upwardly mobile, embrace anti-elitism as “the price they pay for their roles as leaders” (p. 355). It’s a price he’s not willing to pay.

He acknowledges that his leftism works at cross-purposes with his mpm to produce what he calls “Pink Theory” (in the lingo of the Russian Revolution, neither Red nor White). Pink is a restful color, and Pink Theory a formula for political quietism (which is fine by me). Kennedy repeatedly and accurately describes “internal critique” as “viral,” conjuring up the image of HIV or a computer virus—agents of voracious destruction. It eats up liberal legalism, leading Kennedy to admit that it isn’t absurd to argue that “we crits are naively willing to play with fire by
questioning a central pillar of humane politics in the modern age of barbarism . . . The securely centrist, first peripheral and then imperial, but continentally isolated American political culture has provided a Galápagos-like enclave for bizarre intellectual mutations" (p. 74). Because viral critique also devours identity politics and leftist righteousness generally, little room remains for leftist “resistance” either.

Kennedy thinks that the law schools induct their students into bad faith by teaching them to submerge awareness of behavior designed to advance an ideological agenda “in a necessitarian discourse that everyone knows is only part of the story” (p. 367). Yet he also believes that a student who keeps his wits about him just may be able when he goes into practice or becomes a judge “to set up a political identity to the left of liberal bad faith, without being or seeming to be a wrecker” (p. 374). There won't be many such, however, if they listen to Kennedy. He not only acknowledges the stability of the American political system and the impotence of academic critique to bring about political change; he also fails to explain how a left liberal who is not a wrecker can accomplish anything by boring from within or even how one can be a borer from within without being a wrecker. And if policy argument, left or right, is, as Kennedy believes, indeterminate and interminable, there isn’t even a vocabulary in which left liberals can defend their principles and proposals.

I have said that I don’t think policy analysis is as indeterminate as Kennedy believes. A related point is that I don’t think he has the psychology of judges right. No doubt some liberal law professors are in bad faith, that is, half aware that the arguments they make for why some right or other that they or their set likes is “in” the Constitution are grounded in pure political preference. But I have never met a judge who had this kind of queasiness. For a judge, the duty to decide the case is paramount. He wouldn’t be doing his duty if he said, “I can’t decide this case, because I can’t deduce the outcome from the orthodox materials of judicial decision making.” He decides as best he can, and in doing this he is doing law. It is true that when he comes to write an opinion in a difficult case he is unlikely to be fully candid about the degree to which he has had to rely on policy or personal values to decide it, although Kennedy exaggerates when he says that judges always try to cast their decisions in a rhetoric of necessity or inevitability. But lack of complete candor in a judicial opinion, as in any public document, especially an official one, is not hypocrisy or bad faith. There is a role for tact in public life. A judicial opinion is not a confessional document or a cri de coeur. The opinion has to be acceptable
both to the legal community and to the larger community that is affected by what judges do. And many members of both communities believe in perfectly good faith, though erroneously, that legal materials alone are sufficient to resolve even the most difficult cases. Those are the judges, by the way, who are most likely to be unconstrained activists. Hugo Black was a prime example.

I keep coming back to Kennedy’s disbelief in the possibility of cogent policy analysis. It is the error that in the end undoes him. The unsentimental (unironic, unecstatic, and undepressed) legal pragmatist admits that in difficult cases he can’t bridge the gap between the formal materials of the law and a sensible outcome without doing policy. So either he rolls up his sleeves and does policy, hoping that the bar or more likely the academy will provide him with the resources for making sensible policy analyses, or he uses his ignorance of policy, as Holmes often did, as a warrant for judicial restraint. The pragmatist like Kennedy who doesn’t think that you can do anything with an appeal to sound policy but hide your ideology in it has no resources for deciding a case or advocating a policy change.⁹⁷ He is left stranded in the rubble of his transgressive artifacts—which is pretty much where another noted postmodernist latterly interested in law, Stanley Fish, finds himself.

Stanley Fish: Postmodern Thersites

Fish is properly contemptuous of highfalutin legal and political theory. When he says “that there are no different or stronger reasons than policy reasons, and that the announcement of a formula (higher-order impartiality, mutual respect, or the judgment of all mankind) that supposedly outflanks politics, or limits its sphere by establishing a space free from its incursions, will be nothing more or less than politics—here understood not as a pejorative, but as the name of the activity by which you publicly urge what you think to be good and true—by another name, the name, but never the reality, of principle,”⁹⁸ I find myself in complete agreement with him. But his contempt for his intellectual opponents and for reasoned argument is insatiable and at times threatens to devour decency, accuracy, and Fish himself.

⁹⁷. The defeatist, or quietistic, implications of postmodernist social thought have been noted frequently. See, for example, Litowitz, note 91 above, at 80–86.
He sometimes seems to conceive of intellectual activity, his own included, as a branch of defamation motivated by self-aggrandizement. The implied author of his book nominally on free speech99 is Homer’s Ther-sites, a trafficker in scurrility and effrontery. Fish’s effrontery is illustrated by his remark that he “prefer[s] the quieter tones of pragmatic inquiry” (p. 50). His scurrility is illustrated by his treatment of Arthur Schlesinger, Jr. After calling Schlesinger a racist for affirming the worth of Western civilization, because racists have affirmed that worth, Fish remarks that a photograph of Schlesinger reveals features that “are ethnic, Semitic, even a bit negroid,” and he criticizes Schlesinger for “nowhere mak[ing] mention of that heritage” (p. 88). Elsewhere Fish remarks: “Academics like to eat shit, and in a pinch, they don’t care whose shit they eat” (p. 278, emphasis in original). Fish wants to be noticed, not necessarily believed or even taken seriously. Speaking of his debate opponent Dinesh D’Souza, Fish remarks that “our personal interactions were unfailingly cordial. We dined together, traveled together, and played tennis whenever we could . . . In May I danced happily at his wedding” (p. 52). Yet in one of the essays to which these remarks are a preface, Fish describes D’Souza as a racist and a liar. It’s like debating Joseph Goebbels over the proper place of the Jew in modern Europe and afterwards dancing at Goebbels’ wedding. Either Fish doesn’t believe that D’Souza is a racist and a liar or he cares little about either racial justice or truthfulness. Or both. He calls himself a “contemporary sophist” (p. 281) and adds, “I don’t have any principles” (p. 298). I believe him. Socrates, thou shouldst be living at this hour.

To those who argue that academic merit rather than race or sex ought to be the exclusive criterion for academic appointments, Fish replies that their opponents simply have a different conception of merit. But race or sex is not anyone’s idea of a meritocratic criterion of appointment; the disagreement, which Fish wants to recast as a semantic misunderstanding, is over the weight to assign merit. In like sophistic vein he argues that since everything is politics, there can be no such thing as a debate between proponents and opponents of political correctness; there can just be conflicting notions of political correctness. But as he well knows, the term “political correctness” denotes efforts to eliminate terminology and arguments thought to encode hostile or insensitive attitudes toward vulnerable

99. Stanley Fish, There’s No Such Thing as Free Speech, and It’s a Good Thing, Too (1994). Subsequent page references to this book appear in the text. The book is a collection of essays not limited to free speech or, for that matter, to law.
groups. It is those efforts that the opponents of political correctness, many of whom share the politics of the proponents, resist.

Fish quotes with approval, as a telling point against meritocracy in education, someone’s remark that the correlation between scores on the Scholastic Aptitude Test and college grades is lower than the correlation between height and weight. But height and weight are correlated, and the question is how closely they are correlated and how much weaker the correlation between SAT scores and college grades is. Critical of scholars and publicists who shirk “the hard work of presenting evidence” (p. 20), Fish yet is one of them, content to mouth liberal pieties about the effects of discrimination, refusing to acknowledge that these might be matters for investigation, oblivious to the tension between admitting weak students to a college for the sake of having a diverse student body in which people of different races can learn from each other and allowing them to choose racially segregated living quarters, eating arrangements, and even curricula once they are admitted—both of which positions he holds. He thinks the fact that test scores are correlated with parents’ income shows that the scores are arbitrary. He ignores the possibility that the parents’ incomes and the children’s test scores may be different manifestations of the same values and aptitudes.

He distrusts systematic thought about issues of law or public policy because he believes, in a parody of Wittgenstein, that theory can have no effect on practice. For Fish, every area of human activity is a game that has rigid rules, like chess. You could have a theory about chess—about its origins, people’s fascination with it, even how it might be improved by a change in its rules. But you could not use the theory in playing chess. When you play chess you play by its rules, not theory’s rules. So no theoretical reflections about law could be expected to alter the way judges decide cases, because judges play the judging game, which has its own rules. The theory game and the practice game never intersect.

Never? The rules of the judicial game are much looser than those of chess, and theoretical insights and perspectives can alter the rules—can make them more like those of economics, say, or of social science generally, or conceivably (though, as I have argued, improbably) of moral reasoning, or (as used to be the legal profession’s aspiration) of logic. Fish does not allow for these possibilities because he thinks that judges make decisions only on ad hoc political grounds and that they always conceal their ad hoc-ery in a phony rhetoric of rule and principle. He thinks
judges equally impervious to interdisciplinary and to formalist conceptions of the judge’s role. He thinks they’re as cynical as he is, illustrating the adage that people tend to be highly sensitive to their own weaknesses when they see them in other people.

His is an odd conception of the judicial “game,” one that is inconsistent with his own previous writings, that disregards what sociologists have long known about role playing, and that he is unable to substantiate. He offers the following “evidence” of how legal rules are emptied of meaning so that judges can do justice on a retail basis uncabined by rules. If a written contract recites that it is the complete agreement between the parties, the court will not listen to testimony that contradicts the written agreement. This is the parol evidence rule. It is phony, Fish argues, because the court will hear evidence that the trade to which the contract pertains attaches a special meaning to words used in the contract, a meaning that would not be apparent to an outsider. So, says Fish, the parties are allowed to contradict the written contract after all. He overlooks a vital distinction. Trade usage can be established by disinterested testimony to a reasonable degree of certainty. To consult trade usage is like consulting a dictionary. And the use of a dictionary to interpret the words of a contract does not undermine the parol evidence (and cognate “four corners”) rule, which is founded on concern that written contracts would mean little if a party could try to persuade a judge or, particularly, a jury that while the contract said $X$, the parties had actually agreed, without telling anybody or writing anything down, that the deal was $Y$. Such evidence would be subjective, unverifiable, unreliable, and self-serving, unlike a dictionary or trade usage.

It is true that no contract can be made to say anything unless the author and the readers share a common understanding of the words and of essential contextual factors such as the purpose of making contracts. But if contracting parties believe that a judge is likely to be a member of the

100. See Posner, note 34 above, at 132–135.
102. “Each role has its inner discipline, what Catholic monastics would call its ‘formation.’ The role forms, shapes, patterns both action and actor. It is very difficult to pretend in this world. Normally, one becomes what one plays at.” Peter L. Berger, Invitation to Sociology: A Humanistic Perspective 98 (1963).
same interpretive community as they and will thus read the contract as they intend it to be read, then by including an integration clause (a clause saying in effect that the parol evidence rule shall apply if there is a dispute over the meaning of the contract, thus excluding inquiry into the parties’ subjective understandings) they can foreclose most disputes over meaning.

Fish is similarly off-base in arguing that the doctrine of consideration—that a promise will not be enforced unless the promisor has received a reciprocal promise or some other benefit—is fake. He points out that promises are sometimes enforced when the promisor had previously received a benefit from the promisee. The promisee might have rescued the promisor and been injured in the process. If the rescued person promises for the first time after the rescue to compensate the rescuer for his injuries, and thus receives nothing in return for the promise, how can the promise be thought supported by consideration? One answer lies in the practical function of the doctrine of consideration. That doctrine, like the parol evidence rule, reduces the likelihood of phony contract claims, because bilateral exchanges are more likely to be intended to give rise to legal duties than purely gratuitous promises. In the rescue case, which is emblematic of the “past” or “moral” consideration cases that Fish considers doctrinally aberrant, the likelihood that the promise was in fact made is high, so a wider mesh for straining out phony claims is appropriate.

Doctrinal aberrance is central to Fish’s conception of law, for he believes that “the inconsistency of doctrine is what enables law to work” (p. 169). This is a version of the common misconception, now several centuries out of date, that law is an assemblage of senselessly rigid rules from which unprincipled departures are continually necessary to save the whole clumsy edifice from collapsing. In like vein Fish argues that “‘free speech’ is just the name we give to verbal behavior that serves the substantive agendas we wish to advance.” The judges protect the “speech they want heard” and regulate “the speech they want silenced” (p. 110). At one level this is true. Freedom of speech is not absolute. It is relative to social conditions. It had a narrower scope for Blackstone than it has for us, and it would take careful historical inquiry to substantiate a claim that he had too narrow a conception of it even for his time. Even in today’s United States freedom of speech is not absolute. People can still be punished for disseminating obscenity, for revealing military or trade secrets, for defamation, for inciting riots, for copyright and trademark infringement, for

plagiarism, for threats, for perjury, for false advertising and other misrepresentations, for certain types of verbal abuse, for exchanging information in the hope of facilitating price fixing, for talking back to prison guards, for revealing confidences of various sorts, for certain forms of picketing and aggressive solicitation, for indecorous behavior in courthouses, for publicly criticizing one’s employer on matters not deemed to be of public concern, for irresponsible or offensive broadcasting, even for using loudspeakers. Justice Jackson warned against interpretations that would make the Bill of Rights a national suicide pact. But there is a difference between free-speech doctrine shaped and constrained by broadly political considerations and a free-for-all in which judges base decisions on which speech they like and which they don’t like. Most of the “speech” that survives legal challenge in the United States—such as neo-Nazi ravings, blasphemous art, pornography that does not cross the line to obscenity, government documents containing diplomatic secrets (the Pentagon Papers, for example), flag-burnings, picketing, and cross-burnings—offends the mostly conservative, mostly middle-aged and elderly persons who, as judges, insist that the government allow such things.

Fish acknowledges this point obliquely in discussing a parody, held constitutionally protected by the Supreme Court, published in Hustler magazine in which Jerry Falwell, the fundamentalist religious leader, is represented as having sexual intercourse with his mother in an outhouse.105 The Court’s inability to draw a line that would permit the suppression of so intellectually barren and gratuitously repulsive a personal attack draws a pointed remark from Fish about the judiciary’s “self-imposed incapacity to make distinctions that would seem perfectly obvious to any well-informed teenager” (p. 132). That incapacity sounds, however, like the very opposite of the ad hoc political decision making that Fish told us is all that judges do.

The free-speech strategy of civil libertarians and the courts, a strategy to which Fish is oblivious, resembles the U.S. defense strategy during the Cold War. It was a forward defense. Our front line was the Elbe, not the Potomac. The choice between a forward and a close-in defense involves trade-offs. The forward defense is more costly, and the forward-defense line, because it is nearer the enemy forces, is more likely to be overrun. But the forward defense allows a defense in depth, reducing the likelihood that the home front will be penetrated. The analogy to free-speech strategy is

straightforward. Rather than defending just the right to say and write things that have some plausible social value, the courts defend the right to say and write utterly worthless and deeply offensive things as well. The fight goes on at these outer pickets; it is costly because the claim of free speech is weak because overextended; and sometimes the claim is defeated. But the home front is secure, the enemy having dissipated his strength in penetrating the outer bulwarks. Fish understands the political function of judicial decisions, but not the political function of rules. He does not realize that judges can sometimes strengthen their political hand by binding themselves to rules, as in the case of free speech. He does not understand the possibility of what I earlier called a “rule pragmatist.”

For Fish, the judges’ pretense that they can detach themselves from their own values and preferences is at one with the liberal pretense that the state can and should be neutral among rival world views. He thinks that liberalism is just another ideology and that every ideology must rest on a fundamental conception of what the world is like—the scientific conception, for example, or the religious conception. Liberalism and religious fundamentalism, the first committed to empirical verification and the second to biblical inerrancy, are simply rival faiths. Fair enough; but what follows? Liberalism is a set of practices and institutions with a long and on the whole a highly successful history when compared with rival systems in point of wealth, power, happiness, social justice, peace, and freedom. The politics of biblical inerrancy has been tried repeatedly as a principle of social ordering and repeatedly found wanting.

I do not think that Fish would disagree with what I have just said about liberalism. He is not a radical or even, despite appearances, a cynic. He actually admires the law. (And why not? He has recast it in his own image.) But for him as for Duncan Kennedy, government and law are constructed out of nothing more solid than rhetoric, politics, and ideology, so that all the “justice” and “fairness” talk in law is an indispensable fraud because “the law’s job [is] to give us ways of redescribing limited partisan programs so that they can be presented as the natural outcomes of abstract impersonal imperatives” (p. 222). I don’t think law is quite so airy as that. Like Kennedy, Fish is blind to the possibility that with the help of social science, professional experience, and common sense, judges and legislators create legal rules, practices, and institutions that have more to commend them than rhetorical hot air and partisan politics. But he is right to emphasize that the judicial game is different from the philosophy game. He is also right that interpretation is something we can do compe-
tently without having a theory about it and that theories of interpretation are unlikely to affect the practice of interpretation. He misunderstands, however, the stakes in legal debates over “originalism” and other interpretive theories. As with the parol evidence rule and the doctrine of past consideration, the issue is what kinds of evidence shall be admissible in the resolution of particular types of dispute. Not all debates in legal theory are, as Fish would have it, the product of semantic confusion and stubborn foundationalism. And “pragmatic,” in law anyway, need not mean ad hoc.

The hostility of a Kennedy or a Fish to pretentious theorizing is refreshing. But ultimately these and other postmodernist critics of legal theory are as useless as moral theorists. Judges (most of them, most of the time) play the judicial game, not the moral-theory game, but also (albeit with notable exceptions, especially in constitutional decisions of the Supreme Court) not the game of advancing their political preferences behind a fig leaf. Theorists who adjure them to play the theory game, and nontheorists who adjure them to play the willfulness game, are equally out of touch with their audience except insofar as it consists of other, like-thinking academics.

Some Institutional Implications of Legal Pragmatism

I have argued that law should be more pragmatic (but steer clear of postmodernist extravagance) en route to becoming more professional in the best sense of the word. If this is right, it has implications for institutions as well as for attitudes. Moreover, whether it is right may depend on whether law’s institutional framework can be adapted to the needs of pragmatic professionalism. I conclude this chapter and the book by examining these questions with reference to three institutions. One is legal education. I argue for reforms that while leaving the first year of law school intact would drastically truncate the remainder of a legal education for most students. And I argue that these reforms would come about more or less automatically if legal education were deregulated, that is, if persons wanting to be lawyers were not required, as they are in most states (California is the most important exception), to spend three years studying in an accredited law school.

The second institution that I discuss is the student-edited law review, still the cornerstone of legal publication. I suggest a reorientation of the