

AT WAR WITH THE ECLECTICS: MAPPING PRAGMATISM IN CONTEMPORARY LEGAL ANALYSIS

*Justin Desautels-Stein**

ABSTRACT

This article has two primary goals. The first is descriptive, and seeks to respond to what appears to be an increasing degree of confusion over the word “pragmatism,” especially as it is used in a good deal of legal literature. This descriptive aim begins by separating out three general categories of pragmatism: (1) the so-called “everyday” pragmatism familiar to the American vernacular, (2) the classical philosophy of the early pragmatist authors like William James and John Dewey, and (3) pragmatism as understood in the context of law. The majority of the article is subsequently concerned with exploring this last category, and in so doing identifies three major camps of legal pragmatists: (1) *eclectics*, as represented by Thomas Grey and Daniel Farber, (2) *economists*, as represented by Richard Posner, and (3) *experimentalists*, as represented by William Simon, Charles Sabel, and Michael Dorf. With map in hand, it is hoped that instead of clamoring to the call of legal pragmatism, legal academics and practitioners will take greater caution both in their embrace of the pragmatist method, as well as in their carefree use of the word. This hope grounds the second and more normative goal of the article, and that is to make some trouble for legal pragmatism by not only pointing to its sectarianism, but also by querying its usefulness. Two of the lesser critiques target first the wholesale lack of predictive power latent in the eclectic approach, and second, the counter-intuitive relationship between eclecticism and neo-formalism. The thrust of the primary criticism is that legal pragmatism, in each of its manifestations, tends to either mask or simply murder the promise of an enriched and empowered philosophical pragmatism. As a consequence, the philosophical muscle latent in the pragmatist method is lost on the law, barring access to a truly “pragmatist” moment of legal decision.

* Associate, Latham & Watkins LLP; LL.M., Harvard Law School (2006); J.D., UNC- Chapel Hill School of Law (2005); M.A.L.D., The Fletcher School, Tufts University (2004). I received helpful comments from Paulo Daflon Barrozo, Adrienne Davis, Janet Halley, Duncan Kennedy, Fernanda Nicola, Hengameh Saberi, and Amartya Sen. Special thanks go to David Kennedy and Gerald Postema.

I.	Introduction: The Good, the Right, and the Pragmatist.....	- 2 -
II.	Fighting for Foundations: Consequentialists versus Pragmatists	- 9 -
III.	Mapping Legal Pragmatism.....	- 18 -
A.	From Subversion to Complacency: Legal Realism and Legal Pragmatism.....	- 18 -
B.	The Players.....	- 21 -
1.	The Eclectic Pragmatist	- 22 -
2.	The Economic Pragmatist.....	- 26 -
a.	Pragmatic Adjudication	- 27 -
b.	Efficiency and Welfare	- 29 -
c.	Rational Choice: A Theory of the Good.....	- 34 -
3.	The Experimental Pragmatist.....	- 38 -
a.	Ungerian Experimentalism.....	- 41 -
b.	The Experimental Method in Legal Reasoning	- 43 -
IV.	Conclusion: Against the Cold and the Clammy.....	- 47 -

I. Introduction: The Good, the Right, and the Pragmatist

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.¹

-- Oliver Wendell Holmes, Jr.

It would be an interesting exercise to identify among legal academics the number of active-duty dragon-wranglers working in the profession today. For Holmes, in this very well-known passage, history appears as an obligatory part of doing legal study. Without such historical context, so the argument goes, we lack the means for getting rid of senseless doctrines or for bettering those that deserve a second wind. Historical study of the law, as a consequence, need not be viewed either as the tool of critique or apology, but as simply a way of making relevant our received understandings. Though Holmes' view is not exactly a controversial one today, it was a clear attack on what was at the end of the 19th century a dominant mode of legal analysis – a mode which harbored little love for historical study.² Due to the extraordinarily rich source of ideas extant in Holmes' writings, he now stands as Godfather to a great deal of the

¹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

² For discussion on Holmes' critique of Christopher Columbus Langdell, as well as Langdell's perspective on the use of history in legal analysis, see Patrick J. Kelly, *Holmes, Langdell, and Formalism*, 15 RATIO JURIS 26 (2002).

people who, in the course of the 20th century, developed variously contradictory approaches to legal thought in the United States. Thus, sociological jurisprudence, legal realism, legal process, law and society, law and economics, critical legal studies, and legal pragmatism can, in one way or another, find some part of their project in Holmes and his realism/positivism/pragmatism.³

Duncan Kennedy has traced these developments, in effect bringing out the dragon of American legal thought so better to count its claws and teeth.⁴ In quick schematic form, the dragon looks something like this.⁵ In the 19th century a mode of legal analysis, or legal consciousness, called Classical Legal Thought (CLT) reigned supreme in Europe, and by way of export, in the United States as well.⁶ CLT's central ideas included the strict division of separate spheres of activity for public and private actors (with the autonomy of the private sphere being the more important of the two), an emphasis on individualism, and a scientific approach to legal reasoning that imagined formal concepts susceptible, through logical deduction, to the full elaboration of legal doctrines. It was this set of ideas with which Holmes began his criticisms, thus launching what Kennedy has called the "social" phase of legal consciousness. This social perspective constructed itself in opposition to classical legal thought. Thus, where CLT emphasized individualism, social thought focused on social and institutional needs and demands; where CLT talked of private autonomy, social thought argued for the politicization of property and contract law; where CLT believed in formalism and logical deduction as a mode of legal reasoning, social thought countered with an instrumental orientation towards law as a means to social ends.⁷ Kennedy goes on to argue that somewhere in late 1960s and early 1970s, a third legal consciousness took the helm in the American legal profession.⁸

In contrast to the dialectical relationship between the first thesis in CLT and antithesis formed in social thought, however, this third phase, in which we now live, did not represent a synthesis.⁹ Instead, contemporary legal thought is characterized by the undigested materials

³ For a chronological anthology, see WILLIAM FISHER & DAVID KENNEDY, eds., *THE CANON OF AMERICAN LEGAL THOUGHT* (2006). Representative writings from these various categories would include HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958); Stewart Macaulay, *Non-Contractual relations in Business: A Preliminary Study*, 28 *AMERICAN SOCIOLOGICAL REVIEW* 55 (1963); Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 *HARV. L. REV.* 1685 (1976).

⁴ This has been an extensive project. For illustrative works, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205 (1979); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form*, 100 *COLUM. L. REV.* 94 (2000).

⁵ This account comes from Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *Law and Development: A Critical Appraisal* (David Trubek and Alvaro Santos, eds., 2006).

⁶ See DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006). Representative authors include FRIEDRICH CARL VON SAVIGNY, *ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (1831); FRIEDRICH CARL VON SAVIGNY, *THE SYSTEM OF MODERN ROMAN LAW, I* (1839); JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* (1863).

⁷ Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850-1968*, 36 *Suffolk L. Rev.* 631, 633 (2003).

⁸ *Id.* at 634.

⁹ This dialectical scheme draws largely on the conceptual tools first developed by Hegel and Marx. See Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1156 (2001). Karl Klare has called this mishmash of

found in both CLT and social thought, where the contradictory perspectives and rhetoric of individualism and society, formalism and anti-formalism, rights-talk and consequentialism, all remain readily available to the judge, lawyer, law professor, and student.¹⁰ Indeed, the sign of the times appears to be an eclecticism that nods its head in approval at the ecumenical state of contemporary legal thought. When the critiques of social thought began to gain steam in the rise of the various “law and-” movements mentioned above,¹¹ it seems fair to say that the dominant state of affairs became one in which it was not necessarily best to find yourself aligned with any one of these schools, but something instead more functional, more pragmatic.¹² That is, contemporary legal consciousness now seems to suggest that the best judge, lawyer, professor, whoever, is the one that can intelligently and persuasively wield any argument that suits the context. If that means an economic argument makes best sense in a contracts or antitrust case, so be it. If it means that critical theory is best used for uncovering a particular ideological sub-text, great. If it means arguing in the language of human rights and liberal constitutionalism, that’s fine too. The zeitgeist, in sum, looks to best be captured by an interest in balancing among any number of conflicting approaches with a view of securing an end with the best effects.

In this article I will be arguing that this contemporary posture is a form of pragmatism. In so doing, it is “pragmatism” itself to be brought from the cave, and as it turns out, there are a good many more teeth and claws than one might have at first expected. As many writers have explained, pragmatism got its legs in the birth of social thought at then end of the 19th century,

the first two modes of legal consciousness “social conceptualism.” Karl Klare, *The Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265, 280 (1978). Klare writes: “The resultant, hybrid style of legal reasoning was more attentive to social and political realities and more self-conscious and candid about the political character of adjudication than its conceptualist predecessor. But like the latter, it was premised on the notion that a disjunction between law and politics is necessary to legitimate the judicial role, and it sought in the reasoned elaboration of neutral principles a method for upholding the law/politics distinction.” *Id.*

¹⁰ Roberto Unger paints a similar picture in his *WHAT SHOULD LEGAL ANALYSIS BECOME* (1997). As Unger explains, the indeterminacy thesis took legal realists places they had no intention of ever going. Far from wishing to assert that it was impossible to convey objective meaning within legal discourse, Unger suggests that the true intent was to instead challenge the ideological assumptions upon which such conveyances are based: “The thesis of radical indeterminacy turns out to be in large part a metaphor for something else: a planned campaign of social and cultural criticism. The trouble is that it does nothing to equip for this campaign or to illuminate its aims. It is a dead end. It tempts the radical indeterminist into an intellectual and political desert, and abandons him there alone, disoriented, disarmed, and, at last, corrupted – by powerlessness.” *Id.* at 121. The upsetting effects of this disorientation have been the abandonment of the debates with no ready replacement. Like the other ways in which the formalist aims ultimately proved self-subversive, so did the debate on indeterminacy. The general trend in legal discourse over the past two centuries seems to follow a similar pattern: a goal is set, its ends are realized to be indefinite and incapable of fruition, only to be left unsettled without having taken the lessons to heart from their failed projects. The debate on judicial activism is dead, but surely not buried, cluttering the field of legal thought with the corpses of stupefied hopes. *Id.*

¹¹ See, e.g., Edward Rubin, *Law And and the Methodology of Law*, 1997 WIS. L. REV. 521 (1997).

¹² The sense that this point of view is dominant, though relatively unspoken, might be identified in the Harvard Law Review’s choice to have Richard Posner write the forward to its current Supreme Court issue. His argument is that the Court is inevitably “political,” and should understand itself in more pragmatic terms. Richard Posner, *A Political Court*, 119 HARV. L. REV. 31 (2006).

but varieties of the view continued into the contemporary period.¹³ One aim in this article is to specify more clearly just what it is that we are talking about when we refer to these pragmatist origins, and more recently, the development of a school called legal pragmatism. This goal is consequently a descriptive one in which it is hoped that by shedding more light on the concept of pragmatism, the interpretive possibilities for the reader rapidly increase, perhaps uncomfortably so. After all, if parsimony might be a virtue, the map of legal pragmatism finds it lacking. A necessary risk here is that, upon finding pragmatism to mean so many things all at the same time, it might not mean anything at all. There is also a modest normative stake in the article, and it concerns the set of promises legal pragmatism typically (but not always) seeks to realize, yet almost invariably fails to affirm. As will be discussed below, this rather complicated issue turns on the philosophical stance of any given strand of legal pragmatism, and moreover, the rather bland results a pragmatist stance tends to admit.

Before heading any further, it will be useful to offer a preliminary sketch of the different uses of “pragmatism” at work in the lexicon today.¹⁴ For present purposes, this will involve three general categories of pragmatism – “everyday,” philosophical, and legal.¹⁵ As for legal pragmatism, I break the category into another set of three strains – eclectic, economic, and experimental.

It is easy enough to imagine examples of the first general category of everyday pragmatism, or what might be called in the vernacular “pragmatic decision-making.” A popular and controversial one is the decision of the United States government to invade Iraq in early 2003. The relevant question for the Bush administration did not appear to be whether international “rules” allowed for territorial engagement; the focus was instead on the consequences that might come from not acting.¹⁶ Worried that weapons of mass destruction were in the offing, the question was therefore one of how and when to prevent another horror from taking place on American soil. While many have disagreed with the decision to invade Iraq, it was a typically “pragmatic” decision in that it used as its handle an emphasis on consequences and an attention to what would “work.” In this case, and as this view would have

¹³ Duncan Kennedy, *Two Globalizations*, *supra* note, at 677. David Kennedy, “‘The Rule of Law,’ Political Choices, and Development Common Sense,” in *Law and Development: A Critical Appraisal* (David Trubek and Alvaro Santos, eds., 2006) (forthcoming); MICHAL ALBERSTEIN, *PRAGMATISM AND LAW* (2002).

¹⁴ For discussion, see Tom Rockmore, *On Classical and Neo-Analytical Forms of Pragmatism*, 36 *METAPHILOSOPHY* 259 (2005).

¹⁵ The term “everyday pragmatism” comes from Richard Posner. RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 4 (2003).

¹⁶ Nathaniel Berman provides an interesting analysis of the Bush administration’s anti-authoritarian attitude with respect to the relevance of international rules. For Berman, the Bush administration felt itself justified precisely in the fact that where the United Nations was tripped up by its own rules, the United States would find legitimacy in the antinomian invasion. Berman quotes Bush: “some of the permanent members of the Security Council have publicly announced they will veto any resolution that compels the disarmament of Iraq. These governments share our assessment of the danger but not our resolve to meet it.” Nathaniel Berman, *Legitimacy Through Defiance*, 23 *WIS. L. REV.* 93, 109 (2005). Curiously, if Berman is right, this might actually prove against the war as an example of everyday pragmatism. Antinomianism may in fact presuppose a latent positivism, and if this is so, it is not pragmatic, in any sense.

it, military intervention was going to work where diplomacy had failed.¹⁷ Another example of pragmatic decision-making is one touted by Judge Richard Posner, taken by the United States Supreme Court during the election crisis in 2000. Despite the questionable legal basis for the decision in *Bush v. Gore*,¹⁸ Posner has argued, the decision was a good one because of its pragmatic basis.¹⁹ The decision, not based on formal legal reasoning deducted from state election law rules or traditional federalism jurisprudence, favored a result that was concerned first with its consequences. Here, the consequences of prolonging a national crisis where the fate of the presidency hung in the balance might prove too much for the public. The pragmatic move, said Posner, was to end the affair, and quickly. An example of pragmatic decision-making a little closer to home might involve the choice a Christian could face when deciding on a church to join. Rather than deciding on a denominational basis, say the choice instead turns on the joy and solace the believer feels he will gain by joining the church with the most charismatic minister and like-minded congregation. Indeed, if the believer feels that in the future another church better suits his preferences, he will pragmatically move along, despite worries about denominational or sectarian allegiance.

This style of pragmatic decision-making has become a substantial aspect of a contemporary mainstream Americanism – in its policies, and sometimes, its morality. Indeed, it is likely the case that few characteristics personify the spirit of American exceptionalism as succinctly as this “everyday” pragmatist style.²⁰ This is evident enough in the rhetoric of officials from both sides of the aisle, touting their abilities to pragmatically cut through the red tape, partisan bickering, or whatever other perfunctory obstacles remain in the way. To call someone pragmatic in this way is probably something close to a compliment, and possibly it is also to call them a good American.

Despite the appeal of this common-sense, action-oriented approach, however, everyday pragmatism looks, upon reflection, a little suspicious. The pragmatism at work in the types of decision cited above eclectically takes its cues from little more than a stripped down consequentialism. We know effects are important, but when it comes to deciding whether something has a good or bad effect, to what does the decision-maker turn? What is the measure of what counts as having “worked” in an assessment on the efficacy of military over diplomatic deployments in the case of Iraq, judicial termination of the presidential controversy over electoral resolution in *Bush v. Gore*, or consequentialist determinations of religious affiliation over doctrinal or theological alignments in the Christian-Congregation scenario? Is it the case, therefore, that the pragmatist style simply begs the question, offering up functional solutions that

¹⁷ A White House background paper illustratively describes this position: “A Decade of Deception and Defiance,” 9/12/2002 (available <http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf>).

¹⁸ 531 U.S. 98 (2000).

¹⁹ RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); See also RONALD DWORKIN, ed., *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* (2002).

²⁰ See, e.g., BRIAN LLOYD, *LEFT OUT: PRAGMATISM, EXCEPTIONALISM, AND THE POVERTY OF AMERICAN MARXISM, 1890-1922* (1997); James T. Kloppenberg, *Pragmatism and the Practice of History: From Turner and Dubois to Today*, 35 *METAPHILOSOPHY* 202 (2004); CLASSICAL AMERICAN PRAGMATISM: ITS CONTEMPORARY VITALITY (Sandra B. Rosenthal, Carl R. Hausman, and Douglas R. Anderson., eds., 1999); Alberstein, *supra* note, at 1: “[P]ragmatism is described in this chapter as having a central role in the constitution of the American subject.”

typically leave unearthed the value-judgments that support them? Is it not plausible, for example, that a decision to have let the diplomatic process run its course in Iraq could have been equally pragmatic for its attention to long-term consequences for terrorism? If the pragmatic style – the style that likes to emphasize impacts and results – can be turned around so easily, is pragmatism really a sham?

The answer is “not necessarily,” and the reason is that where this everyday pragmatism appears to fail its philosophical parent – the second general category of pragmatism – may be able to succeed. As will be elaborated below, philosophical pragmatism as developed by writers like Charles Sanders Peirce, William James, and John Dewey,²¹ takes a view on truth, meaning, and knowledge that is contextual, instrumental, and empirical, yet also fallibilistic and anti-skeptical.²² In gross over-simplification, these factors suggest that the classic pragmatists were very interested in showing how (1) “truth” was best understood as a compliment one group of people have attributed at one particular historical moment to a concept due to that concept’s high cash-value, (2) the domain of “means” should be lauded and loved while the realm of “ends” should largely be discarded, (3) the powers of observation, study and the scientific method could be usefully applied to questions of ethics and morality, (4) human beings are inevitably committed to provisional, and not conclusive, epistemological projects due to an inherent penchant for getting things wrong, at least some of the time, and (5) the fact that despite our incapacity to ever never know what is really “true” or “good” in the world, we can never let this fact disrupt the way in which we would ordinarily live in it: even with our eyes closed, the show must nevertheless go on.

The ascendance of philosophical pragmatism did not, however, come at the time of these classic writers; as a philosophy it went into hiding after World War II and the emergence of analytic philosophy.²³ It would be revived in the 1970s in what is often called the “neo-pragmatist” movement led by scholars like Richard Rorty and Hilary Putnam, who in different respects incorporated into the classic conception the existential and hermeneutic work of philosophers such as W.V.O. Quine, Wilfrid Sellars, Thomas Kuhn, Ludwig Wittgenstein, Friedrich Nietzsche, and Martin Heidegger.²⁴ The force of the reawakening was not of the “everyday” kind, however, and again was concerned with typically “philosophical” questions of epistemology, language, historicism, and foundations for truth and meaning.²⁵ Everyday

²¹ For a history, see LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001). For collections of the classic texts, see *PRAGMATISM* (Alan Malachowski, ed., 2005); *PRAGMATISM: A READER* (Louis Menand, ed., 2001).

²² For this discussion, see text, *infra* notes 56-88.

²³ See Richard Bernstein’s account in “John Dewey and the Pragmatic Century,” in DEWEY, *PRAGMATISM, AND ECONOMIC METHODOLOGY* 27 (Elias L. Khalil, ed., 2001).

²⁴ RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); *CONSEQUENCES OF PRAGMATISM* (1982); *CONTINGENCY, IRONY, AND SOLIDARITY* (1989); HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DISTINCTION* (2002); HILARY PUTNAM, *REASON, TRUTH, AND HISTORY* (1981). For influential writings, see W.V.O. QUINE, *TWO DOGMAS OF EMPIRICISM*, THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1955); FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* (2005); MARTIN HEIDEGGER, *ON TIME AND BEING* (1977).

²⁵ For representatively general treatments, see *THE RANGE OF PRAGMATISM AND THE LIMITS OF PHILOSOPHY* (Richard Shusterman, ed., 2004); *THE PRAGMATIC TURN IN PHILOSOPHY* (William Egginton & Mike Sandbothe, eds., 2004); *PRAGMATISM, CRITIQUE, JUDGMENT* (Seyla Benhabib & Nancy Fraser, eds. 2004); *CLASSICAL AMERICAN PRAGMATISM*, (Sandra Rosenthal, et. al. eds., 1999); JOHN P. MURPHY, *PRAGMATISM: FROM PEIRCE TO DAVIDSON* (1990).

pragmatism – the focus on action and “what works” – proceeded obliviously in American culture and government of its philosophical counterpart.

A third variety of pragmatism (other than the everyday vernacular and philosophical types), which performs as the primary subject of this article, is pragmatism as understood in the context of law.²⁶ Despite the prominence of pragmatism elsewhere in the lexicon, pragmatic decision-making has enjoyed a strange and rather obscure career in American legal thought.²⁷ On the one hand, there was the strong relationship between innovative legal thinking in the social critique of CLT and the classic pragmatist philosophers. Explicitly influenced by each other, people like Holmes and Dewey were crafting approaches in their respective fields that tended towards the basic ideas of historical study and instrumentalism. Holmes’ work, however, did not go on to produce anything like a thing called legal pragmatism as we know it today. Rather, sociological jurisprudence and legal realism were the direct heirs, with a considerably different politics than that hosted by the various legal pragmatisms.²⁸ What appears to have happened instead, after WWII and the ascendance of the legal process school, was the import of everyday pragmatism into the machinery of legal reasoning.²⁹ The potentially explosive and subversive aspects of pragmatism, clear in Dewey’s work and inchoate in the writings of Holmes, was gone.

As the phase of social thought came to an end in the ‘60s and ‘70s, however, the proliferation of “law and something” movements helped engender a new space for contemporary forms of legal pragmatism. In contrast to the Deweyan themes present in legal realism, and the everyday pragmatism at work in the latter days of legal process, the new legal pragmatisms became self-conscious: these schools actually used the word “pragmatism” as a way of distinguishing their approaches from rival schools of thought. In contemporary legal consciousness, there now appears to be three central categories of legal pragmatism, the discussion of which forms the majority of this article. One question that might flow from this typology is why pragmatism in law seems so obscure, whereas pragmatism in the vernacular, and to a lesser extent philosophical pragmatism, are fairly well-known, and further, understood so favorably. Or in other words, why do lawyers and legal academics typically know what it means to be “pragmatic,” yet few are familiar with “legal pragmatism”? Part of the answer appears to be related to the unsynthesized state of contemporary legal thought, where rival ideas about private autonomy and formal rights dance, as David Kennedy has said, the *pas de deux* of anti-

²⁶ For general discussions of pragmatism and law, see DENIS BRION, *PRAGMATISM AND JUDICIAL CHOICE* (2003); DAVID LUBAN, *LEGAL MODERNISM* 125-178 (1994); Brian Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociological Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315 (1996); Steven Smith, *The Pursuit of Pragmatism*, 100 YALE L. J. 409 (1990); *PRAGMATISM IN LAW AND SOCIETY* (Michael Brint & William Weaver, eds., 1991); Christopher Kutz, *Pragmatism Regained*, 100 Mich. L. Rev. 1639 (2002); Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755 (1992); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

²⁷ For a fascinating account of a non-linear picture of these developments, see Alberstein, *supra* note, at 1-99.

²⁸ For this discussion, see text, *infra* notes 93-115.

²⁹ As Alberstein explains, pragmatism has lost much of its philosophical luster by this point: “This decline does not prevent pragmatism from functioning as a common-sense text... The emergence and dominance of the Legal Process School also can be explained by the pragmatic mode of children brought up on these ideas, and upon the common-sense level that pragmatism has reached until then.” Alberstein, *supra* note, at 36.

formalist days and formalist nights.³⁰ The resistance to a full acceptance of legal pragmatism is probably at its clearest in the judiciary, where the separation between law and politics remains its most sacred. Indeed, one of the well-known advantages of separating out law from politics is the capacity to inoculate dispute resolution from consequentialist or outcome-based decision-making. The job of the judge, as Chief Justice Roberts recently explained, is to be little more than a sagacious umpire, calling balls and strikes.³¹ The job, therefore, is one suited for finding the *right* decision, though not necessarily the most *practical* decision. This formalist residue consequently makes it difficult, or at least unsettling, to think about law in pragmatist terms.³²

In the discussion that follows, the argument seeks to highlight the nature of these legal pragmatisms and the significance of their arrival on the shores of American legal thought. It begins in Part Two by providing a brief philosophical background primarily concerned with the argument between consequentialism and philosophical pragmatism, an argument over the viability of moral foundations. Part Three grafts the discussion from Part Two onto the law, tracking its development from Holmes to legal realism to present-day legal pragmatism. In addition to mapping the three major sects of legal pragmatism, the discussion also argues that something critical was lost in the evolution from realism to pragmatism due in part to the dialectical relationship present in the realist attack on classical legal thought, but absent in the mish-mashed milieu of contemporary legal thought. As for the map itself, I take Thomas Grey and Daniel Farber to represent Eclectic Pragmatism, Richard Posner to represent Economic Pragmatism, and Charles Sabel, William Simon, and Michael Dorf to represent Experimental Pragmatism (though few of the authors would likely use these labels themselves). Finally, the article concludes with some considerations on legal pragmatism's penchant for false promises and its entrenchment of neo-formalism.

II. Fighting for Foundations: Consequentialists versus Pragmatists

In the field of moral philosophy, a consequentialist perspective is one that assumes a given act's moral status to depend on the goodness of that act's outcomes.³³ Of course, many non-consequentialists agree that outcomes are an important part of identifying what makes a

³⁰ David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 15 (1994).

³¹ John Roberts, in his testimony before the Senate judiciary committee, explained that "I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes and not to pitch or bat." (available at <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html>).

³² Unger explains that the modern condition has placed a spell on legal thought: "As it spreads through the world, rationalizing legal analysis helps arrest the development of the dialectic between the rights of choice and the arrangements that make individual and collective self-determination effective – a dialectic that is the very genius of contemporary law." Unger, *supra* note, at 39. Anticipating the discussions on experimentalism later in the article, Unger goes on to say that "The most important way in which it does so is by acquiescing in institutional fetishism." *Id.*

³³ See generally, CONSEQUENTIALISM (Philip Pettit, ed. 1993); CONSEQUENTIALISM (Stephen Darwall, ed., 2003). Michael Smith.

particular act a properly moral one.³⁴ What distinguishes the consequentialist is that she regards outcomes as the *only* factor necessary for determining moral status.³⁵ For this reason, the consequentialist is morally required to act in the way that will produce the best consequences – other considerations are only secondary to this first-order principle of *action towards best consequences*. This principle, however, is incapable of actually telling the consequentialist what to do in any particular situation: she knows that she wants to act in such a way that it will yield good results, but she knows nothing yet of what distinguishes a good consequence from a bad one.

Consequentialism places a determination of what constitutes a good consequence (a theory of the good) prior to what counts in determining the right act in a given situation (a theory of the right).³⁶ Thus, consequentialist action is entirely dependent on the acquisition of a separate normative principle. Philip Petit explains that consequentialism “amounts to nothing more than the view that rightness is determined on the basis of the promotion of...[neutral and universal] values; it says nothing on what the relevant values are.”³⁷ In this view, it is important to distinguish *right acts* from *good results*. Rightness is parasitic on goodness such that we know some option to be the right one because it best coheres with the value that has been identified as the good one; but the converse does not hold: something is good because it is good, not because it is right. Utilitarianism is probably the most well-known example of a consequentialist theory of the right combined with a particular theory of the good.³⁸ The utilitarian concept of the good turns on happiness, such that the more of it is maximized, the better overall. If we call a theory of the good that emphasizes pleasure or happiness “welfarism,” utilitarianism can be understood as the sum of welfarism (a theory of the good) and consequentialism (a theory of the right).³⁹

³⁴ See, e.g., Amartya Sen’s discussion on how ethical inquiries could generally be improved upon by taking more care with the consequentialist reasoning, in AMARTYA SEN, *ETHICS AND ECONOMICS* (1992).

³⁵ Some consequentialists, however, draw a distinction between formulas that encourage a view that is exclusively involved with consequences, and views that require that exclusivity. See Phillip Petit, *The Consequentialist Perspective*, in *THREE METHODS OF ETHICS* 92, 132 (Marcia W. Barron, Phillip Petit & Michael Slote, eds., 1997).

³⁶ SHELLEY KAGAN, *NORMATIVE ETHICS* 61.

³⁷ Phillip Petit, *The Consequentialist Perspective*, in *THREE METHODS OF ETHICS* 92, 132 (Marcia W. Barron, Phillip Petit & Michael Slote, eds., 1997).

³⁸ For discussion, see STEPHEN DARWALL, *PHILOSOPHICAL ETHICS* 109-138 (1998).

³⁹ Kagan, *supra* note, at 61-62. Another aspect of consequentialism concerns whether it is the agent’s own assessment of the situation or the objective ultimate impact of the act that determines the act’s moral status. Kagan suggests that this reveals a distinction between subjective and objective forms of consequentialism. In the subjective breed, “we will say that if in fact all the available evidence supported the belief that the given act would have the best results – if this was the conclusion that any reasonable person would have reached – then this was indeed the right act for the person to choose.” The objective view, in contrast, actually looks to the all-things-considered “objective” impact, so that we might say that even though it had appeared reasonable at the time, a particular act was actually immoral because it surprisingly produced a bad result. This space between the objective and subjective strains likely turns on whether one looks to morality as a standard for evaluating acts, or as a guide for decision-making. What they have in common, however, is the first-order consequentialist principle. But both versions encounter the same criticism: what good is a method that requires the agent to spend all their time calculating the best consequences? An agent that spends all day calculating will not likely produce the best consequences (as that agent understands them to be), and so perpetual analysis would in itself be contrary to the consequentialist method.

The famous antagonist of this ordering is the deontologist.⁴⁰ Deontological perspectives can be said to place the right prior to the good, reversing the consequentialist grammar (this does not mean, however, that the good must be understood as a function of the right), and in so doing place an independent moral constraint on a theory of best consequences.⁴¹ For example, says the deontologist, an act might result in the maximization of the good, but it is nonetheless the wrong act to take if it violates some higher normative principle, such as not doing harm to an innocent person. The demands of “justice” or “fairness” or “categorical imperatives” place the right act of protecting the innocent superior to the interest in maximizing the good.

In contrast to this well-known distinction between consequentialist and deontological ethics is a fundamental quality shared by both: a commitment to moral or philosophical foundations. This type of commitment is one that holds that basic beliefs about moral goods structure the justifications for right acts. The utilitarian believes that a correct decision will be the one that maximizes welfare; a deontologist might believe that a correct decision will be one that never involves lying. It is unnecessary for either actor, in terms of their own justificatory schemes, to explain why it is that welfare is a moral good, or lying is a moral bad. Foundational beliefs need not be inferred from other knowledge points. The idea is rather that these basic beliefs sit at the bottom of the decision-pyramid, laying the foundation. Of course, when the two people meet, they will need to rationally justify their choices on their basic beliefs to one another, but in terms of the ethical systems themselves, they both share the quality of having a rooted set of goods that are not inferentially dependent on any other good. For foundationalists, the buck stops with the good.⁴²

The way out is to simply adopt whatever method yields the best results, and in moral theory, this typically relies on common sense and habit. Ultimately, however, the question of calculation and method is a strictly empirical one, and therefore a point on which the consequentialist should not have a per se answer. Indeed, in the consequentialist world, the only thing that is per se is that right acts are those that lead to the best consequences. *See* Kagan at 65.

⁴⁰ One of the most famous neo-Kantian, deontological philosophers is John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE (1979).

⁴¹ Kagan, *supra* note, at 70-77.

⁴² *See generally*, ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS (1981).

At first glance, pragmatism appears to have a lot in common with consequentialism.⁴³ Pragmatism is, after all, very concerned with consequences. Two primary ways in which the philosophies diverge from one another, however, include the pragmatic takes on “right acts” and theories of the good. Where the consequentialist argues for a decision or act to be the right one when it has the best consequences, the pragmatist challenges the traditional modes by which “best consequences” have been determined. Where the consequentialist tests an understanding of consequence against a foundation of basic beliefs, the pragmatist denies the dualism of acts (means) and goods (ends).

The classic forms of pragmatism were famously developed by a group of American philosophers working at the turn of the 19th century.⁴⁴ Among them were William James and John Dewey, who argued for a focus on the “principle of practice,” where truth and meaning could best be understood as a matter of consequences and effects, rather than in abstracted inquiries into phenomenological essences.⁴⁵ It was a mistake, James explained, to lose ourselves in discussions that ultimately had little purchase on the course of our lives – the better option would be one that simply asked whether a given idea, concept, or system proved useful: “The pragmatic method is primarily a method for settling metaphysical disputes that otherwise might be interminable.”⁴⁶ By settling such disputes through a re-orientation of which questions mattered and which ones didn’t, pragmatism opened the way for “clear thinking.” For example, a pragmatic approach to the question of whether God exists would dismiss theological

⁴³ It seems settled that if pragmatism has a view on deontological ethics, it is decidedly negative. This generalization would probably be accurate were it not for scholars writing in the tradition of Jurgen Habermas. See Maeve Cooke, *Meaning and Truth in Habermas’ Pragmatics*, 9 EUR. J. PHIL. 1 (2001); WILLIAM REHG, *INSIGHT AND SOLIDARITY: THE DISCOURSE ETHICS OF JURGEN HABERMAS* (1994). For Habermas, pragmatic philosophy is deontological and neo-Kantian, and so, while out to displace the consequentialist, he is also out to displace the future-loving pragmatist unable to say which way and how. In William Rehg’s discussion of Habermas, the relationship between the right and the good begins with a distinction between ethical and moral claims, where ethics concern values that are inter-subjectively constituted through social agreements within a particular community, while moral norms set constraints on action between and among various communities. Ethical values are broad and flexible, while moral claims (in the form of norms and rules) are obligatory restraints. This division resembles the separation of procedural justice from the substantive good – hard and fast rules that dictate the shape of the game in which we all decide for ourselves (individually and collectively) what we want to become. A central argument here is that since there will inevitably be a multiplicity of value-theories operating in a given society, a scheme of reflexive justification and practical reason is necessary to insure non-strategic social integration (which Habermas believes to be a requirement for liberal democracy). In order for this to work, however, moral considerations must “allow for it, i.e. only so far as an individual can bring his or her notion of the good into harmony with rules of cooperation acceptable to all.”⁴³ Rehg at 99. See also Karl-Otto Apel, *Plurality of the Good? The Problem of Affirmative Tolerance in a Multicultural Society from an Ethical point of View*, 10(2) *RATIO JURIS* 199 (1997); Pablo de Greiff, *Habermas on Nationalism and Cosmopolitanism*, 15 *RATIO JURIS* 418 (2002).

⁴⁴ William James is credited with having popularized the term “pragmatism” in an 1898 lecture titled “Philosophical Conception and Practical Results,” though James explained that he had actually borrowed the concept from Charles Sanders Peirce. Menand, *supra* note, at xiii. It turned out, however, that Peirce was not a great fan of James’ telling, and Peirce instead introduced a label that he thought better captured the merits of his thinking: “pragmaticism.” Peirce thought that this word was awkward enough that it would prove difficult in attracting a following. He appears to have been correct. See KARL-OTTO APEL, *CHARLES S. PEIRCE: FROM PRAGMATISM TO PRAGMATICISM* (1995).

⁴⁵ William James, quoted in Menand, *supra* note, at 95.

⁴⁶ *Id.* at 94.

distinctions on spirit and body, free will and determinism, or good and evil. The pragmatic approach would ask whether a belief in God proved useful, whether the consequences of acting on such a belief made the world, in the view of the believer, a better place.⁴⁷ The “truth” of God’s existence, therefore, could be framed in a way that enabled action in the face of a stymied agnosticism – the concept of God’s existence was meaningful and true if the concept cashed in for the believer.⁴⁸

A quick sketch of this pragmatic approach to decision-making yields at least four basic elements. The first is instrumentality.⁴⁹ This is not to suggest instrumentality in the sense that decision-making should be viewed as an instrument for the realization of some projected goal; rather, inquiries should be instrumental in that the inquiry should be most concerned with its effects, i.e. what will be the consequences for this decision? Dewey’s vision of pragmatic instrumentality rejected dualisms that purport to categorize certain subject areas as amenable to scientific inquiry, and others not.⁵⁰ This position suggested that it was a mistake to identify a sharp contrast between the worlds of ethics and science, where rigorous thinking could be applied to the one and not the other.⁵¹ The “logic of inquiry,” Dewey believed, was equally applicable in every context, and the superstitions that underscored these divisions were fodder for the pragmatist machine.⁵²

⁴⁷ WILLIAM JAMES, *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* (1979). For a thorough examination of James’ ideas on the construction of truth and meaning, see Hilary Putnam, “James’s Theory of Truth,” in *THE CAMBRIDGE COMPANION TO WILLIAM JAMES* 166 (Ruth Ana Putnam, ed., 1997).

⁴⁸ James’ well-known approach to meaning was to ask: “What is its cash-value in terms of practical experience?” James, quoted in Menand, *supra* note, at xiv. For further discussion on pragmatism and religion, see WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (2002); Eugene Fontinell, “James: Religion and Individuality,” in Rosenthal, *supra* note, at 146; Mikael Stenmark, *Theological Pragmatism: A Critical Evaluation*, HeyJ (2000) 187-198.

⁴⁹ John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17, 19 (1924). Sydney Hook, “Thinking as Instrumental,” in Malachowski, *supra* note, at 21; Grey, *Freestanding*, *supra* note, at 23; Nicholas Rescher, “Functionalistic Pragmatism,” 32 *The Philosophical Forum* 191, 193 (2001).

⁵⁰ John Dewey, “The Pattern of Inquiry,” in Malachowski, *supra* note, at ; Jose Medina, “In Defense of Pragmatic Contextualism: Wittgenstein and Dewey on Meaning and Agreement,” 35(3) *The Philosophical Forum* 341 (2004).

⁵¹ Dewey, *supra* note 56, at 21; Dewey *supra* note 57, at 233.

⁵² *Id.* See also, John E. Smith, “Dewey on Inquiry and Language: After Bentley,” in Khalil, *supra* note, at 133. In articulating the basis of pragmatic inquiry, Dewey had in his sights the specter of logical formalities – the logic of syllogisms, deduction from general principles, “fixed forms,” and “rigid demonstration.”⁵² When we come to face a particular problem, Dewey explained, it is very rare that we come pre-equipped with a set of premises and principles that work as guides for action. If this were the case, then it would be possible to simply deduce a correct act in a given situation from the storehouse of rules locked up in the attics of our brains. Dewey, along with the other pragmatists, just didn’t see it that way.⁵² What actually happens is that “we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions.”⁵² In order to capitalize on this human fact, the tendency to begin with questions instead of answers should be amplified by the tools of science. This is not to say that the scientific method as used precisely by physicists or chemists should be taken as the procedure by which one decides whether to buy a new car. It is to say, however, that the decision-making procedures should be similar in form: “Men first employ certain ways of investigating, and of collecting, recording and using data in reaching conclusions, in making decisions; they draw inferences and make their checks and tests in various ways...[Such a decision] comes into existence without any conscious thought of logic, just as

The second and third elements in the pragmatist tool-kit are denials of the means/ends and facts/values dualisms. As for means and ends, this was a subject with which Dewey spent a good deal of time, arguing against what he believed to be the supremacy of ends over so-called “means.”⁵³ Pragmatism might work as a method for clearing the way for new thinking on a matter, so the criticism went, but at bottom, a style of inquiry could be no more than that – a style or a method. The issue to which such a method was directed – the ends or values sought – would always remain something separate from the means of pragmatic inquiry. Thus, a logic of inquiry separate from a theory of the good, or a “theory of reality,”⁵⁴ or some normative picture towards which action should be directed, could never go very far. Dewey’s rebuttal began by suggesting that a dualism at work in this criticism – that between means and ends – was a false one: the logic of pragmatic inquiry was the means and the end, all at the same time.⁵⁵ The arguments against the facts/values dualism is not far behind. “Facts,” Dewey argued, are little more than the “values” a given community has chosen to bestow “with the compliment” of calling it truth.⁵⁶ The heart of the argument here has already been laid out: in Dewey’s attack on general principles, syllogisms, and abstractions, he was not simply saying that they, by and large, don’t really work the way we often think them to work, i.e. as conceptual frameworks we deduce practical answers to contemporary problems. In addition to this, Dewey is also arguing against

forms of speech take place without conscious reference to the rules of syntax or rhetorical propriety. But it is gradually learned that some methods which are used work better than others. Some yield conclusions that do not stand the test of further situations; they produce conflicts and confusion; decisions dependent upon them have to be retracted or revised...Thus logical theory becomes scientific.”⁵²

⁵³ See, e.g., John Dewey, “The Ethics of Democracy,” in Menand, *supra* note, at 182. This piece of the argument picks up on the reconstructive chunk of Dewey’s philosophy. As this section is meant to only use Dewey as a representative of the common pragmatist denominator, it would be inappropriate to include Dewey’s own thoughts on democracy and growth. On Dewey’s ethics, and as he related them to pragmatism, see generally, DAVID L. HILDEBRAND, *BEYOND REALISM AND ANTIREALISM: JOHN DEWEY AND THE NEOPRAGMATISTS* (2003); TODD LEKAN, *MAKING MORALITY: PRAGMATIST RECONSTRUCTION IN ETHICAL THEORY* (2003); STEVEN FESMIRE, *JOHN DEWEY AND MORAL IMAGINATION* (2003).

⁵⁴ Dewey, *Pattern*, *supra* note, at 222.

⁵⁵ *Id.* at 218-223. Dewey believed that ends qua ends, characterized as principles, values, or ideals, had for far too long held dominance over the means by which such ideals were meant to eventually be realized.⁵⁵ “Means have been regarded as menial, and the useful as servile.”⁵⁵ Ideals, on the other hand, are regarded as lofty, aspirational, and often disconnected from the realities of practice. If we turn our eyes away from the language of ends and ideals and towards the world as it actually functions, Dewey believed, we would be doing no more than reconciling our language with the practice of people in their everyday lives: “After a polite and pious deference has been paid to ‘ideals,’ men feel free to devote themselves to matters which are more immediate and pressing.”⁵⁵ The way forward, consequently, was to do away with the dualism that propagated the notion that means are only meaningful to the extent that they are connected up with a set of ideals. Ultimately, it was by treating general principles and traditional customs as little more than revisable hypotheses through the operation of pragmatic inquiry that the role of reason could take on “revolutionary”⁵⁵ qualities. Dewey argued that the use of formal reasoning and antecedent rules “sanctifies the old; adherence to it in practice constantly widens the gap between current social conditions and the principles used by the courts.”⁵⁵ To focus on the means through the rigors of pragmatic and scientific inquiry was, for Dewey, the end in itself.⁵⁵ Of course, Dewey also had other goals in mind, such as the realization of an ever-advancing deliberative democracy,⁵⁵ but to the degree that such an entity would grow, it would live or die by the rule of reason as practiced in the loving care of logical inquiry.

⁵⁶ RICHARD RORTY, *OBJECTIVITY, RELATIVISM AND TRUTH: PHILOSOPHICAL PAPERS, VOLUME 1*, 24 (1991).

the power of tradition and history as claims on our abilities to work problems out in present time. Just as the means/ends dualism mystified the importance of consequences, the dualism that mystifies the contingency of history is a fact/values dualism.⁵⁷

The fourth element is anti-foundationalism. The pragmatic method – with its emphasis on inquiry and context – looks a lot like what consequentialism could become if its theory of the right was severed from its foundational theory of the good. Where the consequentialist will eventually say that whatever belief it is that tells her how to tell a good consequence from a bad one, that belief is not inferentially dependent on some other belief. This non-inferential quality does not exist for pragmatists, as their beliefs and decisions are constantly and continually open to question and revision: good decisions will be the decisions that are the most useful, and useful decisions, to the degree it is worth using the term, are the most “moral.”⁵⁸ If consequentialism is a “simple theory of the right,” pragmatism might be a “complex” theory of the right. Consequentialism’s simplicity turns on its relation with a foundational set of basic beliefs; pragmatism’s complexity turns on the absence of such a foundation, where the inquiry just never leads to a “right” decision at all.⁵⁹ Thus, the pragmatist preoccupation with consequences has nothing to do with moral superiority. Universal moral truths, to the extent they existed, could only be detected after a long stretch of determined inquiry,⁶⁰ or, more likely, not at all.⁶¹ A key aspect of the pragmatist approach, however, is that a realization on the unlikelihood of universal truth did not produce catatonia. For pragmatists like Dewey, it was clear that human beings will always make mistakes, that it will be unlikely that absolute truths will ever be reachable, but it was essential that the experimental drive remain anti-skeptical and optimistic in the hope for social growth.

⁵⁷ HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 30-31 (2002). Recalling Dewey’s argument in favor of bringing scientific inquiry into the domain of ethics, it should be noted here that the claim turns in the other direction as well. As Hilary Putnam has explained, Dewey, along with the other classic writers, believed that “normative judgments” included a much broader universe of decisions than the traditional dichotomy empiricism had established with respect to “facts” and “values.”⁵⁷ For the pragmatists, just as ethical decisions deserved rigorous, consequentialist analysis, it was important to recognize that “science” was just as normatively dependent and constrained as “morality.”⁵⁷ This insight – that assumptions in favor of coherence, parsimony, consistency, and rationality were normative choices – was similarly at odds with David Hume’s argument that an “ought” can never be derived from an “is.”⁵⁷ It was not that the pragmatists contested the idea that there was a distinction between a description and a prescription. The idea was that a description was always a choice, and if the descriptive procedure followed a given set of value-judgments (like the scientific method), then that description was in fact a prescription on how to talk about our environment. In order to create the maximal amount of discursive space, said the pragmatist, it was better to characterize the things called “facts” as values that had, through the course of history, habit, and custom, attained a status called “objectivity.”⁵⁷

⁵⁸ Stanley Fish is a strong, contemporary advocate of the pragmatic critique of foundations: “If you say that someone or something is wrong, you will often be asked to provide a basis for your judgment that is independent of the social, political, and biographical circumstances in which it was formed. . . [N]o such basis is available and the ordinary resources that come along with your situation, education, and personal history are both all you have and all you need.” STANLEY FISH, DOING THINGS NATURALLY 293 (1997).

⁵⁹ *Id.*

⁶⁰ See Murphy, *supra* note, at 55.

⁶¹ See Rorty, *supra* note, at 5.

The fight against foundationalism continues to be an essential element in the modern pragmatist method, though it does at times get a little tricky. Consider Richard Rorty's defense of a pragmatist "ethic" in *Philosophy and Social Hope*. "What matters for pragmatists," Rorty explains, "is devising ways of diminishing human suffering and increasing human equality, increasing the ability of all human children to start life with an equal chance of happiness."⁶² This normative aspiration, however, "is not written in the stars, and is no more an expression of what Kant called 'pure practical reason' than it is of the Will of God."⁶³ This interest in alleviating human suffering cannot be supported by a transcendent moral principle because such things have never existed. Following the classic writers, Rorty argues that "such principles are abbreviations of past practices – way of summing up the habits of ancestors we most admire."⁶⁴ If we tend to admire the idea that human beings should be treated as ends and never as means, then this should be understood as a "habit of action" that has produced better results than other habits. If, however, it turns out that the categorical imperative is no longer doing its work, then we should revise in favor of a practice that happens to work better. The choice, however, to embrace one "principle" at the expense of another cannot be a product of rational deduction or inductive generalization. A love of egalitarian justice, for example, may be in tension with the principle that "it would be better to have no son than to have one who is a homosexual."⁶⁵ "Those of us who would like to put a stop to...gaybashing produced by [such a] principle call such principles 'prejudices' rather than 'insights.'" The maneuver that enables one to label the one principle a prejudiced one, says Rorty, is one that says egalitarianism is more rational than gaybashing. "But to say that they are more rational is just another way of saying that they are more universalistic – that they treat the...difference between gays and straights, as relatively insignificant. But it is not clear that the failure to mention particular groups of people is a mark of rationality."⁶⁶ In the end, our goals might be worth dying for, but we should not rely on universalizing impulses in the guise of rationality or "supernatural forces" to back them up.⁶⁷ All we can do is what might have "seemed like the best thing to do at the time, all things considered."⁶⁸

Given this perspective on the implausibility of moral foundations, as well as when we recall the pragmatist rejection of the means-end dualism, it is a little confusing when Rorty states, as quoted above, that "what matters for pragmatists is devising ways of diminishing human suffering..." Perhaps he meant, "what matters for *me* is..." To suggest otherwise seems to collide with Rorty's oft-stated claim that pragmatism lacks any particular politics – that is, a person's views on meaning, truth, knowledge, and action will not give you a window on whether

⁶² RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* xxix (1999).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at xxx.

⁶⁶ *Id.*

⁶⁷ *Id.* at xxix.

⁶⁸ *Id.* at xxx.

their politics are those of a Nazi, leftist, or compassionate conservative.⁶⁹ After all, as Rorty has explained himself, an interest in devising ways of diminishing human suffering is not the only interest out there, and so the question must be put to the pragmatists: if “pragmatism” rejects moral foundations and denotes a way of thinking with no special political valence, what guidance is offered to those who have been sold on the idea that the classical dualisms are bunk, that meaning is a function of the benefits a practice happens to provide, but want to know how best to determine “benefits”? How best to determine the useful results from the bad? As we have seen, the consequentialist answer is to look to your theory of the good, while the deontological perspective will defer to a rationalized set of universal principles. What does the pragmatist say? Here is Rorty’s response:

When [pragmatists] are asked, “Better by what criterion?”, they have no detailed answer, any more than the first mammals could specify in what respects they were better than the dying dinosaurs. Pragmatists can only say something as vague as: Better in the sense of containing more of what we consider good and less of what we consider bad. When asked, “And what exactly do you consider good?”, pragmatists can only say, with Whitman, “variety and freedom,” or, with Dewey, “growth”... They are limited to such fuzzy and unhelpful answers because what they hope is not that the future will conform to a plan, will fulfill an immanent teleology, but rather that the future will astonish and exhilarate.⁷⁰

While Rorty’s “ethic” remains inescapably vague, it is confined to such vagueness lest the pragmatic method turn into precisely what it is out to destroy – foundational philosophies of the good and the right. Modern pragmatism thus seems to balance itself on the edge of a blade, looking nostalgically back at Dewey’s moral ambition, yet constantly keeping itself from indulging in a normative stance. As Stanley Fish suggests, “Turning into just another would-be foundation – into another theory that would then have consequences – is always the danger pragmatism courts when it becomes too ambitious...[W]hatever form it takes, the [ambitious] project is an instance of what I call the critical self-conscious fallacy or antifoundationalist theory hope, the fallacy of thinking that there is a mental space you can occupy to the side of your convictions and commitments, and the hope that you can use the lesson that no transcendent standpoint is available as a way of bootstrapping yourself to transcendence...”⁷¹ It is this non-normative, apolitical stance with which pragmatism, especially in the context of the law, has become most fascinated. In the next section, it is suggested that the career of legal pragmatism, as a descendant of legal realism, might not have developed in this apolitical direction.

⁶⁹ *Id.* at 23-24. See also Richard Rorty, *The Banality of Pragmatism and the Poetics of Justice*, 63 S. CAL. L. REV. 1811, 1812 (1990).

⁷⁰ Rorty, *supra* note 111, at 28-29. In a similar vein, Stanley Fish levels the same critiques against moral foundations.⁷⁰ A decision on whether an action is the right one is always made on the spot, in context, with reference only to the goods at hand.

III. Mapping Legal Pragmatism

A. From Subversion to Complacency: Legal Realism and Legal Pragmatism

While these themes were gaining steam in the fields of philosophy, psychology, and education in the early years of the 20th century, the figure that stands as the pragmatic interlocutor for law was Oliver Wendell Holmes, Jr.⁷² Holmes moved in the same Cambridge circles as James, Peirce, and other members of the so-called “Metaphysical Club,”⁷³ but it was the work of John Dewey that most moved him.⁷⁴ Despite this linkage between Holmes and the classical pragmatist movement, however, Holmes did not introduce a “pragmatic theory of the law.” What he did do was write in 1897 one of the legal profession’s most influential legal articles – “The Path of the Law” – scorching the field with critiques of what was then the dominant mode of legal reasoning by logical deduction and appeal to formal, abstract concepts – in short, classical legal thought. Holmes believed that it was nonsense to characterize the law as a formal body of concepts that, if properly studied, could canvass the landscape of legal problems. Rather, the law is nothing more than a prediction of what a particular judge will have decided in a given case – the life of the law, then, is not an evolving discovery through logical exercise of the hidden mysteries of a platonic set of legal ideas – it is an evolving experience by which judges apply their best ideas to contemporary problems. As Holmes said so well: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”⁷⁵

Holmes’ perspective, along with those of writers like Wesley Hohfeld, served as the backdrop for what became the legal realist movement.⁷⁶ Legal realism, as Morton Horwitz has explained, was largely concerned with dispelling legal superstitions and fetishes in the law, and was thus an approach with a clearly negative orientation – its aim was subversive and reform-minded.⁷⁷ Horwitz describes the movement as “more of an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a set of methodologies or propositions about legal theory.”⁷⁸ Building on these early attacks on formalism and judicially

⁷² See generally, Grey, *Holmes*, *supra* note.

⁷³ Menand, *supra* note.

⁷⁴ *Id.* at

⁷⁵ *Id.* at 469.

⁷⁶ See, e.g., Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923); Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied Judicial Reasoning*, 23 YALE L. J. 28 (1913); Morris Cohen, *The Process of Judicial Legislation*, 48 Am. L. Rev. 161 (1914). JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Columbia L. Rev. 809 (1935); Karl Llewellyn, *A Realistic Jurisprudence – The Next Stop*, 30 Columbia L. Rev. 431 (1930); For discussion, see MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW; AMERICAN LEGAL REALISM* (William Fisher et. al., eds., 1993).

⁷⁷ See Joseph Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465 (1988).

⁷⁸ Horwitz, *supra* note, at 169.

imposed bottlenecks on legislative social engineering, the “legal realists” of the inter-war period, in Horwitz’s words, challenged “the political and moral assumptions of the old order and the structures of legal doctrine and legal reasoning that were designed to represent those assumptions as neutral, natural, and necessary.”⁷⁹ The traditional attacks included critiques against the distinction between the natural, apolitical character of the private legal order and the contestable domain of public law; the plausibility of being able to meaningfully deduce answers to factual questions from abstracted legal concepts; the lack of empirical studies that should accompany the process of legal reasoning in the service of conceiving a fully realized sociological context for legal decision-making; the circularity and indeterminacy inherent in reasoning about legal “facts;” and a systematic penchant for moving away from policy analysis despite the inescapable policy implications of legal decision-making.

Might legal realism just as well have been called legal pragmatism, where Holmes and Hohfeld are accompanied by James and Dewey as the fathers of the legal realist movement?⁸⁰ After all, the lines of attack bear undeniable similarities: they reject logical deductions from foundational principles, they are suspicious of moral sensibilities as guides for functional decision-making, they prefer consequentialist-based decision-making, they look to history for its usefulness, and not its imprimatur, and they favor experimentation. In all likelihood, if the phrase “legal pragmatism” had never emerged, it would be pointless to ask whether the pre-WWII mode of legal thinking known as realism should have been called something else. As it turns out, however, it was not the early years of the 20th century, but the early years of the 21st century that finally did produce self-conscious schools of legal pragmatism.

In the next Section, it will be argued that there is a meaningful difference between the old legal realism and the new legal pragmatism, and that that difference is largely a political one. Lawyers and jurists working in *Lochner*’s wake and after the New Deal were realists because they had a concept of the political⁸¹ that, for them, was far more powerful and robust than was the one being traded on in the courts. Where formalism and foundationalism prescribed a huge sphere of private autonomy for the world of contract and property law, legal realists wanted to open that world up to the heat of political contest. Legal realism therefore had a political and subversive edge that early 21st century pragmatism, to a large degree, does not. Ultimately, this is explained by the fact that the legal realists defined themselves in dialectical fashion against classical legal thought, although it is true that their critiques ended up being just as applicable to the “social” period as well. Contemporary legal pragmatism, in contrast, has no thesis with which to offer an antithesis; rather, it exists, and may come to thrive, in a legal consciousness best characterized by eclecticism.

This “de-politicization” of legal pragmatism makes sense when viewed against its philosophical background. As described above, the classic pragmatists also believed in anti-

⁷⁹ *Id.*

⁸⁰ Of course, James and Dewey *are* regarded by many as founding fathers in the legal realist movement. *See, e.g.,* Singer, *supra* note.

⁸¹ I intentionally refer here to the phrase made famous by Carl Schmidt, though I do not mean to imply that the legal realists shared Schmidt’s understanding of the friend-enemy dichotomy so important to his theory. Rather, I mean to emphasize the way in which the realists, like Schmidt, understood how liberal legalism tends to obscure the politics of the private. *See* CARL SCHMIDT, *THE CONCEPT OF THE POLITICAL* (1995); CHANTAL MOUFFE, *ON THE POLITICAL* (2005).

foundationalism and the disutility in talking about universal moral rights. Neo-pragmatists like Rorty depart from people like Dewey, however, in what might be termed a radicalization of the pragmatic impulse away from reconstruction and towards deconstruction.⁸² For Dewey and James, pragmatism was very ambitious, despite Fish and Rorty's complaints. It provided more than the means to clear away debris – it was a philosophy of change interested in growth, imagination, democracy, and a “will to believe.” Guided by an optimistic faith in the power of scientific inquiry, a prominent pragmatic interest was one of transforming the current world into a better and different one. In the classic style, then, pragmatism had a politics, which was picked up and contextualized by the legal realists in a largely coherent way.⁸³ Neo-pragmatists like Rorty and Fish, however, foreclose the possibility of pragmatic politics through a public-private cleavage.⁸⁴ That is, the transformation that takes place with respect to a person's relationship with metaphysical questions under the pragmatist lens does not apply to the public realm of political and legal discourse. As discussed in the following section, the reception of this cleavage has serious implications for legal pragmatism.⁸⁵

⁸² Richard Rorty, (Charles Guignon & David Hiley, eds., 2003); Richard Rorty (Alan Malachowski, ed., 2002); Deconstruction and Pragmatism (Chantal Mouffe, ed., 1996); GILES GUNN, BEYOND SOLIDARITY (2001).

⁸³ Jeffrey C. Isaac, *Is the Revival of Pragmatism Practical, or What are the Consequences of Pragmatism?* 6 CONSTELLATIONS 561 (1999); Paul D. Forster, *Pragmatism, Relativism and the Critique of Philosophy*, 29 METAPHILOSOPHY 58 (1998); Marion Smiley, *Pragmatism as a Political Theory* 63 S. CAL. L. REV. 1843 (1990).

⁸⁴ As for Rorty's philosophy/politics divide in the context of law: “I find it hard to discern any interesting philosophical differences between Unger, Dworkin, and Posner; their differences strike me as entirely political, as differences about how much change and what sort of change American institutions need. . . I do not think that one has to broaden the sense of ‘pragmatist very far to include all three men under this very accommodating rubric.” Rorty, Banality, *supra* note, at 1813. This distinction should not be confused for the public-private distinction described in the context of classical legal thought where there are separate domains for the law of the state (constitutional, administrative, criminal law) on the one hand, and the law of the market (property, contract, tort) on the other. In the United States, the division between public and private law is not obvious. Law school curricula bypass the problem, considering it a distinction with little difference in terms of the functions of lawyers and the function of law. This cleavage between the public and private is highlighted in continental Europe, however, and has been so for more than a millennium. In the European civil tradition, legal education explicitly and dogmatically entrenches the chasm between the private fields of property, contract, tort, and commercial law, and the public fields of constitutional and administrative law. A question relatively common to comparative legal studies is why the distinction has survived at the self-conscious level in Europe, but not in the US. A typical answer begins with Emperor Justinian's *Corpus Juris Civilis* – a code of accumulated Roman rules and analogies culled together in the mid-6th century that explicitly recognized a difference between public and private law. Public law was concerned with “sacred rites, with priests, and with public officers,” and was the law of the Emperor and the organization of his Empire. Private law, on the other hand, regulated individual interests and the relations between them. This constituted the bulk of the civil law and was broken into categories for regulating the law of persons, family, inheritance, property, torts, and contracts. These subjects fell under the broader headings, as labeled in Justinian's *Institutes*: “Of Persons,” “Of Things,” and “Obligations.” See, e.g., JOHN MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 90-100 (1985); John Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3 (1968); JOHN DAWSON, THE ORACLES OF LAW (1968), Roscoe Pound, *Public Law and Private Law*, 24 CORNELL L. Q. 469, (1939). For contemporary analysis, see University of Pennsylvania Law Review Symposium on the Public/Private Distinction, 130 U. Pa. L. Rev. (1982); Frances Oleson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983).

⁸⁵ Rorty believes that that philosophy is a post-Renaissance “transitional genre,” and that the field, as we know it, is on its death-bed. This transition is situated between the old world of religious redemption and a nascent literary culture which will offer “redemptive truth” through “making the acquaintance of as great a variety of human beings

B. The Players

Jules Coleman has described the flight of pragmatism into legal circles in a less than admirable fashion: “Pragmatism, a term with a long and illustrious history in American philosophy, has had the great misfortune of falling into favor among the American legal academy, where it is too often reduced to a series of slogans providing cover for a flourishing philosophy-made-easy school of legal theory.”⁸⁶ Coleman is right to complain that legal pragmatism has enjoyed a less than consistent career among legal academics: at times legal pragmatists look complacent and status-quo oriented,⁸⁷ while at others legal pragmatists seem to be parodying law and economics. Much of the time, legal pragmatists have used pragmatism to masquerade particular norms as a guide for legal reasoning. Part of the problem for legal pragmatists has therefore been this topsy-turvy take on the public/private, philosophy/politics distinction. Depending on your point of view, a legal pragmatist tends to either look apolitical in the style of Richard Rorty, moral in the style of consequentialism, or experimentalist in the style of John Dewey. The following sections elaborate on these distinctions by categorizing legal pragmatists as Eclectic, Economic, and, Experimental.

as possible.” The projects of modern analytical philosophy are pointless, and, on this view, perishable. Richard Rorty, “Philosophy as a Transitional Genre” in Benhabib, *supra* note, at 3.

⁸⁶ JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 6 (2001).

⁸⁷ Although his brand of pragmatism is of a different flavor, Jules Coleman agrees with the philosophy/politics divide: “As a holist and a pragmatist I cannot and do not deny that moral norms may in some way enter into the sphere of considerations that govern concept revision – they may do so whether the issue is our concept of law or our concept of laundry. What I deny is that our concept of law answers to moral or political norms in a way that makes the analysis of that concept primarily a matter of substantive moral or political argument.” Coleman, *supra* note, at 4.

1. The Eclectic Pragmatist⁸⁸

The eclectic style has a taste for consequentialism, a mild dose of empirical study mixed with a gentle historical gloss, a lukewarm dissatisfaction with legal formalism and grand theory, is preoccupied with adjudication, and gets queasy around “political issues.” This queasiness, or political nausea, comports with Rorty and Fish’s belief that it is very important to maintain a separation between the private world of metaphysical contemplation and the public world of political and legal discourse. The other elements consist in an affirmation of the private pragmatist mode of reasoning: “an orientation towards inquiry – one that stresses the agent’s perspective; the interaction of impulse, habit, and reflection; and a holistic approach to justification.”⁸⁹ The confluence of these two elements – an affirmation of pragmatic decision-making and an affirmation of a separation between philosophy and law – produces eclectic pragmatism. Two prominent pragmatist scholars are illustrative of this position.⁹⁰ The first,

⁸⁸ I take the best representatives of this view to be Thomas Grey and Daniel Farber. To a lesser extent, Cass Sunstein fits here as well. See Thomas Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569 (1990); Thomas Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Thomas Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21, 21 (1997); See, e.g., Daniel Farber, *Building Bridges Over Troubled Waters: Eco-Pragmatism and the Environmental Prospect*, 87 MINN. L. REV. 851 (2003); Daniel Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Cass Sunstein, *Incompletely Theorized Agreements*, 103 HARV. L. REV. 1733 (1995); CASS SUNSTEIN, *ONE CASE AT A TIME* (1999). See also J.M. Balkin, *The Top Ten Reasons To Be a Legal Pragmatist*, 8 CONST. COMMENTARY 351, 351 (1991). As Duncan Kennedy has described it, this eclectic method, or to use Kennedy’s phrase, policy analysis, involves “the commitment to balancing conflicting policies, with an eye to consequences, in a context in which rules represent no more than the means to implement the resulting compromise...” 1073. Although Kennedy does not use the word “eclectic” in the way being used here, it seems that much of his “conflicting considerations approach” maps onto the eclectic pragmatist. Consider his discussion of the product of realist critique and Weberian legalism: “The best way to understand the United States development would be this: The U.S. post-social scholars accepted and even greatly intensified the abuse of deduction critique, but recognized Weber’s (and others’) critique of the social as threatening diffuse judicial usurpation and incalculability. The danger was particularly obvious in the United States, where progressive forces had struggled for several generations against conservative judge-made constitutional law restrictive of the very reforms advocated by the social people. Both the rise of policy and the development of human rights judicial review were post-realist responses to these challenges. This means that Weber’s sociology of law was not prophetic—not LFR but a distinctively hybrid contemporary mode of legal thought legitimates contemporary legal/bureaucratic domination.” Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or, Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L. J. 1031, 1071 (2004).

⁸⁹ Grey, *supra* note, at 21-22.

⁹⁰ Jules Coleman would probably fall into this group due to his philosophy/politics distinction. Coleman’s pragmatism does not use much of the vocabulary common to the other legal pragmatists (“In so characterizing the method, I do not mean to align myself with the fashionable ‘pragmatism’ of today’s American legal academy...” xiii), and consequently, I will not discuss his position in any depth here. At a glance, Coleman’s method has five elements. The first two, “semantic non-atomism” and “inferential role semantics” involve the basic notion of indeterminacy and relational meaning: words do not generally have meanings that can be gleaned independently from the other parts of the semantic system, and that much of the meaning will necessarily come from inferences involved in the practice of that word or word-set. The third and fourth elements, “explanation by embodiment” and “holistic perspective,” state the importance of understanding how the variously interconnected concepts that fill out a concept comprise a general principle, and how such principles are to be viewed holistically through the set of practices that embody them. Finally is the familiar theme of “revisability,” which applies not only to empirical mistakes but to so-called analytical truths which have been at the center of the neo-pragmatist critique. Coleman, *supra* note, at 6-9.

Thomas Grey, is especially well-suited to highlight the distinction between eclectics and the third category (experimental pragmatism), as Grey had at one time rejected the public-private distinction only later to have embraced it. In an early article,⁹¹ Grey suggested that pragmatism, when it was wielded by a judge like Holmes, yielded Dewey's belief in the "transformation of means into ends."⁹² This transformation of what appears at first to be simply a means (such as a system of laws), into an end in and of itself (due process), is an illustration of legal pragmatism at its finest: "Legal pragmatism thus understood is receptive to the classical republican conception both of law as a constitutive element in political life, and of politics itself as an activity of intrinsic as well as instrumental value."⁹³ Although Holmes was "an instrumentalist without an adequate system of ends,"⁹⁴ (and despite Holmes' admittedly conservative orientation) Grey hardly considered this a problem. A pragmatic judge armed with the capacity for seeing ends where other saw only means was, for Grey, a highly exciting prospect for legal reasoning.

To see by pragmatist lights changes the way a person goes about understanding the world, about what types of justifications are legitimate and which are not – in the words of Louis Menand, "[pragmatism] cannot help acting the role of the termite – undermining foundations, collapsing distinctions, deflating abstractions, suggesting the real work of the world is being done somewhere other than in philosophy departments."⁹⁵ Pointing to the unbounded exhilaration in the pragmatic turn where one has "the sense that a pressing but vaguely understood obligation has suddenly been lifted from their shoulders,"⁹⁶ Grey has said that "[b]ecoming a pragmatist...feels more like a conversion than like being persuaded that a proposed deal is reasonable."⁹⁷

Thanks to an intervention by David Luban, however, Grey reeled in his position.⁹⁸ It may very well be the case that a person will come to a pragmatist point of view on epistemological and metaphysical questions on the right and the good, but what does this have to do with the very *practical* work of legal reasoning? In making his reversal clear, Grey introduced the example of two lawyer-friends: a deeply theistic Christian and a humanist

⁹¹ Grey, *Holmes*, *supra* note.

⁹² Holmes, quoted in Grey, *supra* note, at 853.

⁹³ *Id.* at 861.

⁹⁴ *Id.* at 850.

⁹⁵ Menand, *Reader*, *supra* note at xxxi.

⁹⁶ *Id.* at xi.

⁹⁷ Grey is not suggesting here that pragmatism recommends a particular metaphysical view, but that pragmatism recommends a particular way to view metaphysics. Grey, *supra* note 66, at 22. This is a nod in the direction of Richard Posner, who Grey in 1997 lumps together with Holmes, Pound, Cardozo, and Fuller as one of the great legal pragmatists. *Id.*

⁹⁸ In a critique of Grey's account of freestanding legal pragmatism, David Luban has written that "[e]clectic, result-oriented, historically minded antiformalism is indeed free-standing – but legal pragmatism disconnected from the philosophical impulse purchases its independence at the cost of condemning itself to meaninglessness." David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 *CARDOZO L. REV.* 43, 65 (1997).

atheist.⁹⁹ They wildly diverge on their views of foundationalism and truth but both agree that legal analysis should be rooted in custom and practice, proceed instrumentally such that it serves the human good, and shy away from formal and over-inclusive legal theories in favor of experimental case-by-case trial and error.¹⁰⁰ There is, therefore, little connection between a person's philosophical views and their choices on whether to adopt certain styles of legal reasoning. Pragmatic philosophy, as a consequence, should have little to say about legal pragmatism.

The result, for Grey, is the separation of philosophy from law: freestanding legal pragmatism. Many scholars appear to agree that freestanding legal pragmatism is not very exciting.¹⁰¹ The exhilaration and exuberance affiliated with tearing the walls of history asunder is nowhere to be found in the freestanding approach. It is, in fact, particularly banal – a middle of the road approach to legal reasoning and adjudication that mediates the pulls between competing economic and cultural approaches to the law. This characteristic, however, is not a problem for eclectics. It is rather an advantage – a mediating force between the foundational pitfalls of grand theory and the anti-intellectualism of a “business-as-usual” approach.¹⁰² The model, as mentioned above, makes good on the basic pragmatist anti-foundational moves in the valance of contextual and instrumental argument, but it stays its hand from the philosophical muscle that renders legal decision-making a metaphysical enterprise in the Holmesian style.

For more on the banality of this approach, consider the second legal scholar in this category. Along with Grey, Daniel Farber stands among those associated with the label of legal pragmatism.¹⁰³ For Farber, the key idea, again, is a critique of foundationalism and an emphasis on “context, judgment, and community.”¹⁰⁴ This view has several advantages, such as the recognition of enduring disagreement and conflict within a particular political community. Since conflict will be ever-present, it is important to deal with problems incrementally and flexibly – a foundational approach based on first principles cannot do this since it will either be connected up with hard precedents established by a previous community facing different problems, or universal principles assumed to answer all questions for all time. This eclectic view also has the advantage of being concerned with the consequences of judicial action, where a foundational view will steer decision-making along a pre-determined course oblivious of how case-specific arrangement actually affect the lives of real people.¹⁰⁵ Furthermore, this type of pragmatism is capable of having respect for precedent when such respect is necessary, as well as a commitment

⁹⁹ *Id.* at 38-42.

¹⁰⁰ *Id.*

¹⁰¹ Richard Posner, Ronald Dworkin, Richard Rorty, and Thomas Grey have all approvingly commented on the “banality” of legal pragmatism.

¹⁰² Grey, *Freestanding*, *supra* note, at 38.

¹⁰³ The following discussion is primarily focused on Farber's thinking in the context of constitutional law. In administrative contexts, it may be that he is better captured in the experimentalist vein of legal pragmatism.

¹⁰⁴ Daniel Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1335 (1988).

¹⁰⁵ *Id.* at 1342-1343.

to fundamental rights. Farber's pragmatism, therefore, appears to have its anti-foundational cake, and the fundamental right to eat it, too.¹⁰⁶

Indicating once again the interest in "middleness," Farber situates his brand of legal pragmatism between two extremes of pragmatic decision-making, where on the one side lives the "activist judge" and on the other resides the judge committed to the status quo. In Farber's view, the merits of the pragmatist position are found in a middle way notable for its eclecticism.¹⁰⁷

Pragmatism provides no reason to exclude consideration of original intent, precedent, philosophy, social science, or anything else that might be appropriate and helpful in resolving a hard case. Ideally, all of these factors point to the same outcome. When they conflict, the only recourse is to make the best decision possible under the circumstances. Although this methodology, if it can even be called one, may seem quite open-ended, pragmatists argue that in concrete cases it is often possible to identify the most reasonable resolution to such conflicts. Decisions are channeled by the professional training and experienced judgment of the judge, which do not provide unlimited leeway and may in fact be felt as coercing a single "right answer."¹⁰⁸

The judge that best fits this eclectic style is not Holmes, Farber says, but Louis Brandeis.¹⁰⁹ Where Holmes was too theoretical, Brandeis emphasized technical skill, empirical study, and substantial respect for the limits of the judicial function – the "passive virtues."¹¹⁰ Brandeis represents the best of pragmatic judging because he loved facts, distrusted theory, and was open to experimentation, but only in modest doses. The approach is eclectic, drawing on the tools at hand that best fit the task, without falling prey to the extremes of judicial activism, fetishized ideas about the role of the founding fathers, or laissez-faire concepts of the de-politicized market.

One question that might be raised at this point is to ask how pragmatic legal reasoning differs from the classic moves typical of the legal realists. Aren't scholars like Grey and Farber simply giving a new name to an old concept? In some sense, the answer must be yes. As was discussed above, legal realists had made plain all Grey and Farber wish to sustain.¹¹¹ At least one big difference, however, is the political edge typical among the legal realists and entirely lacking among the eclectic pragmatists. As will become more evident in the discussion of the next two types of legal pragmatism, eclecticism is distinguished for exactly the reasons offered by Grey and Farber: eclecticism is bland, banal, and while it courts experimentation and empirical study, its efforts remain tied to the political orbit of traditional legal reasoning. The

¹⁰⁶ *Id.* at 1348-1349.

¹⁰⁷ Daniel Farber, *Reinventing Brandeis: Legal Pragmatism for the 21st Century*, 1995 U. ILL. L. REV. 163, 169 (1995).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 175

¹¹⁰ *Id.* at 177. This is a reference to ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111 (1962).

¹¹¹ Indeed, Farber has written a review article titled *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279 (2001).

nature of that political orbit has been explained elsewhere,¹¹² and it is beyond the scope of this article to examine it here. It is, however, essential to show that whatever the nature of such a politics is, it is to this conception that the anti-foundational tendencies in the pragmatist vessel will forever remain anchored. In the sections that follow, the anchor is lifted by the importation of, on the one hand, a moral style of consequentialism (economic pragmatists), and on the other, the philosophical machinery of the classic pragmatists (experimental pragmatists).

2. The Economic Pragmatist¹¹³

In contrast to the dominantly eclectic style of legal pragmatism immanent in the debris of contemporary legal thought, economic pragmatism, as well as its experimental sibling, trades in eclecticism and political nausea for more powerfully public methods and explicit normativity. Eclectic pragmatism, as we have seen, picks and chooses its value-judgments from wherever, using them as the measure by which to decide whether a particular consequence (e.g., will it “work” to quickly end the 2000 presidential elections?) is a good one. Economic Pragmatism, on the other hand, is quite clear about setting up a series of norms that should guide a decision-maker on how to tell the good consequences from the bad. That is, the economic pragmatist structures legal reasoning to proceed such that “reasonableness” be unpacked in a way that best describes the real world, where “best” quite clearly means welfare maximization, efficiency, and rationality.

Economic pragmatism has a champion, and that is Richard Posner.¹¹⁴ His particular idea about pragmatism also has a champion, and is economic theory and the heavy lifting it does in unpacking the nature of Posner’s “reasonable” legal reasoning. To be fair, Posner would likely disagree with his being separated from pragmatists like Thomas Grey. Writing in the same symposium as Grey’s “Freestanding” article, Posner agreed with Grey on the claim that philosophical pragmatism had nothing to offer legal pragmatists.¹¹⁵ Indeed, Posner and Grey seemed much alike in their respective approaches, where anti-formalism, instrumentalism, and reasonableness constituted the bulwark of the pragmatist approach. The fact of the matter,

¹¹² Kennedy writes, “In contemporary legal theory, policy is always a potential Trojan horse for ideology, just because of the patently weak rationality of choosing policies by universalizability and then merely ‘balancing’ them.” Kennedy, *Weber*, *supra* note, at 1076.

¹¹³ The representative of this view is Judge Richard Posner. His best summation is in RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003). For an earlier iteration, see Richard Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1, 1 (1997). It might seem strange to call this category a variant of pragmatism at all. Indeed, there is already a field of legal thought that captures these ideas, and it is called law and economics. The claim to legal pragmatism comes from its initial posture, which is a methodological commitment to the rule of reason, anti-foundationalism, and moderate degrees of interest in history and empiricism. By itself, this sounds pretty much like the eclectic view. Where economic pragmatists go out on their own is in their systemic approach to the rule of reason, which is to define reasonableness in terms of rational choice theory.

¹¹⁴ For perspectives on Posner’s pragmatism, see David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 *STAN. L. REV.* 1001 (1996); Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 *YALE L. J.* 687 (2003); Richard Epstein, *Too Pragmatic By Half*, 109 *YALE L. J.* 1639 (2000); Jeremy Waldron, *Ego-Bloated Hovel*, 94 *NW. U. L. REV.* 597, 600 (2000); William E. Scheuerman, *Free-Market Anti-Formalism: The Case of Richard Posner* 12 *RATIO JURIS* 80 (1999).

¹¹⁵ Posner, *Pragmatic Adjudication*, *supra* note, at 1.

however, is that a number of significant differences distinguish eclectics from economists.¹¹⁶ First is the rejection of the public-private divide. This issue is tricky, since Posner explicitly says that his brand of legal pragmatism is freestanding of its philosophical parentage. What it is not freestanding of, however, is economic theory and its attendant assumptions on human nature and morality. Thus, while economic pragmatists reject one sphere of philosophical content, it picks up another. The second difference between eclectics and economists follows from the first, and that is a consistent way of approaching decision-making through its understanding of “reasonableness” and “consequences.” While eclectics understand these concepts as essential to their position, *the means for their deployment always remains hostage to the political commitments inherent in the mode of legal reasoning used by the eclectic practitioner.* For the economist, his political commitments are much more precise, tracking norms like efficiency, welfare, and rationality. As a result, economic pragmatists are strange birds. They talk the pragmatist talk, but walk like economists.

In fleshing out this analysis, this discussion begins by looking at Posner’s theory of pragmatic adjudication, then explores the work that the rule of reason is doing by incorporating a notion of rationality. Rationality, as an assumption in theories like rational choice theory, will be argued to be a value-choice, thereby animating Posner’s legal pragmatism with the flavor of foundationalism. In the end, economic pragmatism appears to fall prey to Fish’s foundational-hope theory by merging into consequentialism.

a. Pragmatic Adjudication

Posner’s fullest explanation of the theory of “pragmatic adjudication” is in his book, *Law, Pragmatism, and Democracy*, in which he describes it as a “disposition to ground policy judgments in facts and consequences”¹¹⁷ - consequences that are not ad-hoc but understood in light of their systemic implications for the legal system. Posner explains, however, that the focus on systemic consequences should not be treated as a rule in itself, as this would turn into a kind of formalism with which his pragmatism, naturally, would find disfavor. Rather, a pragmatic judge should adopt the “pragmatic mood” that will sometimes find it advantageous to focus only on the parties before him, on the need to follow precedent. Eschewing formalism as a point of departure, Posner argues that instead formalist decision-making should be one of many tools the pragmatic judge will have at his disposal. Pragmatic adjudication will consequently be spotted with “formalist pockets”¹¹⁸ which stand for the values in stability and predictability served by only slowly adjusting the status quo and the expectations that underlie it. Furthermore, since judges can hardly be expected to always take an “all-things-considered” account in the decision-making, they will sometimes have to dispense with moods and rely on rules. This reliance will not be due, however, to any requirement of precedent per se, but will be attractive because it is the most reasonable course of action in that particular context. This formalism also takes shape in the form of judicial limits or boundaries. These limits include the rare times when a dispute

¹¹⁶ As Luban points out, however, there is a great deal of difference between the claim to political agnosticism on the one hand, and the robust and controversial claims Posner makes about the rule of reason and its attendant relationship with law and economics on the other. It is for this reason that Luban reads Posner, at least in 1996, as disagreeing with Grey’s philosophical break.

¹¹⁷ Posner, *Law*, supra note, at 13.

¹¹⁸ *Id.*

will have such a clear answer that to decide against precedent will have untoward effects on the legal system, and the separation of powers doctrine which forbids judges from deciding questions in ways that exceed their jurisdiction.¹¹⁹ Even if the best consequences demand a decision that would override, say, the political question doctrine, or blatantly flout precedent, the *reasonable* judge will be bound to refrain from making what appears to be the *best* decision.¹²⁰

Posner has recognized the similarities his program shares with consequentialism, and has attempted to separate the two with reference to his emphasis on the ultimate criterion of reason. Posner says, “[i]f a consequentialist is someone who believes that an act, such as a judicial decision, should be judged by whether it produces the best overall consequences, pragmatic adjudication is not consequentialist, at least not consistently so. That is why I prefer “reasonableness” to “best consequences” as the standard for evaluating decisions pragmatically.”¹²¹ It is, of course, crucial for Posner to sufficiently make this point. If Posner’s pragmatism can be characterized as a form of consequentialism, he runs into a problem: his program talks like an anti-foundational method and walks like a foundational form of ethics, losing all purchase on the pragmatist label since pragmatism and consequentialism (in its moral form) are mutually exclusive ways of looking at the world.

It is hard to see just how Posner gets out of this. Posner’s legal pragmatism can be defined as a decision-making process whereby the best judicial act will be the one with the most reasonable consequences. Consequentialists, in contrast, would replace “reasonable” with “best.” Recall from above that the consequentialist requires a normative theory to inform her actions on what will be counted as best and what will not. “Best” in this sense does not have any independent meaning exogenous of the normative content provided by her theory of the good. When Posner distances legal pragmatism from consequentialism because it substitutes what appears to be the more flexible standard of “reasonable” for “best,” he makes the mistake of ignoring the difference between act- and rule-consequentialism.¹²² The account provided thus far has been one of act-consequentialism, but rule-consequentialism in contrast holds that an act will be right to the extent that it conforms to a particular rule – a rule that is assumed to produce the best consequences when it is obeyed.¹²³ Posner gives examples of pragmatic decisions that will not have the “best” consequences in the short run, but due to values in predictability, stability, or separation of powers, they will serve the good in the long term. This is precisely the formulation of rule-consequentialism, where, for Posner, the rule being served in the long term is the Rule of Reason. The set-up is relatively simple: under pragmatic adjudication, a judicial act is the right one when it has the best consequences, subject to the Rule of Reason. As rule-consequentialists understand, however, this form of the theory is no less held hostage to a theory of the good than is act-consequentialism.¹²⁴

¹¹⁹ *Id.*

¹²⁰ *Id.* at 66.

¹²¹ *Id.* at 65.

¹²² To be fair, Posner does discuss rule-consequentialism, but he dismisses it for reasons that are not all together clear. *Id.* at 49.

¹²³ See Kagan, *supra* note 13, at 212.

¹²⁴ A second way of looking at Posner’s legal pragmatism is to emphasize the phrase “pragmatic adjudication” and the constraints on legal decision-making, in contrast to a focus on the outcomes of those decisions. That is, Posner

Posner can reply at this point that legal pragmatism does not have such a theory of the good, is held hostage to nothing but the constraints a reasonable perspective on the legal order will understandably entail, and so cannot be lumped in with other foundational moral systems. This response is misleading to the extent that Posner's basic method does not stop at "decision-making process whereby the best judicial act will be the one with the most reasonable consequences." In order to make sense of the paralyzing ambiguity that an emphasis on reason, left by itself, would necessarily imply, Posner explains that "pragmatic reasoning is empiricist, and so theories that seek to guide empirical inquiry are welcomed in pragmatic adjudication..." The approach to legal problems that best gives content to reasonable decision-making guided by empirical inquiry, on Posner's view, is law and economics.

b. Efficiency and Welfare

It is not coincidental that Posner looks to law and economics for help in unpacking the rule of reason in the pragmatic method. In his reading of the classic pragmatists, Posner sees a rejection of deductive logic and universal moral truths, the desire to understand propositions by their consequences and not by their formal elements (if such things could ever be found), and a "radical empiricism" that advocated an "extension of the scientific method into all areas on inquiry."¹²⁵ This extension opens the door to economic analysis, but as Posner explains in his most recent statement on this issue, economics should not become a normative base for judicial action:

But economics, and therefore economic analysis of law, come in both formalist and pragmatic versions, and it is important to distinguish them. In the formalist version, legal decisions are deemed sound insofar as they conform to a given economic norm, such as Pareto superiority or wealth maximization. In effect, economic logic is substituted for legal logic, but the structure of law remains logical. In the pragmatic version of economic analysis of law, economic analysis identifies the consequences of legal decisions but leaves it up to the judge or other policy-maker to decide how much weight to give to those consequences in the

appears to conflate a distinction between the process that leads to an act of judicial interpretation (a consideration of relevant rules and standards, precedent, systemic constraints) and the outcomes of the judicial act itself (a consideration of policy choices on various outcomes). As a consequence, the fairest reading of Posner's pragmatism seems to be that it aspires to at once perform as a mechanism for pragmatically discerning legal materials and restraints, and pragmatically assessing policy outcomes. To be sure, Posner believes that the decision-making process to be impacted by a judge's evaluation of outcomes, in addition to the other more traditional material – but this is precisely the point: legal pragmatism marries what might otherwise be two separate sorts of inquiries, with distinct consequences for how to understand legal pragmatism. For example, the equation made above between legal pragmatism and rule-consequentialism is less tenable when legal pragmatism is articulated exclusively as a method of judicial interpretation. But this is not what Posner has in mind, for when he describes the task of interpretation and adjudication, Posner says that it goes in two steps: understanding the rule or standard in play, then ascertaining the way in which the purpose of the rule or standard would best be served. This immediately implicates, once again, the emphasis on reasonable consequences, and in turn, the parody of rule-consequentialism.

¹²⁵ Richard Posner, *Legal Pragmatism*, 35 METAPHILOSOPHY 147, 148 (2004).

decision-making process. Economics so understood is an empirical social science, not a body of normative doctrine.¹²⁶

If Posner is right, then it does indeed seem unfair to call the economic pragmatist a political actor with a theory of the good. He is apolitical, applying his anti-foundationalism to the law with an emphasis on instrumentality and context, guided by an economically-charged rule of reason. If he is wrong, and this dichotomy is a false one, Posner falls prey to Fish's foundational-hope syndrome by having smuggled a theory of the good into his pragmatic adjudication. This is exactly what I intend to presently argue.¹²⁷

On the opening page of Richard Posner's "Economic Analysis of Law", he states that "[t]he task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions – what we shall call his 'self-interest.'"¹²⁸ Similarly, the first page of Steven Shavell's "Foundations of Economic Analysis of Law," states that "...the view taken will generally be that actors are 'rational.' That is, they are forward looking and behave so as to maximize their expected utility."¹²⁹ Robert Ellickson likewise explains that this central task "consists of methodological individualism (the assumption that individuals are the only agents of human action) and the assumption that individuals are self-regarding and rational."¹³⁰ These assumptions on the importance of rationality and self-interest maximization pivot round "the central norm in law and economics," that of allocative and productive efficiency.¹³¹ Economic efficiency obtains when goods in a society are allocated

¹²⁶ *Id.* at 152. This account seems to draw on Thomas Cotter in his review of legal pragmatism's relationship with law and economics, at the prima facie level there is a genuine collision between legal pragmatism's alleged anti-foundationalism and the foundational emphasis on wealth maximization over distributional equity in law and economics. The pragmatist decision-maker that is wedded to a law and economics approach will therefore be caught up in a series of normative views privileging particular types of criteria – an especially non-pragmatic approach. If the decision-maker retreats from this type of methodological exclusivity, however, and maintains Posner's reasonableness as the ultimate criterion, economic approaches can often be useful for predicting the consequences of certain rules. The bottom line for Cotter is that the law and economics model, taken alone, is a foundational and non-pragmatic legal theory, but once its user disenchants the method – understanding its biases and presumptions – the economic approach can assist the pragmatic decision-maker in her search for predictable results. See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L. J. 2071, 2098-2114 (1996).

¹²⁷ Jane B. Barron & Jeffrey L. Dunoff, "Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory," 17 CARDOZO L. REV. 431 (1996); Duncan Kennedy & Frank Michelman, "Are Property and Contract Efficient?" HOFTSRA L. REV. (1980); Ronald Dworkin, *Wealth as a Value*, 9 JOURNAL OF LEGAL STUDIES 191(1980); Jean Hampton, "Rational Choice and the Law," 15 HARV. J. L. & PUB. POL'Y. 649 (1992); Mark Kelman, "Consumption Theory, Production Theory, and Ideology in the Coase Theorem," 52 S. CAL. L. REV. 669 (1979); Jeffrey Harrison, "Egoism, Altruism, and Market Illusions: The Limits of Law and Economics," 33 UCLA L. REV. 1309 (1985); W. Bradley Wendel, "Mixed Signals: Rational Choice Theories of Social Norms and the Pragmatics of Explanation," 77 IND. L. J. 1, 50 (2002); Martha C. Nussbaum, "Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics," 64 U. CHI. L. REV. 1197 (1997);

¹²⁸ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (1998).

¹²⁹ STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 1 (2004).

¹³⁰ Robert Ellickson, "Law and Economics Discovers Social Norms," JOURNAL OF LEGAL STUDIES 537, 539 (1998).

¹³¹ Russell Hardin, "Magic on the Frontier: The Norm of Efficiency," 144 U. PA. L. REV. 1987, 1987 (1995).

through voluntary exchange into the hands of the people that value those goods the most.¹³² The value of a good is therefore a measure of how much a person is willing to pay for it, as this is what rational behavior recommends for social welfare.

The queasy feeling that these assumptions might veer towards moral theory prompted economists in the early 20th century to figure out how to adequately compare the utility one person experienced against the utility of another, in terms of their relative degrees of happiness.¹³³ On the battle's frontier was Vilfredo Pareto, who developed an efficiency concept predicated on the value an item would garner as it moved through the market.¹³⁴ Pareto efficiency became a theoretical model that claimed scenario A to be superior to scenario B when no one in B loses anything by moving to A, and at least one person has gained. As Posner has admitted, however, Pareto efficiency is often too demanding a criterion for economic analysis of law because of the impact transactions necessarily have on third parties.¹³⁵ Consequently, the criterion more-traveled is the Kaldor-Hicks concept, sometimes called "Potential Pareto Superiority," which holds that an outcome will be efficient when the winners in a transaction are capable of compensating the loser such that no actors are worse off. The big caveat in Kaldor-Hicks is that the winners, while they should be capable of compensating the losers, are not obligated to do so.

It is common in the literature to refer to a distinction between normative or ethical economics and explanatory or engineering economics.¹³⁶ On the normative side, the claim is that norms like efficiency and rationality should guide individual, legal, and social decision-making because they are values that are best situated to shape a society in which we want to live. In the context of courts, the normative claim is not simply that judges decide cases in ways that maximize social wealth, but that social wealth-maximization should be a, if not the, guiding principle.¹³⁷ The normative/descriptive distinction is crucial for economists to maintain that their work on the way the world really is should be viewed independently of any arguments over how a society ought to be governed.

In the 1970s and 1980s, as law and economics was getting its legs within the legal profession, the normative stakes seemed much more obvious than they do today, where the majority of law and economics literature assumes with little (if any) argument its normative superiority. One of the more well-known instances in which this claim was debated is the contribution made by Ronald Dworkin's 1980 law review article in which he asked whether wealth was an intrinsic value.¹³⁸ If wealth-maximization has an ethical base, Dworkin surmised,

¹³² Posner, *supra* note 13, at 11.

¹³³ Hardin, *supra* note 16, at 1996. This was originally a problem for utilitarianism.

¹³⁴ *Id.*

¹³⁵ Guido Calabresi & Phillip Bobbit, *Tragic Choice* 83-85 (1978); Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1980).

¹³⁶ Shavell, *supra* note, at

¹³⁷ The normative claim need not necessarily be limited to the argument that efficiency be the sole criterion, but inevitably it will be viewed as at the very least, among the most important.

¹³⁸ Dworkin, *supra* note. Dworkin developed the argument further in *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980).

then a society that experiences an increase in value through the maximization of wealth, no matter how small and barring other changes to that society, then that society will, as a matter of morality, be all the better for it. Dworkin ultimately argued that this was crazy, and in so doing introduced the example of Derek and Amartya.¹³⁹ Derek is willing to sell a book at a price lower than the price Amartya is willing to pay for it. Amartya therefore values the book more than Derek. If a hypothetical tyrant were to come in and force Derek to give the book to Amartya without compensation, Dworkin explained, the society now populated by these two would be a better one since social wealth has been maximized by the book being in the hands of the person who valued it most. Dworkin then asked whether we could say that this society was morally superior once the book had changed hands, excluding all other considerations and testing only for wealth as an ethical principle. Not surprisingly, Dworkin's answer was decidedly not.¹⁴⁰

In defense of the normative position, Posner clarified that wealth was viewed as an instrumental value towards the satisfaction of human needs and desires.¹⁴¹ Instead of allying his position with utilitarianism, as traditionally had been done in the field of political economy where it was argued that society was served best by maximizing utility,¹⁴² Posner suggested that norms of wealth and efficiency could be supported in Kantian terms.¹⁴³ If a Pareto superior society was one in which all actors were better off, or at least, some were better and none for the worse, then this must be a society with which all would consent to be a part. Efficient market transactions, coupled with consent, therefore nourish a concept of autonomy.¹⁴⁴ This is not to say that Posner heads in the direction of a Kantian moral theory of economics.¹⁴⁵ Rather, the position is one of "constrained utilitarianism. The constraint, which is not ad hoc but is supplied by the principle of consent, is that people may be able to seek their utility only through the market or institutions modeled on the market."¹⁴⁶ Thus consensual transactions would be assured,¹⁴⁷ and efficiency and wealth-maximization could be grounded in the ethical terms of individual rights and autonomy-seeking, and as a consequence, an argument as to why economic analysis ought to have a greater role in social decision-making.¹⁴⁸ Or so the argument went.

¹³⁹ Dworkin, *supra* note, at 197-201.

¹⁴⁰ *Id.* at 196.

¹⁴¹ Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

¹⁴² Jules Coleman, *The Grounds of Welfare*, 112 YALE L. J. 1511, 1515 (2003).

¹⁴³ Posner, *supra* note, at 490.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Posner's Kantian adventures were by no means the extent of the normative defense. Indeed, much more recently Louis Kaplow and Stephen Shavell have argued that the norm of personal welfare, as mediated by the efficient allocation and production of social resources, should be the only principle with which the legal decision-maker should be armed.¹⁴⁹ In particular, Kaplow and Shavell have argued that (1) fairness considerations either end up serving a welfare interest, or if they are altogether independent of a welfare criterion, they systematically produce undesirable social consequences, (2) fairness considerations are at best subsidiary to welfare considerations and at worst in conflict with human welfare, and as a consequence, (3) deontic preferences for justice or fairness should be abandoned in favor of efficient allocations of goods that best approximate the needs of social welfare.¹⁵⁰ This approach to a normative defense of the law and economics approach is quite different than the round of arguments made in the 1980s in that Kaplow and Shavell presume that there is something intuitively desirable about efficiency as a first principle, and once it is claimed that fairness considerations violate that first principle, the burden falls on deontologists to show how fairness can, in fact, serve efficient ends.¹⁵¹ The big difference between the two debates is that what was once understood as an issue for actual debate in terms of justification and legitimation (i.e. whether efficiency and wealth-maximization could be normatively defended on moral grounds), now happily operates as the default position where the burden is on non-welfare considerations to show how they do not threaten social welfare. What looks here to be little more than a tautology that can quite easily be turned around (if there is a conflict between fairness and welfare, why does welfare not need to defend its transgressions?) has been discussed in a number of criticisms.¹⁵²

For present purposes, however, it is only necessary to show what the discussion has looked like on the question of normative economics, and not to delve deep into its many layers. Posner's claim, after all, is that law and economics will serve legal pragmatism best when it is not in its normative frame, but is simply explanatory. This more modest approach, which is called empirical, descriptive, predictive, explanatory, and engineering, is focused on the tools with which economics brings to bear on legal questions without suggesting an answer. The point is to simply give the decision-maker a picture of the way things really are, what consequences certain decisions will have on the allocation of goods and resources as mediated by rational actors pursuing their self-interest. Distributional concerns are not part of the calculus (on the Kaldor-Hicks model, anyway), but, says the empirical economist, there is nothing stopping the decision-maker from making choices that emphasize justice over welfare – the purpose of the economist is only to provide data on the consequences of such a decision, not to provide a logic for the decision itself. One assumption which appears to enable this argument in favor of modest explanations on what is really happening in the world, is that the central assumptions track what

¹⁴⁹ Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 967 (2001).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 971.

¹⁵² This critique is made powerfully by Jules Coleman, *supra* note. For other critiques, see Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L. J. 173 (2000); Chris William Sanchirico, *Deconstructing the Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001); Hanoch Sheiman, *Are Tradeoffs Between Justice and Welfare Possible? Calabresi and Dworkin on the Normative Foundations of Law and Economics*, 64 MD. L. REV. 250 (2005); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); Brett H. McDonnell, *The Economist's New Arguments*, 88 MINN. L. REV. 86 (2003).

is really happening the world. That is, the explanatory model insists that it is not normative because it says nothing on the matter of how people ought to behave. It only illuminates the consequences of human behavior. Of course, this is hardly pragmatic, recalling Dewey's critique of the fact/value dualism, in which it is impossible to see where normativity ends and the purely "descriptive" begins.

Before moving to the discussion itself in the next section, however, it is important to offer an introductory caveat. For present purposes, the following argument will not require a fight between two pragmatisms: those belonging to Dewey and Posner. Rather, the argument against the descriptive/normative split will come from within economic theory itself, and rest heavily on the work of Amartya Sen. It is important to be clear, however, about what will be presently argued, and what will not. The argument will be no more than this: it is a mistake to believe "descriptive" economics to be free from choices about and interpretations of the fundamentals of human behavior. So-called descriptive economics, as a result, cannot be defended in a non-normative light since there is nothing intuitively natural or necessary about those particular assumptions. And if these assumptions are not natural or necessary, and could just as well be replaced by categorically different ideas about the nature of self-interest and human behavior, it is impossible to defend Posner's normative/descriptive distinction in the way he intends.

However, it is here that one could misunderstand this argument and take from it a *pragmatist* point that is not altogether necessary. In pointing out the choices immanent in the construction of a "descriptive" economics, it simply does not follow that one must believe that there are in fact no differences between what the economic discipline understands as its "normative" and "descriptive" strands. Indeed there are differences, and descriptive economics, even after it has been undressed in a Sennian way, does not require the decision-maker to argue for results that track economic principles. For Posner's economic pragmatism to ultimately avoid falling into consequentialism, however, it must inoculate itself from Fish's foundational-hope syndrome, and given the normative choices necessary to the very particular formula of rational choice theory, it seems that Posner fails to do just that.

c. Rational Choice: A Theory of the Good

If it turned out upon reflection that neo-classical economic models do not actually track real world behavior, but instead privilege only one of many particular ideas about how people should behave, it would necessarily mean that a choice had been made to model one type of behavior over available alternatives. If there is indeed a choice here, then the move to privilege rationality in economic modeling is a normative one – if there are alternative ways of conceiving human behavior, so says rational choice theory, the model that *ought* to be followed is the one that favors a conception of rational, self-interested actors seeking to maximize their wealth. The argument that descriptive economics involves just such choices and interpretations has been offered by scholars like Amartya Sen in his discussion of rational choice theory – the model of human behavior which underscores neo-classical economics.¹⁵³

¹⁵³ See AMARTYA SEN, RATIONALITY 30-31 (2003); Amartya Sen, *Description as Choice*, OXFORD ECONOMIC PAPERS 32 (1980). For an earlier version of the critique, see Kant's distinction between actions done by naturally sympathetic people ultimately working from the ground of "self-love," and action done from moral duty. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 22 (2002).

Sen begins his critique by separating out three elements of rational choice theory which are often conflated under the one rule of self-interest pursuit:

(1) that behavior is regular enough to allow it be seen as maximizing behavior with an identifiable maximand; (2) that the maximand is interpretable as the self-interest of the person; and (3) that the self-interest of the person is narrowly self-centered and is unaffected by the interests of others and about the fairness of the processes.¹⁵⁴

Of these three, Sen is primarily concerned with the second element (the one specifying the maximand as one concerned with self-interest), as he agrees with the first element and acknowledges that the third has been justifiably extended and critiqued by scholars like Gary Becker, Richard Thaler, Christine Jolls, and Cass Sunstein.¹⁵⁵ What Sen does not see in these critiques, however, is any issue taken with (2), and consequently, therein lies the heart of his attack.

The articulation of a *maximand interpretable as personal self-interest*, Sen argues, begs for a good deal of un-packing. First is the question of “self-interest” – just what is this supposed to mean, precisely? Sen suggests that in rational choice theory there are typically three types of self that float in and around this usage: self-centered welfare, self-welfare goal, and self-goal choice. “Self-centered welfare” is the notion that a person’s welfare is exclusively a function of how her personal needs are satisfied, without any regard whatsoever for the needs of others. “Self-welfare goal” is the orientation towards maximizing self-centered welfare. “Self-goal choice” is the restraint placed on the types of choices a person has at their disposal by selecting only those life-choices that explicitly track the self-welfare goal. These three selves therefore represent first the root conception of personal welfare, then the articulation of that conception as the goal of human behavior, and lastly the demand that all choice be directed towards effecting that goal. This, Sen explains, is “self-interest pursuit” as understood in mainstream rational choice theory. The second question that follows from the second premise in rational choice theory (that the maximand is interpretable as the self-interest of the person) concerns Sen’s use of the word “interpretable.” It is Sen’s claim that the three types of self that are conflated into “self-interest pursuit” is only one of many various maximands that might be available as a metric for rational behavior, and to *interpret* the maximand as one that *must only* be concerned with self-interest pursuit is to make an arbitrary choice. As Sen explains:

[Rational Choice Theory] has tended to choose, fairly arbitrarily, one very narrow interpretational story, rejecting other rival understandings of what can lie behind the regularity of choices and the use of goals and values...For example, the analysis of “efficiency” of legal arrangements (including the hypothesis that the Common Law is efficient) is thoroughly dependent on *interpreting* the maximand

¹⁵⁴ Sen, *Rationality*, *supra* note, at 30-31.

¹⁵⁵ GARY BECKER, ACCOUNTING FOR TASTES (1996); Christine Jolls, Cass Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 150 STAN. L. REV. 1471 (1998).

in a very specific way, and in particular in taking the maximand to be exclusively a reflection of the *welfare* of the person involved.¹⁵⁶

After having un-packed self-interest pursuit as involving three distinct types of claim and having argued that the selection of these three claims is exactly that – a selection, a choice, an interpretation – Sen explains that the interpretation of the maximand as self-interest pursuit makes two mistakes. The first is a distancing from the role of ethics, and the second is a distancing from the role of freedom. Sen explains that the core constituent of self-interest pursuit, that of self-centered welfare, has already been sufficiently critiqued. What remains, however, is the argument that even an extended version of self-centered welfare – one that incorporates the human tendencies towards altruism and stupidity – still sets the table for self-welfare goal and self-goal choice. Here, Sen brings in ethical considerations to argue that it is simply wrong to believe that human goals pivot round an extended welfare conception, and that human choices track those goals. In making this argument, Sen introduces the distinction between sympathies and commitments, where sympathy is defined as “one person’s welfare being affected by the state of others.” That is, when a person spends time and money fighting for the rights of people on the other side of the world – time and money that does not yield any tangible increases in their personal welfare – this kind of behavior can still be explained as self-interested because the person has been made happy by her work, or satisfied, or perhaps advantaged by a strategy of helping others such that she might be helped herself later on. Whatever the reason, the human rights advocate’s sympathies can be explained by rational choice theory because the person’s self-interest has been served, even if not in the classic style of wealth-maximization.

Sen does not argue that it is impossible that any of these rationales might actually have determined the course of action taken by the human rights advocate. The mistake, he argues, is that this modeling is especially vulnerable to a claim of over-inclusiveness. What if the human rights advocate has more than a sympathy, but a “commitment” to helping these people? Perhaps there is something more going on in the decision-making process that enables a person to make a choice that should not really be included in the self-interest ambit. It is this inclination which leads Sen to argue that advocates of the self-interest pursuit model are gobbling up too much – there is simply a lot of behavior that cannot be explained that way. The idea of commitments, or what Kant would have called duties, helps Sen make the argument out: whereas sympathies cause problems for the traditional form of self-centered welfare, commitments erode the “tight link between individual welfare (with or without sympathy) and the choice of action.”¹⁵⁷ That is, sympathies may or may not involve rearrangements of a person’s self-conception, but commitments go beyond the ways in which we categorize our values and infect our goals and choices themselves. Thus, the human rights advocate may choose a certain course of action not because she feels joy or satisfaction, but because she is committed to an ethical principle, and that principle guides her goals and choices. A typical reply would ask whether the commitment, in the end, isn’t followed simply because it is a course that somehow adds to the advocate’s overall utility or happiness in some way. If it didn’t, then why would she have adopted the principle in the first place? Sen’s response points out that it seems highly unlikely

¹⁵⁶ Sen, *supra* note, at 28.

¹⁵⁷ *Id.* at 35.

that the advocate's choice will typically be justified (even to herself) on the grounds that the decision to act makes her happy, or that a failure to act would cause her suffering; rather, the success or failure may very well have the side-effects of bringing happiness or suffering to the advocate, but it must be the case that at least some times these effects are little more than symptoms, and not actual causes. Sometimes, a person's motivation will be grounded in ethical considerations, and a commitment to action, and while it may have emotional side-effects, it cannot always be entirely justified in and of itself by those effects. Sen writes,

[When the advocate makes her decision to act,] [s]he may or may not actually suffer, and also the extent of that suffering, when it exists, may be too small to justify the kind of sacrifice that may be involved in pursuing social justice or fairness at a personal loss in other ways. But most important, it has to be acknowledged that a commitment can be a reason for action irrespective of any personal loss suffered from the failure of one's commitment.¹⁵⁸

In his examination of self-interest pursuit, Sen thus uses the idea of ethical commitments as a wedge, prying the notions of self-welfare goal and self-goal choice loose from the conception of self-centered welfare. It is not necessary to Sen's argument that self-centered welfare be much different from the mainstream conception; all that is here argued is that our goals and actions need not mechanically follow from that conception. Sometimes our goals may reflect ethical commitments, the realization of which, no matter how pleasurable or horrible, cannot always be justified by self-centered welfare. They come from someplace else. It is here that Sen suggests the other part of the puzzle (besides ethics) that has been missing, and that is freedom. If the classical forms are correct, and there exists a universal and unwavering relationship between the ideas that individual behavior is regular enough to conceive of it as generally maximizing, and that what is being maximized is the pursuit of self-interest, Sen is wrong that the maximand has been interpreted to mean self-interest. The maximand *is* self-interest, and that's all there is to it. If Sen is correct, however, and the maximand has been interpreted to refer to only one particular style, and that other reasons, like ethical commitments, can also play decisive roles in the behavior meant to be maximized, then the classical argument has placed an unnecessary constraint on what counts as rational behavior. If this constraint is removed, there is room to discuss a fourth type of self, in addition to the three types already discussed (self-centered welfare, self-welfare goal, and self-goal choice). This fourth type is motivated by a freedom that "self-interest" pursuit can never be, since it is a self whose goals and choices can come either from sympathies or commitments, no matter how varied. The only constraint that Sen applies to this fourth self is that of "reasoned scrutiny" – Sen's standard for rational behavior.¹⁵⁹ This is the self that is able to reason about his choices, his goals, his sympathies, his commitments, and is fundamentally free to do whatever he wishes. As long, that is, that the wish has been subject to reasoned scrutiny.¹⁶⁰

¹⁵⁸ *Id.*

¹⁵⁹ Sen, *supra* note, at 34.

¹⁶⁰ For more on the idea of practical reasoning, *see generally* DEREK PARFIT, REASONS AND PERSONS (1984); THOMAS SCANLON, WHAT WE OWE EACH OTHER (1998); ETHICS AND PRACTICAL REASON (Garrett Cullity and Berys Gaut., eds. 1997).

Interestingly, Sen's story of rationality and reason serves as the inverse of Posner's. As will be recalled from above, Posner's legal pragmatism begins by claiming that a judicial act is right when it has the most reasonable consequences. A judge will be assisted in determining when the consequences have been reasonable by looking to the classic economic assumptions on the role of efficiency in guiding rational actors seeking to maximize their interests. For Posner, "reason" serves as little more than a doorway through which one then comes to rational choice theory. Scratch reason and you find rationality beneath. Sen's story, as we have seen, goes in the other direction. If we begin by asking what rational behavior is, the assumptions of rational choice theory quickly rise to the surface. Once these assumptions are interrogated, they deconstruct, revealing their constituent parts, and once these constituencies are revealed, Sen argues, two points emerge. One is that ethical considerations, despite having been ignored by economists for almost a century, wreak havoc on the self-interest pursuit model, and as a consequence, the assumptions of rational choice theory do not logically follow from one to the next. The "fact" that what is maximized by human beings is their self-interest subsequently transforms into an interpretation – a normative choice of one model among others. Sen's second point is that rationality, thus critiqued and when best construed, turns out to be a doorway to freedom and "reason."

It is beyond the scope of this paper to go more in depth as to the contours of Sen's notion of reasoned scrutiny. The present argument, after all, does not concern who is ultimately right in this very long and controversial debate. It is instead concerned with the alleged non-normativity that Posner hopes to find in descriptive economics, and the critique of that idea. If Sen is right that the move which privileges self-interest as the maximand is a choice and an interpretation, then there seems little in the way of defending description as a non-normative enterprise. To be sure, there would still remain significant differences between various types of claims, i.e. the claim that efficiency and wealth-maximization are the norms that will best guide decision-making, and ought to be foregrounded as such, is different from the claim that economic analysis is offered as way of predicting and describing the consequences of rational, self-interested actors operating in a market. This is also not the same as arguing that there is no distinction between facts and values, or that "normative economics" is not substantially different from "descriptive economics." What the critique does disclose, however, is that when Posner seeks to avoid consequentialism by pointing to his preference for descriptive over normative economics in making sense of pragmatic adjudication, he fails. Although Posner successfully avoids the strong "oughts" of normative economics, he nonetheless reels in the strong "oughts" immanent in the choices required by rational choice theory.

3. The Experimental Pragmatist¹⁶¹

The third category of legal pragmatists – Experimental Pragmatists – is more aligned with philosophical pragmatism than either of the previous two.¹⁶² Experimentalists look to put

¹⁶¹ The primary texts used in this article are Charles Sabel and William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015 (2004); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 Wm. & Mary L. Rev. 127, 174-175 (2004); Charles Sabel & Michael Dorf, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 270 (1998).

¹⁶² Much of the literature that constitutes the experimental approach has a critical lineage and goes under the name of some or another anti-status-quo *nom de guerre*. In an article surveying this literature, Orly Lobel lists a number of the labels: "reflexive law," "collaborative governance," "democratic experimentalism," "responsive regulation," "outsourcing regulation," "reconstitutive law," "post-regulatory law," "revitalizing regulation," "regulatory

more muscle on the basic legal pragmatist foundation of anti-formalism, consequentialism, and contextual reasoning by looking to the classic writers, as well as critical traditions in social theory and democratic experimentalism. What experimentalists share with economic pragmatists is a heavy concern with social science and empirical study – they want to know what is going on in the world, and, like economists, are ready to become J.D./Ph.D.’s to figure it out. As for the public-private distinction, experimentalists are very clear in that they wish to take the metaphysical critique and push it into the public realm. For these scholars, the normative impulse is subversive, seeking change and reform through the constant transformations of trial-and-error. Despite the familiarity, however, experimental pragmatism is not another name for legal realism. It is notably an artifact of contemporary legal consciousness for its tendency, as will be explained, to elaborate the experimental impulse in the language of “social conceptualism.”¹⁶³ Legal realism, with its critique of individualism and the abuse of deduction, did not.¹⁶⁴

In making out this argument it is useful to detail the experimentalist rejection of the public-private distinction. Where Rorty, Grey, and Posner (in failed attempt) argue for a separation of philosophy from the world of law and politics, experimental pragmatists instead draw on Dewey’s reconstructive philosophy, and more recently, Roberto Unger’s democratic experimentalism.¹⁶⁵ In order to get a sense for what this means for experimentalists, consider Menand’s view that pragmatism provides “the sense that a pressing but vaguely understood obligation has suddenly been lifted from their shoulders.”¹⁶⁶ One imagines a sweeping,

pluralism," "decentering regulation," "meta-regulation," "contractarian law," "communicative governance," "negotiated governance," "destabilization rights," "cooperative implementation," "interactive compliance," "public laboratories," "deepened democracy and empowered participatory governance," "pragmatic lawyering," "nonrival partnership," and "a daring legal system." Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 346-347 (2004). Among the citations she includes are: Dara O'Rourke, *Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1 (2003); Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, 12 INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW 375 (1984); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (2002). Other representatives of the experimental approach include Charles F. Sabel, "Learning by Monitoring: The Institutions of Economic Development," in *The Handbook of Economic Sociology* 138-65 (Neil J. Smelser & Richard Swedberg eds., 1994); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2002); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 19 AM. J. L. & MED. 395 (2003).

¹⁶³ See University of Wisconsin Law School’s Symposium on New Legal Realism, 2005 WIS. L. REV. 335 (2005).

¹⁶⁴ Kennedy, *Two Globalizations*, *supra* note, at 651.

¹⁶⁵ ROBERTO UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* (1998); ROBERTO UNGER, *POLITICS: THE CENTRAL TEXTS* (1997).

¹⁶⁶ Menand, *supra* note, at xi.

swooning feeling where the newly-baptized pragmatist who had once seen life as a constrained set of choices and dogmas is now opened up to the limitless vistas in his possible alternative futures. The experimental pragmatist takes this excitement, pulls it from the private space, pushes it into the public, and arrives, quite dramatically, in the world of an unbound pragmatism which contributes, in Unger's words, to a person's "raising up to godlike power and freedom -- and the deepening of democracy -- that is to say, the creation of forms of social life that recognize and nourish the godlike powers of ordinary humanity, however bound by decaying bodies and social chains."¹⁶⁷

The significance for legal pragmatism when the public-private distinction is relaxed can consequently be quite great. The persistence of the distinction enables eclectic pragmatism in its characterization of public discourse as immune from the destabilizing effects of philosophical deconstruction. Once the private-public partition is lowered, these effects spill into the public realm. This is the maneuver of experimental pragmatists, who argue for the application of pragmatic rejuvenation to the public mind, just as philosophers have favored it in the contexts of truth-seeking and belief formation for private individuals. For William Simon, one of the scholars this discussion takes as representative of the experimental strain, legal pragmatism has a number of ingredients. First is a perspective that emphasizes the responsibilities of citizens to take active and deliberative roles in participatory government.¹⁶⁸ Immediately, then, we can see how this version moves away from Rorty's public-private distinction, pushing pragmatic reform into the levers of governance. Second, this reliance on individual initiative moves legal pragmatism away from a dependence on the judiciary and towards involvement in civic associations and non-governmental organizations.¹⁶⁹ This kind of strategy is conducive to a third ingredient, which is a governance that it is decentralized, flexible, and open to rolling rule regimes.¹⁷⁰ Fourth, legal pragmatism is consequentialist such that solutions take priority over rights-claims.¹⁷¹ To some degree, this factor is based on the pragmatic argument against foundations and first principles, i.e. if we cannot accept as a deontological given the morality of individual rights, why should they have a trumping power over other forms of problem-solving? Simon's account provides a second way of differentiating experimentalists from the eclectic and economic versions of legal pragmatism: the method is more than a preoccupation with context, consequence, and adjudication; it is interested in new governance strategies, public deliberation, and the experimentalism inherent in a destruction of the means-end dualism.

A second distinguishing characteristic of the experimentalists is the normative underpinning which generates the move to ignore the public-private distinction in the first place. That is, it is not an arbitrary move to say, as experimentalists do, that the philosophical power of the pragmatist method should be transposed onto public discourse. The motivation appears to be rooted in a basic disposition lacking among eclectics and economists, and that is a disposition towards reform. Experimentalists are discontent with liberal social arrangements and the

¹⁶⁷ ROBERTO UNGER, *THE SELF AWAKENED: PRAGMATISM UNBOUND* (2006).

¹⁶⁸ Simon, *supra* note, at 174-175.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 177-178.

attendant distributional effects in a way that the other camps are not: they see something wrong with the world, and they want to fix it. What distinguishes experimental pragmatists, however, from their counterparts in the 1980s and '90s writing under the labels of critics or feminists¹⁷² is that where these reform-minded pragmatists came at the law from a distinctly left-liberal position, experimental pragmatists view themselves as “post-left” and increasingly preoccupied with technocratic/managerial reform perspectives. Whether this “technocratic turn” has the stuff to make pragmatists like Menand swoon or Unger feel as if we have been raised to God-like powers, is a question for another time. Here, the discussion turns to some of Unger’s experimentalism and illustrative writing from Sabel, Simon, and Dorf.

a. Ungerian Experimentalism

According to Unger, the classic pragmatists sacrificed the seeds of a potentially powerful philosophy “to a range of costly and unnecessary concessions.” These concessions have all involved an affiliation with “naturalism.” Unger argues that Dewey’s vision is tripped up by a contest between his double emphases on human agency and an evolutionary naturalism, where the second idea inevitably consumes the first. Dewey, Peirce, and James, Unger suggests, all suffer from equivocations between the power of human agency and evolutionary naturalism, thus depriving pragmatism the “tools with which better to serve the cause of democratic experimentalism.” Instead of realizing its potential by categorically distancing itself from naturalism, pragmatism has been reduced to what I have been calling its everyday, or eclectic variety: “[it] has been turned into another version of senility masquerading as wisdom...[a] doctrine of shrinkage, of retreat to more defensible lines, of standing and waiting, of singing in our chains...” If we could make good on the ideas that were at the core of the pragmatist project, and unchain the philosophy from its present state, Unger suggests that we could

denaturalize society and culture: we unfreeze them. It is as if, in the physical world, a rise of temperature were to begin to melt down the stark distinctions among things returning them to the indistinct flow from which they came. To the extent we move in this direction, the facts of society and culture cease to present themselves to our consciousness as an inescapable fate...Pragmatism is the theory of this turn; it presents us with a way of approaching our situation, both in general and in particular, that informs this attack on fate and fatefulness. It is the operational ideology of this subversive and constructive practice.

This pragmatist conception is clearly quite different from the one motivating the eclectic and economic models. Although Unger acknowledges the fact that the bottom-line in the pragmatist manifesto is a negative one, one that does the very important work of dispelling the veils of “false necessity” and the “enslaving superstition of the mind,” he argues that pragmatist traditions that stop at this point fail to realize the true power inherent in the philosophy. The problem is that pragmatism, as it has been traditionally expounded, ends by dividing the power

¹⁷² For discussion, see Joseph Singer, *The Player and the Cards*, 94 Yale L. J. 1 (1984); Jay Fineman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724 (1988). There was also a variant of legal pragmatism that attempted to merge liberalism with the pragmatic approach. See Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1049- 51 (1991); Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1984).

to clean house from the need for revision. “[Pragmatism] provides us with no way to understand the circumstances or the capabilities that can make sense of such a reorientation...The future of pragmatism lies in the intransigent radicalization of this discontent.”

In this view, radicalizing pragmatism largely persists in a shift from saying that experimentation through fallible anti-skepticism is *all we can do* to an emphasis on experimentation being a norm *that we should strive towards*. Experimentation is therefore the prime mover in Unger’s pragmatism, moved up from an instrumentality in the classic and neo-pragmatist standards to a goal in this critical, radicalized edition: “The overriding criterion by which to measure our success in approaching an experimentalist ideal in politics is success in making change less dependent on crisis.” That is, it has historically been the case that the political, social, and economic arrangements associated with liberal democracies only become susceptible to change in the event of some great calamity. “To render politics experimental is to dispense with the need for this ally. It is so to organize the contest over the mastery and uses of governmental power -- and indeed over all the institutionalized terms by which we can make claims on one another -- that the present arrangements and practices multiply opportunities for their own revision. Change becomes internal.”

A fair point that might be raised here is one that asks what is so important about “change,” and pressures the framework that prioritizes subversion so emphatically. What if we like the world in which we live? Why must we wed ourselves to a posture that hopes to turn things inside out, when we might like things turned right side-up? The answer brings us back to Grey’s convert: is he excited by the possibilities he sees only in the re-making of his own life-story, or does he have reason to be excited by a re-imagined society? Grey appears to be an example of the former, Unger the latter: “[the aim is] to arrange society and thought so that the difference between reproducing the present and experimenting with the future diminishes and fades. The result is to embody the experimental impulse in a form of life and thought enabling us more fully to reconcile engagement and transcendence. We then become both more human and more godlike.”

Most pragmatists would agree with Unger that pragmatism is negative in its overall orientation, but would argue that his desire to merge this deconstruction into a reconstructive practice might be a good thing, but it is not pragmatism. Consequently, a question for Unger, to which he has a response, is why he feels it necessary to call his program “pragmatism” at all, since he admits that “[i]n no sense is this argument either an interpretation or a straightforward continuation of the philosophical tradition the Americans call pragmatism.” Unger’s response is that he feels the classic pragmatists had emphasized, though not originated, the themes that ultimately underscore the imperatives of individual agency and deepened democracy, and that as pragmatism has now claimed a position as “the philosophy of the age,” there is utility in commandeering the term. This commandeering is hoped to deliver pragmatism from both the vernacular depository in which “pragmatism” operates as the working ideology of the United States, as well as academic view that has found consensus in the writings of Rorty and Putnam as pragmatism’s contemporary representatives.

Unger’s philosophical pragmatism has a counterpart in legal analysis which carries through on the legal realist premise that there are no natural, neutral, or necessary legal forms, but ultimately prescribes a practice of experimentalism.¹⁷³ The claim is that the legal profession is in the sway of a dominant style of legal analysis which “helps arrest the development of the

¹⁷³ Unger, *supra* note 10, at 23.

dialectic between the rights of choice and the arrangements that that make individual and collective self-determination effective – a dialectic that is the very genius of contemporary law.”¹⁷⁴ This style, called “rationalizing legal analysis,” “works by putting a good face – indeed the best possible face – on as much of law as it can, and therefore also on the institutional arrangements that take in law their detailed and distinctive form.”¹⁷⁵ If a judge, for example, were to back off of this rationalizing impulse, and take a more “realistic” or “experimental” perspective on received legal doctrine that looks inconsistent or paradoxical, “intellectual and political threats [become] intellectual and political opportunities [and the] materials for alternative constructions.”¹⁷⁶ Unger offers a parable to help make this point more concrete:

Suppose two societies in one of which the institutional arrangements are perceived to be lightly more open to challenge and revision than the other. In the marginally more open society the jurists say: “Let us emphasize the diversity and the distinctiveness of the present arrangements, their accidental origins and surprising variations, the better to criticize and change them, pillaging arrangements devised for other purposes and recombining them in novel ways.” The practice of such a style of legal analysis over time will result in institutions that invite practical experimentalism, including experimentalism about the institutions themselves. Imagine, by contrast, a society in which the institutions seem marginally less open to revision. The jurists may say: “Let us make the best out of the situation by putting the best plausible face upon these arrangements, emphasizing their proximity to rational and infinitely renewable plan. In the name of this rational reconstruction we may hope to make things better, especially for those who need help: the people likely to be the victims of the social forces most directly in control of law-making.” The sustained practice of this method will, however, help close down our opportunities for institutional experimentalism. It will do so both by turning away from actual experiments and by denying us a way of thinking and talking, collectively, about our institutional fate in the powerful and irreplaceable detail of law. Such is the world rationalizing legal analysis has helped make.¹⁷⁷

b. The Experimental Method in Legal Reasoning

Partially inspired by Unger’s work, there is a body of scholarship which hopes to move away from the limits of rationalizing legal analysis and “Legal Liberalism”¹⁷⁸ towards the “new governance” of experimental pragmatism. Sometimes going under the label of new legal realism,¹⁷⁹ these scholars tend away from a preoccupation with courts and veer towards

¹⁷⁴ *Id.* at 39.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 40.

¹⁷⁸ See Simon, *supra* note; ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

¹⁷⁹ Howard Erlanger, et. al., *Is It Time for a New Legal Realism?* 2005 WIS. L. REV. 335, 358 (2005).

administrative and regulatory reform and renewal. In the introduction to a recent symposium on the new legal realism, the authors explain that their approach involves “a pragmatist jurisprudence [which] may be to understand not only new governance but to reimagine governance itself, a governance that is realist in the sense that it does not enchant the state, but pragmatic in the sense that it resists simple abstractions, emphasizes dynamism, and invests our vision of democracy with real life human relations.”¹⁸⁰

The experimental method, as explained by Charles Sabel and Michael Dorf, relies on two key premises. First off is the notion that democratic “governance,” and not adjudication, is the key interest. That is, experimentalists take a more holistic view of legal pragmatism and its scope, emphasizing the disability of courts to maintain their gate-keeping functions in what is a crisis of governance facing the entire constitutional system in the United States. For the promise of democracy to be realized, pragmatism must reach well beyond the judiciary. Latent in this first assumption is the second: there is a governance crisis that is badly in need of attention. By highlighting the rise of the fourth arm of government (the administrative state) and criticisms on the degree to which the realities of democratic life actually track its foundational principles (separation of powers, federalism, individual rights),¹⁸¹ Sabel and Dorf make it clear that theirs is a reformist agenda. On this view, American democracy is in big trouble, and it needs fixing.

As for the method itself, it draws on an analogy to the private firm, where innovations in the marketplace “suggest institutional devices for applying the basic principles of pragmatism to the master problem of organizing decentralized, collaborative design and development under conditions of volatility and diversity... To determine what to make and how, firms in this new economy must therefore resort to a collaborative exploration of disruptive possibilities that has more in common with pragmatist ideas of social inquiry than familiar ideas of market exchange.”¹⁸² Sabel and Dorf apply these ideas to governmental action at the local level, and argue that since problem-solving is inevitably at its most potent and relevant at the local level, it is essential that the products of local governance initiatives be broadcast through information-pooling techniques. That is, regional and federal institutions are necessary to insure the availability of inter-local cross-linking such that the fruits of deliberative call-and-response might enable localities to learn from one another’s successes and failures.¹⁸³ The result of such an increase in deliberation and local initiative would have two structural effects – the “privatization” on the one hand of opening up governance strategy to the innovative style of a public marketplace, and on the other hand the “re-politization” of our democratic institutions through the introduction of a “a novel form of deliberation based on the diversity of practical activity, not the dispassionate homogeneity of those insulated from everyday experience.”¹⁸⁴ Together, it is argued, these effects will re-structure American democracy in a way that will at

¹⁸⁰ *Id.*

¹⁸¹ Sabel & Dorf, *supra* note at 270.

¹⁸² *Id.* at 286.

¹⁸³ *Id.* at 288.

¹⁸⁴ *Id.* at 313-314.

once track the traditional interests in republican government and the evolving demands of the administrative state.¹⁸⁵

Despite the experimentalist emphasis on the legislative responsibility to insure deliberative fora and local participation, there is still a role for courts to play. One of the fundamental problems identified by Sabel and Dorf is the incapacity of courts to justifiably maneuver through political questions. Where the courts defer to the legislature, it is often the case that such deference is inappropriate due to a lack of legislative intent on the relation of the means employed and the ends sought by the statute. At the same time, where courts intervene and displace congressional will, it is typically an assertion of eclectic balancing techniques that betray little more than the courts' preferences for particular ends.¹⁸⁶ The common problem here, according to Sabel and Dorf, is an indeterminate relation between means and ends – an indeterminacy which inevitably leads courts either to the extremes of deference or ad hoc value judgments. The way out of this dilemma is for the court to adopt, along with the other branches of government, a program of democratic experimentalism.

In its holistic view of democratic governance, experimentalism posits a role for the judiciary that avoids the indeterminacy dilemma by shifting much of the work away from courts and into the hands of agencies and private parties. From the environmental law context, Sabel and Dorf illustrate how this can work. In its adjudication of a dispute over whether it was reasonable for the Reagan administration to make an interpretation of “stationary source” that would treat all emissions from a plant as a single source, the Supreme Court deferred to the agency in light of the ambiguous language of the statute.¹⁸⁷ An experimentalist court would not have been faced with this sort of Hobson's choice – defer or balance. Instead, various localities would be empowered with the “bubble” approach, and after enough time had elapsed and enough information gathered, parties could offer reasons as to why bubble approaches were superior or not to the traditional reading of “stationary source.”¹⁸⁸ Of course, this adjudicative style would be greatly assisted by an experimentalist statute that allowed for such an approach, but even in the absence of such legislation Sabel and Dorf argue for experimentalist judging that takes as its baseline the need for parties to “define the range of alternatives to be considered in an evaluation of the appropriateness of ends to means, further publicizing the variety of possibilities in the process; and in deciding whether due consideration has been given to these alternatives, the court refers to standards of care and attentiveness--the ability to learn and learn to learn--that emerge from the practice of the relevant parties themselves.”¹⁸⁹ In terms of its substance, experimentalist judging focuses on the deliberative responsibility of the parties, as well as care-taking of fundamental legal norms. Procedurally, its focus is on participation and the degree to which parties have referenced best practices in other jurisdictions.¹⁹⁰

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 390-395.

¹⁸⁷ *Id.* at 395-396.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 401.

¹⁹⁰ *Id.* at 403.

In another article, Sabel and Simon illustrate the experimental approach with the case of “destabilization rights,” a term borrowed from Unger. Such rights “are claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.”¹⁹¹ A destabilization right is not typically a “right” that will be predicated in a Hohfeldian sense on some duty by another party to make good on the claimant’s interest in destabilizing the given context. It is better understood as bridging the court’s analysis of the norm in question to the court’s development of a remedy. As Sabel and Simon explain,

Destabilization usefully describes both the remedy and the process by which the meaning of the background substantive right is articulated in these cases. In the new public law, the judge does not exercise discretion in each case to choose among an infinite array of potential responses to the particular problem. Rather, having found a violation of some broad norm--the right to an adequate education, the right to access to justice--she imposes the single remedy that the liability phase has shown to be appropriate: institutional destabilization.¹⁹²

Sabel and Simon primarily discuss the concept as applied to public law litigation, but they explain that the use of destabilization has been common to private litigation. The common law’s interest in securing freedom from competitive injury, for example, is a freedom predicated on a court’s predilection to disentrench monopolies and conspiracies – antitrust is therefore a kind of destabilization right. Similarly, in a public law context such as housing or education litigation, a court will justifiably enforce a destabilization right under two conditions. The first is when liability has been determined on the part of the government actor for failed in satisfying the basic elements of its mandate. The second is an “important background premise” which obtains when the court has found that the problem is substantially immune from conventional political mechanisms of correction.” After this “prima facie” case has been found, and the court moves into the remedial phase, the “experimental tendency” “triggers a process of supervised negotiation and deliberation among the parties and other stakeholders. The characteristic result of this process is a regime of rolling or provisional rules that are periodically revised in light of transparent evaluations of their implementation.” This statement pretty much captures the basic elements of the experimentalism Sabel and Simon have detected in their wide-ranging research on public law litigation: once liability has been determined, (1) the parties engage in a deliberative process in which their interests, which may not have been clear before litigation, have likely been disaggregated after the liability determination, (2) a regime of rolling rules are established which are constantly subject to revision as new information comes to light, and (3) the process is cast in explicitly transparent terms. Consequently, the judicial “remedy” is ambiguous in the traditional sense, and is best understood as one of institutional destabilization. The actual goals of the remedy are unknown – in pragmatic fashion, they will be manufactured by the involved parties as they go through the motions of deliberation, study, and renewed contest.

Sabel and Simon discuss many of the common criticisms of public law litigation, as well as Supreme Court decisions hostile to trial court involvement in what appears to be the never-

¹⁹¹ Sabel & Simon, *supra* note, at 1020.

¹⁹² *Id.* at 1056.

ending saga of intractable political problems. According to the authors, however, these criticisms misapprehend the benefits of a judicial tendency towards experimentalism through destabilization rights. Whereas decisions in housing cases have often been criticized for their abuse of judicial discretion and separation of powers implications, or on the basis that the decisions simply do not effect any meaningful solutions,

[e]xperimentalist intervention is both more consistent with judicial practice in common law cases and more compatible with electoral mechanisms of democratic accountability than most accounts of public law litigation recognize. Experimentalist remedies expose public institutions to pressures of disciplined comparison that resemble the market pressures enforced by common law norms. At the same time, the transparency they induce facilitates related forms of democratic intervention, including electoral ones. The features of experimentalist intervention that respond to concerns about both efficacy and legitimacy are captured by the idea of destabilization rights. In stigmatizing the status quo, the court's intervention opens the defendant institution up to participation of previously marginalized stakeholders and clears the way for the redefinition of relations among more established ones. Counterintuitively, destabilization through new public law creates opportunities for collaborative learning and democratic accountability that the more certain world of pluralist bargaining under the aegis of courts or legislatures often precludes.¹⁹³

In sum, experimental pragmatism is like eclectic pragmatism and unlike economic pragmatism in that there does not appear to be a basic normative foundation that steers pragmatic decision-making. Where eclectics pick and choose as the situation demands, however, experimentalists maintain a more rigorous orientation. There is, after all, a program here: (1) experiment locally, (2) adopt provisional goals, (3) pool information across jurisdictions, (4) repeat. Experimentalism therefore places a premium on locality, reform, and multi-jurisdictional dialectics. On the other hand, experimentalists share with economic pragmatists an emphasis on the public utility of pragmatic decision-making, taking the fruits of the pragmatist method from the private and pushing it into the public.

IV. Conclusions

A. Pragmatism? What Pragmatism?

The first aim in this article was to make an intervention in what appears to be a growing amount of confusion over the nature of pragmatism in its relation to law. This intervention suggested that, at the very least, one can discern between an everyday pragmatism in the American vernacular, the philosophical pragmatism of the classic writers, and pragmatism as manifested in the realm of legal decision. The discussion began by looking to non-pragmatist fields that suggest entryways into legal pragmatism, though stop short, for various reasons, of constituting legal pragmatism itself. Legal pragmatism, it was argued, shares with consequentialism a focus on function and an interest in consequences but maintains an anti-

¹⁹³ *Id.* at 1101.

foundationalist strategy meant to steer clear of the moral criteria on the nature of the “good.” Further, legal pragmatism, at least in its eclectic and economic variations, identifies itself as strictly separate from the philosophy of the classical style, casting notions of truth and knowledge (so important to the philosophers) as irrelevant to the practical work of legal reasoning. Lastly, legal pragmatism was distinguished from legal realism in accord with the subversive concept of the political at work among the realists. Legal pragmatists, as has been argued, sing in a number of political registers, from the center-right work of Farber and Posner to the center-left of Grey, Sabel, and Simon, to the far left of Unger. Further, the three varieties of legal pragmatism are all indigenous to the “post-social” aspects of contemporary legal analysis, whereas legal realism is not. For eclectics, they are post-social in their acceptance of balancing techniques. For economists, they are post-social in their subscription to a sectarian legal methodology. For experimentalists, they are post-social in their refutation of the mainstream liberalism immanent in the language of individual rights.

This diversity within the ranks of the legal pragmatists appears to be lost on many legal scholars. Look at the exemplary work of no less an expert than Ronald Dworkin. In his recent *Justice in Robes*,¹⁹⁴ Dworkin surveys a few of the rival legal theories to his own, and his first target is “legal pragmatism.”¹⁹⁵ Although Dworkin does say that “this theory has taken different forms and attracted different names,” he nonetheless seems to conflate these various forms with the one affiliated with his long-time nemesis, Richard Posner.¹⁹⁶ Dworkin’s understanding is that pragmatism is a theory of adjudication that “should make whatever decision is best for the community’s future with no regard to past practice as such.”¹⁹⁷ To do any more than this, Dworkin, suggests, would plunge the pragmatist into the foundationalism of consequentialism.¹⁹⁸ Although Dworkin is definitely onto something here, he ultimately shows a less than complete understanding of Posner’s less than complicated economic pragmatism. Dworkin argues that Posner’s pragmatism “comes to nothing, that it is empty,” because Posner fails to identify the criteria for determining “best consequences.”¹⁹⁹ Dworkin then suggests that Posner is in a bind, since if he *were* to provide criteria, he would head into consequentialism, but if he doesn’t, the theory is meaningless. Although I largely agree with Dworkin’s conclusions, the argument is nonetheless confused. First, Posner *does* offer criteria, repeatedly, and they consist in the rules of economics. Second, Dworkin’s critique is best leveled at a group he doesn’t even witness - those eclectic pragmatists who really do adopt a functional, practical, and ad-hoc perspective without adopting a set of explicit decisionist criteria. In their apolitical posture, the eclectics are the ones worshipping at the altar of reasonableness and historicity – judges who on the whole “obey the legislature and keep faith with past judicial decisions.”²⁰⁰ Third, Dworkin’s insistence

¹⁹⁴ Dworkin, *supra* note 108.

¹⁹⁵ *Id.* at 21.

¹⁹⁶ *Id.* at 24. Although Dworkin says that there are more radical variants, he doesn’t list any. *Id.* at 23.

¹⁹⁷ *Id.* at 21.

¹⁹⁸ *Id.* at 21.

¹⁹⁹ *Id.* at 24.

²⁰⁰ *Id.*

on a consequentialist framework of means and ends misconstrues the entire pragmatist enterprise that sets itself against just such a posture. Fourth, Dworkin's critique of Rorty and Fish seems to be taken as an attack on a radical arm of legal pragmatism, and yet, neither of these philosophers have put together legal accounts like those found in the work of the experimentalists. Overall, Dworkin seems to have the right idea that there is something deeply troubling about legal pragmatism, but he fails not only to properly characterize his primary target in Posner, but also in characterizing the general terrain.

B. Pragmatism and Formalism, Together Again, and Again...

A second aim in this article took as a background premise the work of Duncan Kennedy on the evolution of American legal consciousness, and in particular the argument that the contemporary period is characterized by an undigested mess of contradictory legal maneuvers left over from the clash between classical legal thought and the "social" sensibility that came into high fashion after the New Deal. The result is what Kennedy calls a conflicting considerations approach, where legal decision-making pushes back and forth between the policy analysis of consequentialist balancing and the deductive work of neo-formalism. I have suggested that legal pragmatism, in its eclectic form, captures a good deal of this posture. Not only does the method of the eclectic track the principal work of the policy analyst, but it also accounts for the decision to shift back and forth between consequentialist legal reasoning and formalism, *as the situation demands*.²⁰¹ Eclectic pragmatism thus stands for more than a simple synonym for policy balancing; it also incorporates what Posner has called formalist pockets – the availability to the pragmatist judge to use deductive means when he feels the consequences of doing so justifies such a move, despite its bad faith.

Eclectic pragmatism and the policy balancing that it entails, however, does not only represent a method which at times makes a neo-formalist approach available. In some sense, it seems to go a step further, actually producing the formalism that philosophical pragmatism had meant to eradicate. By way of an example, imagine again the human rights advocate discussed in the context of Sen's distinction between sympathies and commitments. In large measure, this advocate believes in a concept of individual autonomy from which might be deduced a scheme of rights and responsibilities. This belief spurs the advocate on to seek the protection, through international and domestic legal instruments, of individual rights because these are the rights that liberal internationalism can be understood to demand. Concretely, this can mean an interest in arguing from freedom from torture in Guantanamo to freedom of expression in China to freedom of participation in Iraq. Whatever specific right might be deduced from the abstract liberal principle of individual autonomy, however, it is easy enough to recognize in human rights discourse the conceptual language immanent in the work of classical legal thought. The human rights advocate, as a result, can be understood as a manifestation of a type of neo-formalism. But the human rights advocate will surely respond from a post-CLT experience familiar with the critique of deduction and abstract form. The work of human rights, the advocate will explain, is pragmatic, consequentialist, savvy, and constantly open to the give-and-take balancing of the

²⁰¹ That is, the decision-maker that tends to balance, but also uses formalist means because he believes that sometimes *it is the right thing to do*, is not an eclectic in the style that I have described because he has attached some foundational apparatus that tells him when to balance and when deduce. The eclectic pragmatist, in contrast, never looks to acts always acts in bad faith because he knows that legal "answers," whether they are produced through balancing or deduction, are always an artifact of strategic action. In contrast, the decision-maker that believes that there are right answers is not an eclectic pragmatist – he is something else.

contemporary period. Perhaps the dream of the human rights warrior remains a formalist one, but the actual work is stamped with the imprimatur of pragmatic activism.

What then lies in this strange relationship between pragmatic means and formalist ends? Is it possible that the availability of pragmatist language actually enables the survivability of the formalist interest in an abstracted concept of individual autonomy? After all, what would happen to such an interest if eclectic pragmatism were to vanish? It is clear enough that classical legal thought was hugely discredited by the legal realist movement and the developments thereafter, and yet, it is also quite clear that neo-formalist strategies remain alive and well in contemporary legal analysis. If the language of eclecticism and its attendant power to inoculate against the realist critique suddenly became unavailable to the rights advocate, it seems that one of two things would likely come about. The first would be a full-scale resurgence of classical legal thought, no longer embarrassed by legal realism, pragmatism, deconstructionism, or any of the other movements in the 20th century that exposed the assumptions necessary for a workable – and political – system of thought. The other option, more amenable to the human rights advocate nervous about a strong neo-formalist claim, would be to move away from eclectic pragmatism and towards experimentalism, or any other non-pragmatist movement that identified itself in truly anti-foundational terms. As it stands, however, eclectic pragmatism remains open to the human rights advocate, and as long as he is able to shield himself against the social critique of deduction and abstraction by reference to his pragmatism, the formalist dream will continue.

C. Pragmatism: What's the Use?

A third aim of the article, separate from hinting at the alliance of a formalist/pragmatist strategy, has been to suggest that despite the prevalence and diversity of legal pragmatism, it seems to have a habit of spelling out how judges decide cases without really spelling out how judges decide cases. This false promise shines at its brightest in the work of the eclectics, but we see it with the economic and experimentalist pragmatists as well. Little ink need be spilled on why the eclectics fail to realize the potential of the pragmatist promise for renewal, revitalization, and power. After all, Grey acknowledges that a free-standing legal pragmatism is banal in its quest for reasonable decisions in context. Farber, despite his zeal, is just as likely to argue against anything exciting or dynamic about his pragmatist sensibility. The advantage, on this view, lies precisely in the systemic stability and historical continuity legal pragmatism is meant to uphold. And yet, despite these admissions, the eclectic pragmatist stills falls short, for the very same reasons that everyday pragmatism is so disappointing. In its apolitical posture, the eclectic can never account for whatever counts as reasonable other than decisions that happen to shore up the status quo of a contemporary political/social/economic/legal alliance. And if all the eclectic can ever do is make decisions that stabilize the status quo, well, what use is that? In the end, the so-called functionalism of the approach even begins to run out: if the point of decision inevitably turns on a matter of what will make the system run consistently with the power structure of that moment, a very potent formalism seems to be at work. Indeed, it is in the very articulation of the apolitical stance – that stance favored in the name of reason and stability – which lays a very particular politics. The upshot is, despite admirable attempts at the contrary, the fact that apolitical attitudes are simply unavailable. As Carl Schmidt argued in the last line of his *Concept of the Political*, liberalism attempts the very same maneuver that I have attributed to the eclectic in the banishing of politics from juridical discourse. With reference to the inevitable distinction between members of a political community and non-members, liberalism hopes to confine the political when it separates the economic and the social from the state: “But this

allegedly nonpolitical and even apparently anti-political system serves existing or emerging friend-and-enemy groupings and cannot escape the logic of the political.”²⁰²

With such a dire view of the eclectic, is it the case that experimental pragmatism makes good on the pragmatist promise where others have failed? In this article, I have made the argument that where the eclectics observe the philosophy/politics distinction, experimentalists are eager to take Dewey and Unger where few pragmatists have gone before. That is, they seek to elaborate a pragmatist point of decision that makes good on the means/ends and fact/value dualisms by making destabilization, transformation, and experimentalism the key criteria. With this set of tools, it seems in some ways unfair to criticize experimental pragmatism as a mode of reasoning on the basis of particular projects being carried out in its name. After all, such projects are only *experiments*.

Is it possible, then, to criticize experimental pragmatism from the point of view of the normative consequentialist – a form of decision-making totally anathema to the pragmatist? To do so would be to imagine the decision-making procedure such that the right act for the experimental judge will be the act with the most “experimental” consequences.²⁰³ But surely this cannot be right, for if it was, such a judge would feel compelled to revolt *in toto* against the legal system. That would, after all, be quite destabilizing. And yet, if such a conclusion is *out of bounds* for the experimentalist judge, then a problem begins to creep in. If particular judicial acts would be so experimental that they would destroy the legal system, surely the experimental judge will come to a point when he says “Ok, enough’s enough. This is just crazy.” But when is that? It’s hard to see an answer here, but part of the problem, the experimentalist might respond, “is that this formal way of looking at the decision is that it is assuming a foundation from which the experimentation will inevitably draw, and if anything, the pragmatist does not do that. To worry about when experimentalism might take us too far is a worry rooted in a rejection of the experimental idea that the ends are actually in the means, and if we end up with a system we don’t like, we can always keep re-making it. Indeed, we must always remake it, since it is impossible to ever know a great and final truth.” This normative criticism of the experimental pragmatist, therefore, may end up being little more than a criticism of pragmatist philosophy in general, and if it is, it is surely an issue beyond the scope of this article.

D. To Be Continued...

A fourth aim of the article has been, in arguing for a new taxonomy for what might be the unconscious *lingua franca* of judicial discourse, to provide space for applications of the map to actual cases. Of course, this article has not taken as a chief purpose to make the case that legal pragmatism is, in fact, a hegemonic, or even prevalent, form of legal reasoning. Rather, the focus has been on those sensibilities and moods that have expressed particular attachments with

²⁰² Schmidt, *supra* note, at 79. Max Weber sounds a similar theme: “When we say that a question is ‘political,’ or say that a decision has been made on ‘political’ grounds, we always mean the same thing. This is that the interests involved in the distribution or preservation of power, or a shift in power, play a decisive role in resolving that question, or in influencing that decision or defining the sphere of activity of the official concerned.” MAX WEBER, THE VOCATION LECTURES 33 (2004).

²⁰³ “It has also been objected that the creative act itself is being declared the highest trading value. A pragmatist legal theory would indeed be too narrowly cast as long as it took as its theme only the production of new solutions to problems and not also the new criteria for evaluating them.” Siegfried Schieder, *Pragmatism as a Path Towards a Discursive and Open Theory of International Law*, 11 EJIL 663, 689 (2000).

various elements of the pragmatist style. Nonetheless, once the work has begun in clarifying and assembling those sensibilities, it is natural to expect further research into whether and when particular judges really are performing as eclectics, economists, and experimentalists.

As a purposefully random example of such further work, consider the Supreme Court decision in *Empagran v. F. Hoffman LaRoche*,²⁰⁴ handed down in its 2004 term. The question in *Empagran* was whether foreign vitamins distributors who had suffered financial losses on foreign soil due to a worldwide conspiracy among vitamins manufacturers, largely motivated by foreign defendants, could nonetheless have their claims adjudicated in American courts. In its approach to the case, the Court had before it a set of conflicting circuit court interpretations of the Foreign Trade Antitrust Improvements Act's (FTAIA),²⁰⁵ a host of conflicting Supreme Court precedents on the rules of extraterritorial jurisdiction, a bevy of amicus curia briefs from foreign governments, and the background antitrust violations that formed, in the words of former Assistant Attorney-General Joel Klein, "the most pervasive and harmful criminal conspiracy ever uncovered."²⁰⁶ As a way of further explicating the contours of an eclectic pragmatist sensibility, it could be asked whether the Court, in its ultimate finding against the plaintiffs, engaged in the sort of consequentialist, accommodating, and apolitical style common to that sensibility. Or, in the alternative, whether that decision performed better in the economic or experimentalist registers. Further, it could be asked whether *Empagran*, in any of these possible variations, could even still have been decided in a way better understood as a reflection of a philosophically charged pragmatist point of decision, akin to a Deweyan or Ungerian moral ambition. Finally, such a study could ask whether pragmatism had anything to do with the decision at all. Hopefully, one would imagine that such research could generate more sophisticated thinking on whether pragmatic decision-making is actually something useful, or instead, fit for the fire.

E. Against the Cold and the Clammy

The philosopher Soren Kierkegaard, one of the grandfathers of what later became known as Existentialism, once wrote that there is a great paradox at the heart of human existence. This paradox consisted of a double understanding, the results of which were inescapably "absurd."²⁰⁷ On the one hand, Kierkegaard explained, human beings live in a world that constantly demands the elaboration and purification of Reason – that tool which distinguishes us from the rest of the animal kingdom. At the same time, however, that same world to which humans belong chides us at every step for having been seduced by our beliefs in Reason's dominion. This double understanding, and the paradox that lies within it, thus pushes the human mind to reason its way through the world while cognizant of the fact that reason is itself incapable of making sense of our predicament. In much of Kierkegaard's work he dealt with the question of faith that ultimately attends the "absurd" – the question of how one decides in the face of absurdity. One possible strategy, with which Kierkegaard had little patience, was something like pragmatism.

²⁰⁴ 542 U.S. 155, 124 S.Ct. 2359 (2004).

²⁰⁵ 15 USC § 6a (1982).

²⁰⁶ Barry James, "Monopolists Cited as Key Threat to Trade," International Herald Tribune (July 6, 1999).

²⁰⁷ SOREN KIERKEGAARD, FEAR AND TREMBLING/REPETITION 46 (1983).

To judge decisions on the basis of their consequences, from the happily post-hoc position, was to misunderstand the gripping fact of decision we know when we come face to face with the absurd. Kierkegaard writes:

If occasionally there is any response at all these days with regard to the paradox, it is likely to be: One judges it by the result. Aware that he is a paradox who cannot be understood, a hero who has become an offense to his age will shout confidently to his contemporaries: The result will prove that I was justified. This cry is rarely heard in our age, inasmuch as it does not produce heroes – this is its defect – and it likewise has the advantage that it produces few caricatures. When in our age we hear these words: It will be judged by the result- then we know with whom we have the honor of speaking...Their life task is to judge the great men, judge them according to the result...Anyone with even a smattering of nobility never becomes an utterly cold and clammy worm, and when he approaches greatness, he is never devoid of the thought that since the creation of the world it has been truly customary for the result to come last and that if one is truly going to learn something from greatness one must be particularly aware of the beginning. If the one who is to act wants to judge himself by the result, he will never begin. Although the result may give joy to the entire world, it cannot help the hero, for he would not know the result until the whole thing was over, and he would not become a hero by that but by making a beginning.²⁰⁸

It may seem strange to end an article which has largely had its purpose to map the state of legal pragmatism with an existential critique of consequentialist decision-making. And yet, it is interesting to note that the rarity of the pragmatist move in Kierkegaard's time has dramatically transformed in the present day, where the eclecticism of everyday pragmatism has, at least in the United States, become the sign of the times. For Kierkegaard, one might assume, this fact might suggest that we live in the age of the cold and the clammy – the age in which we avoid the absurd by way of having our cake and eating it too; by having our formalism masquerade as the Knight of Pragmatism. Perhaps this is good, possibly not. Whatever the case may be, the fear and trembling that Kierkegaard associated with a moment of decision in the face of the absurd is not really a long way off from a philosophical pragmatism pregnant with the seeds of an explosive experimentalism. Eclectic pragmatism misunderstands this fear and excitement, and in so doing, has misunderstood its history, and most importantly, what it might have become.

²⁰⁸ *Id.* at 63.