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Citation: 100 Yale L.J. 409 1990-1991



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# The Pursuit of Pragmatism

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Half a decade ago, pragmatist legal scholars were wont to regard themselves as voices crying in the wilderness. Robin West lamented the “demise of pragmatic liberalism,”<sup>1</sup> which had been displaced by a more theoretical version of liberalism founded on the ideal of neutrality. Anthony Kronman, writing in support of a “prudentialism” that partook of many of the characteristics associated with pragmatism,<sup>2</sup> was similarly pessimistic about the “rationalist ethos of our times.”<sup>3</sup>

At about the same time, Ronald Dworkin was castigating legal pragmatism, but he evidently believed that the object of his criticism was virtually defunct already. “Many readers must have been shocked,” Dworkin speculated, by the very description of legal pragmatism; and such readers would “be surprised that anyone would propose pragmatism as an eligible interpretation of our present [legal] practice.”<sup>4</sup> Lest he be accused of brutalizing a straw man, Dworkin saw fit to attempt a modest rehabilitation of legal pragmatism<sup>5</sup> before he proceeded to demolish it.

But history, as we know, can take sudden and surprising turns. Five years after West and Kronman offered their dismal diagnoses, leading legal thinkers are celebrating a “Renaissance of Pragmatism in American Legal Thought.”<sup>6</sup> Numerous legal scholars today are pleased to claim the title of pragmatist.<sup>7</sup> If

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1. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 736 (1985).

2. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985). Kronman asserted that prudentialism is “pragmatic and contextual.” *Id.* at 1571.

3. *Id.*

4. R. DWORKIN, *LAW'S EMPIRE* 151-52 (1986).

5. *Id.* at 148-50.

6. *Symposium: The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

7. In addition to the West and Kronman articles and the Symposium articles noted above, a short list of representative writings of legal scholars offered under the banner of “pragmatism” would include Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Hantzis, *Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U.L. REV. 541 (1988); Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

to these are added scholars who see law as a kind of "practical reason"<sup>8</sup> and feminist scholars whose views overlap with pragmatism,<sup>9</sup> the pragmatist camp expands significantly. Indeed, even scholars who label themselves as critics of legal pragmatism, such as Dworkin, may in reality be unconfessed pragmatists.<sup>10</sup> Thus it seems only a slight exaggeration to suggest that a movement which five years ago included almost no one today appears to embrace virtually everyone.

This surprising development raises difficult questions. What explains the rush to legal pragmatism? And is the movement likely to produce beneficial results for law and legal thinking? Those issues in turn provoke an even more preliminary question: What exactly *is* legal pragmatism? This preliminary question is particularly troublesome because there is an emerging suspicion that if we look too closely for legal pragmatism, we might not find anything—or at least not anything worth discussing.<sup>11</sup> Thus, Thomas Grey writes that "much pragmatist theory . . . [is] essentially banal. At its most abstract level it concludes in truisms . . . ."<sup>12</sup> In a similar vein, Richard Posner begins a recent essay on legal pragmatism with a quotation from T.S. Eliot: "'The great weakness of Pragmatism is that it ends up by being of no use to anybody.'"<sup>13</sup> These suspicions are all the more troublesome because they come from thoughtful scholars who proclaim themselves, with evident pride, to *be* pragmatists; indeed, Grey goes so far as to say that legal pragmatism "is not just one theory among others, but (for now, as far as we can see) the right theory, the best theory."<sup>14</sup>

In dealing with such questions, the tasks of definition, explanation, and evaluation cannot be nicely separated. It is difficult to discuss why legal pragmatism has suddenly become appealing, or whether it has much of value

8. See, e.g., Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323 (1990) (associating "practical reason" with pragmatism). Daniel Farber asserts that "pragmatism," "intuitionism," "prudence," "institutionalism," and "practical reason" are roughly synonymous terms. Farber, *supra* note 7, at 1334-35.

9. See Hantzis, *supra* note 7, at 543 (observing significant overlap between feminist jurisprudence and legal pragmatism); Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990) (discussing relation between pragmatism and feminist jurisprudence).

10. See Radin, *supra* note 9, at 1722 (asserting that "it is clear that [Dworkin] is a pragmatist of sorts"). For my own analysis of Dworkin's pragmatism, see *infra* Section LB.

11. See Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990) (suggesting that legal pragmatism is "banal" and that despite political differences there are no "interesting philosophical differences" dividing legal scholars as seemingly diverse as Roberto Unger, Ronald Dworkin, and Richard Posner) (emphasis in original); see also Schlag, *Contradiction and Denial*, 87 MICH. L. REV. 1216, 1221 n.14 (1989) (noting "conceptual vacancy of the pragmatic approach" and suggesting that current legal pragmatism is "just a glossy public relations cover for the promotion of the highly stylized rhetoric of the lawyer's brief"). Schlag's criticism is directed not against "'true' pragmatism" but rather against "the practice of pragmatism within the legal community." Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1223 & n.110 (1989) (emphasis in original).

12. Grey, *supra* note 7, at 814.

13. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1653 (1990).

14. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990).

to offer, unless one has some notion of what legal pragmatism *is*. But confronted with the variety of ideas and themes associated with pragmatism,<sup>15</sup> one is almost forced to create order by picking those ideas and themes that are valuable; for that reason, it is difficult to say what pragmatism *is* without considering what pragmatism's value might be. The present Article thus attempts to consider descriptive issues in conjunction with evaluative issues. It returns at the end to the question of why legal pragmatism has achieved such sudden popularity.

Sections I and II examine, respectively, two common understandings of legal pragmatism: pragmatism as forward-looking instrumentalism, and pragmatism as a hostility to abstract theory, formalism, and foundationalism. Each section begins by focusing upon a prominent scholar who either criticizes or supports that version of legal pragmatism. The critic in Section I is Ronald Dworkin, and the proponent in Section II is Richard Posner. Paradoxically, it turns out that Dworkin is best interpreted as a disguised proponent of legal pragmatism (at least as he understands it), while Posner routinely deviates from the prescriptions of pragmatism (at least as he understands it). Nor are these turn-about aberrational; each section argues that the problems apparent in Dworkin's and Posner's positions are problems for legal scholars in general.

Section III suggests a different understanding of, and function for, legal pragmatism. Legal pragmatism, I argue, is not in the end a *theory* about law, or a set of propositions about law or legal theory. Nor is it merely a temperament or attitude toward law or legal theory, although it may well reflect particular temperaments or attitudes. Legal pragmatism is best understood as a kind of *exhortation* about theorizing; its function is not to say things that lawyers and judges do not know, but rather to remind lawyers and judges of what they already believe but often fail to practice. The pragmatist is a kind of preacher. This characterization is not meant to disparage. Preachers serve an essential function, and the recent rush to pragmatism suggests that many scholars are finding the pragmatist's sermon timely and appropriate. Whether they are correct in their assessment, however, remains an open question that the Article's conclusion addresses briefly.

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15. As Margaret Radin notes, there is not a single unitary pragmatism but rather "a number of pragmatisms." Radin, *supra* note 9, at 1705; see also Posner, *supra* note 13, at 1653 (pragmatism is "umbrella term for diverse tendencies").

## I. PRAGMATISM AND THE USES OF THE PAST

Legal pragmatism is frequently depicted as an instrumental, forward-looking approach to law.<sup>16</sup> This is the aspect of pragmatism that Ronald Dworkin assails.

A. *Dworkin's Criticism*

Dworkin's criticism of legal pragmatism can be presented in the form of two claims, one descriptive and the other normative. His descriptive claim is that pragmatism as a theory of law holds that legal officials—in particular, judges—“do and should make whatever decisions seem to them best for the community's future, *not counting any form of consistency with the past as valuable for its own sake.*”<sup>17</sup> Dworkin's normative claim is that judges *should* maintain continuity with the past, at least to some extent.<sup>18</sup> Taken together, the descriptive and normative claims can form the premises of a loose syllogism. If pragmatism values only future good but not continuity with the past, and if continuity with the past *is* valuable, then pragmatism offers an inadequate or undesirable theory of law.

The battle lines would be clearly drawn if the proponents of legal pragmatism would respond to this criticism by accepting Dworkin's description and demurring to his normative claim. In fact, they appear to do just the opposite. For example, in defending legal pragmatism against Dworkin's attack, Daniel Farber agrees with Dworkin that continuity with the past is important in the law. Dworkin's error, according to Farber, lies not in his normative position but rather in his belief that pragmatists deny the value of continuity.<sup>19</sup> Other pragmatists seem to agree with Farber. Robin West argues that the liberal pragmatist “shares the conservative's respect for history.”<sup>20</sup> In Thomas Grey's thoughtful discussion, an awareness that thinking is inevitably historically situated is not only consistent with pragmatism, but indeed is an essential defining characteristic.<sup>21</sup>

At this point, it is tempting to conclude that there is no disagreement in substance, and that only Dworkin's mistaken conception of pragmatism distinguishes him from the pragmatists.<sup>22</sup> But this diagnosis gets things exactly

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16. See, e.g., Grey, *supra* note 7, at 802-04 (describing instrumental theme in pragmatism). For a discussion of the relation between “pragmatism” and “instrumentalism” in legal theory, see R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 20-22 (1982).

17. R. DWORKIN, *supra* note 4, at 95 (emphasis added). For a similar understanding, see Lipkin, *Conventionalism, Pragmatism, and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645, 654 (1988).

18. Dworkin's arguments for this claim are considered in more detail in *infra* Section I.B.

19. Farber, *supra* note 7, at 1344-46.

20. West, *supra* note 1, at 680.

21. Grey, *supra* note 7, at 798-800.

22. In this vein, Margaret Radin argues that Dworkin is a pragmatist (albeit a complacent, objectionable sort of pragmatist), and that he avoids the label only by “gerrymander[ing] the word ‘pragmatism’ to mean

backwards. In reality, Dworkin's description is plausible as far as it goes; it is Dworkin's normative claim that goes astray. Indeed, one has reason to doubt that Dworkin himself can actually mean what his normative claim seems to assert. Thus, if Dworkin is really an unconfessed pragmatist—and I think he is by *his* own definition—that is not because his description of pragmatism does not fit, but rather because Dworkin is best interpreted as accepting the view that he purports to criticize.

Start with the descriptive claim: Pragmatism is a theory of law that asserts that “judges do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake.”<sup>23</sup> The key words here are “valuable for its own sake.” Pragmatists know that judges are in part products of their history; they cannot, even if they would like, wholly escape the past.<sup>24</sup> Pragmatists also acknowledge that judges may find the past to be useful, as a source of guidance, perhaps, or as a source of rhetorical material for rationalizing present decisions. And Dworkin knows full well that pragmatists respect the past for its present value; indeed, he discusses at some length the ways in which a pragmatist judge might make use of the past, or might talk as if she were bound by the past.<sup>25</sup>

But this kind of pragmatic use of the past does not defeat Dworkin's descriptive claim. The pragmatist judge maintains continuity with the past for two reasons: first, because she cannot help it and, second, because she finds the past instrumentally useful in promoting future goods. Neither of these reasons leads the judge to respect the past as “valuable for its own sake.”<sup>26</sup> In order to show that Dworkin's description does not fit, the pragmatist would have to demonstrate that he favors maintaining continuity with the past even when such continuity is avoidable and serves no present or future interests.

It seems unlikely that the pragmatist can make such a showing, because in fact pragmatism does not value the past “for its own sake.” An observation by Holmes, whom current legal pragmatists commonly regard as a kind of patron

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crass instrumentalism.” Radin, *supra* note 9, at 1722. I agree with Radin's conclusion, but for different reasons; Dworkin's definition of pragmatism is at least a plausible one, and he is best interpreted as a pragmatist by *his own definition* of pragmatism. See *infra* Section I.B.

23. R. DWORKIN, *supra* note 4, at 95.

24. See *supra* notes 19-21 and accompanying text.

25. R. DWORKIN, *supra* note 4, at 147-58.

26. Since the following discussion puts considerable weight on the idea expressed in these words, it is worth noting that the phrase “valuable for its own sake” is not merely an inadvertent or unfortunate turn of phrase, but rather is essential to Dworkin's argument. Because Dworkin agrees that pragmatists would use the past for instrumental purposes, it is only their refusal to regard the past as “valuable for its own sake” that distinguishes them from the nonpragmatic position that Dworkin advocates. Of course, the particular words are not critical; sometimes Dworkin uses other words to express essentially the same idea. See *id.* at 147 (pragmatism denies that people have legal rights “just in virtue of” past decisions); *id.* at 151 (pragmatism “denies that past political decisions *in themselves* provide any justification for either using or withholding the state's coercive power”) (emphasis added).

saint for the movement,<sup>27</sup> is revealing: “[C]ontinuity with the past is only a necessity and not a duty.”<sup>28</sup> As Holmes’ statement suggests, the pragmatist recognizes that continuity with the past is necessary, but he does not regard such continuity as any kind of obligation, or as something “valuable for its own sake.” Indeed, insofar as he *can* escape the past (and can benefit from the escape), the pragmatist is ready and eager to do so.<sup>29</sup> Dworkin’s description seems right on point.

This conclusion suggests that pragmatists like Farber have selected the wrong strategy. Rather than quarreling with Dworkin’s descriptive claim, they should challenge him to support his normative claim. Why, after all, *should* anyone respect the past except for instrumental purposes? The question requires a closer examination of Dworkin’s position.

### B. *Dworkin the Pragmatist?*

Dworkin develops his argument against legal pragmatism in his examination of what he views as three competing theories or general interpretations of law, which he calls conventionalism, pragmatism, and law as integrity. Of these three, he argues, pragmatism stands alone in denying that judicial decisions have any obligation to maintain continuity with the past.<sup>30</sup> It might seem, therefore, that the pragmatist judge or scholar would be easy to spot; but the matter is not so simple. As noted, Dworkin recognizes that pragmatists may make instrumental use of the past in promoting future good. In order to promote predictability and consistency in the law, for example, they would likely tend to follow precedent and to respect legislation.<sup>31</sup> The pragmatist might also recognize and enforce “as-if rights.”<sup>32</sup> Thus, the pragmatist judge would usually *behave* much like judges committed to the “conventionalist” or “integrity” theories of adjudication.

Indeed, the pragmatist judge or scholar might even *talk* like his other-minded counterparts. Dworkin describes a “sophisticated pragmatist” who, in pursuing his objective of promoting future good, finds it useful to “disguise”

27. See Grey, *supra* note 7; Hantzis, *supra* note 7. Grey describes Holmes as “the first and most important legal pragmatist.” Grey, *supra* note 14, at 1571-72. But see Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. L.J. 427 (1990) (arguing that Holmes’ legal philosophy was positivist but not pragmatist).

28. O.W. HOLMES, COLLECTED LEGAL PAPERS 211 (1920). The remarks that follow clarify the point: As soon as a legislature is able to imagine abolishing the requirement of a consideration for a simple contract, it is at perfect liberty to abolish it, if it thinks it wise to do so, without the slightest regard to continuity with the past. That continuity simply limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think.

*Id.*

29. Cf. West, *supra* note 1, at 680 (arguing that “[t]he pragmatic liberal is critical, not accepting, of historical traditions and institutions”).

30. R. DWORKIN, *supra* note 4, at 95.

31. *Id.* at 154-55.

32. *Id.* at 154.

his pragmatist philosophy and to “pretend” to regard statutes and judicial precedents as legally binding. Called upon to decide a legal controversy, this sophisticated pragmatist would “offer his decision as a surprising ‘interpretation’ of the statute or precedent when it is really nothing of the kind.” He might do this if he believed that “this ‘noble lie’ will help him serve [the community’s] true interests better in the long run.” Dworkin has empathy for this pragmatist-in-disguise, observing that the sophisticated pragmatist acts “for reasons he would believe fully respectable . . . .” Moreover, the pragmatist is as honest as he can be; he would “make his conception [of law] as openly pragmatic as he dares, disguising only those elements . . . that the community is not quite ready to accept.”<sup>33</sup>

At this point, a wicked suspicion arises: how do we know that Dworkin himself is not the “sophisticated pragmatist” that he describes with such apparent insight? Dworkin is renowned, after all, for getting “good” results to legal questions by advancing “surprising ‘interpretation[s]’” of statutes or precedents.<sup>34</sup> Of course, Dworkin protests that he, unlike the pragmatist, “takes rights seriously”; he does not regard rights as mere “as if” constructions for promoting the public good. Then again the sophisticated pragmatist, as Dworkin describes him, would offer the same protestation.

Moreover, Dworkin is hardly averse to “as if” thinking; indeed, such thinking permeates his own law as integrity theory. Law, he argues, should be regarded “as if” it were the work of a single author and “as if” it reflected a single coherent vision of justice.<sup>35</sup> The political community should be regarded “as if” it were a person.<sup>36</sup> In view of Dworkin’s pervasive use of simile in his own analysis, it is difficult to take too seriously his concern about the pragmatist’s “as if” view of legal rights. Indeed, insofar as the pragmatist judge actually enforces the “as if” rights, it is difficult to discern the difference between an “as if” right and a “real” right. In short, if the sophisticated pragmatist were to write a book about legal theory, making his position “as openly pragmatic as he dares, disguising only those elements . . . that the community is not quite ready to accept,” the book might look very much like *Law’s Empire*.

So far, however, the suggestion that Dworkin’s book might be a study in veiled pragmatism is only a suspicion, not a conclusion. How might we go

33. *Id.* at 154-55.

34. Daniel Farber lists Dworkin as a leading example of “brilliant” constitutional theorists, by which he means theorists who, while purporting to do interpretation, generate insights “that would not occur to most people.” Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 924-25 (1986). For example, Dworkin endorses the Supreme Court’s decision upholding an affirmative action program in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and he purports to endorse also the majority opinion in the case. R. DWORGIN, *A MATTER OF PRINCIPLE* 316-31 (1985). In doing so, however, Dworkin rejects the opinion’s “explicit” argument, which is “fallacious” and indeed commits the same error which Dworkin exposes in Justice Rehnquist’s dissent, and instead endorses a different argument—one that Dworkin attributes to the majority but that he himself must “reconstruct[] from independent remarks” in order to make the majority’s position “more explicit.” *Id.* at 326-27.

35. R. DWORGIN, *supra* note 4, at 219, 225.

36. *See infra* notes 51-52 and accompanying text.



about confirming or discrediting that suspicion? One approach would look for clues about Dworkin's personal or subjective intentions. But that approach is unpromising. Dworkin himself has persuasively described the difficulties of capturing, or even characterizing, the author's intent behind a text.<sup>37</sup> Moreover, Dworkin suggests that authorial intent would not necessarily be dispositive of textual meaning even if that intent could be ascertained.<sup>38</sup> Indeed, the finitude of an author's understanding and the possibility of self-deception<sup>39</sup> suggest that an author might have only an inadequate understanding of his own work.

Instead of focusing on Dworkin's subjective intent, therefore, we should be charitable (as Dworkin himself insists) and seek the interpretation that makes the work "the best it can be."<sup>40</sup> The critical question, then, is whether Dworkin offers convincing justifications for the proposition that legal pragmatism rejects, namely that the law should regard continuity with the past as "valuable for its own sake." If he does, then we would not be justified in interpreting his book as disguised pragmatism, because that would not make the book the best it can be.

Dworkin argues first that pragmatism does not adequately describe our existing legal practice with regard to statutes and judicial precedents. He concedes that a pragmatist judge would purport to follow statutes or judicial precedents in order to protect expectations and to promote predictability in the law. But the judge would have no reason, Dworkin argues, to pretend to derive her decisions from statutes or precedents when these are not clear, and thus have not given rise to expectations. In fact, however, our judges *do* try to get answers even from unclear statutes and precedents. Thus, Dworkin concludes that pragmatism does not "fit" current legal practice.<sup>41</sup>

But this ostensible lack of "fit" seems negligible at best. To mention just one obvious rejoinder: in a political culture suspicious of judicial lawmaking, pragmatist judges might sensibly try to achieve greater respect for their decisions by disguising those decisions as interpretations of past enactments, even when those enactments are unclear. It is interesting to compare Dworkin's argument here with his response to a much more serious lack of "fit" between existing legal practice and his own law as integrity theory. Dworkin's theory asserts that judges should treat the law as expressing "a single and comprehensive vision of justice,"<sup>42</sup> or a "single, coherent set of principles."<sup>43</sup> Do our judges in fact think of law in this way? It seems not; at least, Dworkin worries

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37. See, e.g., R. DWORKIN, *supra* note 4, at 53-62.

38. *Id.*

39. Cf. *id.* at 258 ("There is, in this counsel, much room for deception, including self-deception.").

40. Dworkin holds that interpretation should always attempt to make its object "the best it can be." *Id.* at 62, 77, 90, 255.

41. See *id.* at 158-60. But cf. Grey, *supra* note 14, at 1590 (arguing that pragmatism is "implicit working theory of most good lawyers"); Posner, *supra* note 13, at 1666 (asserting that "most American judges have been practicing pragmatists").

42. R. DWORKIN, *supra* note 4, at 134.

43. *Id.* at 166.

that the entrenched practice of dividing law into compartments such as contracts, torts, and property, with each compartment governed by distinctive doctrines and principles, presents a problem of “fit” for a theory which suggests that law should be regarded as expressing a *single* set of principles. But he argues that such compartmentalization is permissible because “[t]he boundaries between departments usually match popular opinion.”<sup>44</sup> Thus, compartmentalization “promotes a deeper aim of law as integrity” by “allow[ing] ordinary people as well as hard-pressed judges to interpret law within practical boundaries that seem natural and intuitive.”<sup>45</sup>

But this argument is beside the point. The argument may justify *compartmentalization*, but it does not justify the law as integrity theory; indeed, the justification works by showing that there are good reasons not to treat law as reflecting a *single* set of principles. Moreover, justified or not, our pervasive compartmentalization shows that our practice does not in fact regard law as expressing a *single* coherent set of principles. Dworkin’s argument does nothing to rescue the law as integrity theory from the charge that the theory does not fit existing legal practice. Thus, the problems of “fit” confronting a pragmatist theory of law seem negligible in contrast to those that afflict Dworkin’s “integrity” theory.

A second rationale that attempts to support a deeper obligation to the past than that recognized by pragmatism enlists the aid of Dworkin’s well-known “chain novel” analogy. The analogy likens the judge to a writer involved in a multimember project in which one author writes the first chapter of a novel, then passes it on to another author who will write the second chapter, and so on. Although each successive author must write her chapter as well as she can, she must also be respectful of what previous authors have done, striving to maintain continuity in plot and characterization.<sup>46</sup>

The chain novel analogy provides an intriguing illustration of what interpretation means in Dworkin’s theory. However, if the analogy is intended as an argument that judges should count continuity with the past as “valuable for its own sake,” then the argument fails for at least two reasons. In the first place, the relevance of the “chain novel” analogy to law is dubious; and Dworkin could establish its relevance only by first proving the point for which the analogy is offered. In essence, Dworkin has simply selected an activity (writing novels) in which an overarching unity is assumed to be an accepted critical criterion, and then transferred the same evaluative criterion to a different activity (law) in which the desirability of overarching unity is at issue. But this move merely begs the question: *is* this kind of unity desirable in law? If it is, then law is like novel writing in this respect. But that is precisely what Dworkin must show, and his position is not aided at all by proposing an

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44. *Id.* at 252.

45. *Id.*

46. *Id.* at 228-32.

analogy that will become apposite, if ever, only after he has already proven his case.

More fundamentally, Dworkin's analogy does not succeed in showing even that authors in a chain novel have any obligation to respect the past "for its own sake." The chain novelist should maintain continuity because she is writing for *future* readers who will read the book *as a whole* and will be disappointed if the book is incoherent. Continuity with the past is desirable only to promote a future good; and if continuity ceases to serve that future good then the value of continuity will likewise disappear. Suppose, for example, that mature readers actually prefer a book with frequent ruptures of continuity; they find it more interesting, or challenging, or realistic. The chain novelist would then be ill-advised to strive for overall continuity; readers will condemn such a book as artificial or boring. Or suppose that the author could be assured that readers of the other authors' chapters will not read *her* chapter, and that readers of *her* chapter will not read other chapters. It would then be senseless to strive for consistency of plot and characterization if such consistency means that the present chapter—the only chapter her readers will ever see—will be less interesting. These supposed situations may seem far-fetched;<sup>47</sup> but that observation merely shows that in novel writing, the future good probably entails some kind of overall literary coherence; it does not show that continuity with the past is obligatory in any different sense, or "valuable for its own sake."

Dworkin grounds his more extensive argument against pragmatism and in favor of law as integrity in his views about community. He asserts that only by regarding law as the expression of a single, coherent set of principles can we achieve a "community of principle" whose law will have legitimacy and moral authority.<sup>48</sup> Conversely, if one views law as serving conflicting principles and interests—and thus as incorporating compromises, accommodations of competing moral visions, and "checkerboard" solutions—then the "community of principle" will not be achieved, and law's authority will suffer.<sup>49</sup> This argument is controversial, of course; but the immediately pertinent point is that if Dworkin's argument is sound, there is no obvious reason why a legal pragmatist (in Dworkin's sense of the term) could not embrace it and still maintain her pragmatic belief that we should respect the past only insofar as it is useful for promoting future good. The reason we should try to treat law as the expression of a single, coherent set of principles, the pragmatist would argue, is that by doing so we promote the best kind of community. Thus, rather than standing *in opposition to* pragmatism, law as integrity could be subsumed *within* pragmatism (in much the same way that Dworkin shows that conventionalism can be in large measure subsumed within pragmatism<sup>50</sup>).

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47. Although, as some modern literature demonstrates, perhaps not as far-fetched as one might suppose.

48. R. DWORKIN, *supra* note 4, at 188, 211-16.

49. *Id.* at 178-79, 212-13.

50. *Id.* at 147-50.

This outcome is not affected by Dworkin's elaborate "personification" argument, which contends that we can—and often do—treat a group or an entire community as if it were a "person," and hence capable of holding principles independent of those held by its members.<sup>51</sup> In the first place, Dworkin makes it clear that he is not saying the community is a person, but only that we can treat a group or community as if it were a person.<sup>52</sup> This contention seems plausible enough; we can, at least for some purposes, think about a group as if it were a person. But the critical question remains: should we? Personifying a community might serve some valuable purpose,<sup>53</sup> but that is just the point: a proponent of personification needs to explain what purpose would be served by adopting Dworkin's "as if" view of the political community. Hence, far from defeating pragmatism, the possibility of personification requires pragmatic justification.

Moreover, even if a convincing nonpragmatic justification for personification could be offered (or, even if a political community actually were a "person" in some ghostly sense), the controversy about pragmatism would remain as viable as ever.<sup>54</sup> After all, a "person" can adopt a pragmatic philosophy just as easily as a legal community can. I can decide, for example, to follow my own past decisions and practices only insofar as this course serves to promote my present and future good. Indeed, it would seem irrational for an individual to choose to adhere to past practices when striking a new course would be more beneficial. Thus, analogizing a community to a person offers no reason for treating the past as "valuable for its own sake," but rather serves only to underscore the unattractiveness of that position.

In sum, the essential difference between legal pragmatism and law as integrity, as Dworkin presents those positions, is that pragmatism, while respecting the past for instrumental purposes, does not count continuity with the past as "valuable for its own sake." But Dworkin provides no persuasive reasons that show that the law *should* regard the past as "valuable for its own sake." The failure of his arguments on this issue makes it tempting to interpret his book as an exercise in veiled pragmatism. Needing to conceal its pragmatism from a community that is "not quite ready to accept" it, the book's analysis purports to assail pragmatism—but with arguments that, upon close

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51. *Id.* at 167-75.

52. *Id.* at 168 (suggesting that we should think "as if a political community really were some special kind of entity," and disavowing the notion that personification implies "some spooky, all-embracing mind that is more real than flesh-and-blood people") (emphasis added).

53. On the other hand, such personification might represent an unfortunate confusion of thought. Cf. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935) (ridiculing courts that try to determine whether state has jurisdiction over corporation by "assum[ing] that it travels about from State to State as mortal men travel"). Or group personification might have pernicious consequences, as when one member of a national or ethnic community is blamed or punished for actions of other members of that community.

54. Dworkin's argument appears to assert that the possibility of personification is a necessary condition for law as integrity, not that personification necessarily entails law as integrity. See R. DWORKIN, *supra* note 4, at 187.

inspection, do not support the book's stated conclusion. From this perspective, Dworkin is not just making bad arguments; rather, he is dropping hints that will lead reflective readers to the correct interpretation, albeit one that he must for the present purport to disavow. Whether this reflects Dworkin's subjective intent remains, of course, uncertain.<sup>55</sup> Whatever Dworkin may have had in mind, an interpretation presenting him as pragmatist is persuasive because that interpretation makes Dworkin the best he can be.

### C. *Irresistible Pragmatism?*

The failure of Dworkin's arguments against pragmatism plainly do not reflect any lack of dialectical prowess on his part. It seems, rather, that Dworkin's criticism of pragmatism undertakes a labor for which even herculean powers are inadequate. If pragmatism is understood as asserting that we—or judges—should do what will produce the most good in the future, *using* the past but not counting it as valuable for its own sake, then the case for pragmatism seems almost overwhelming.

Let us begin with two propositions that, if they do not quite qualify for the lofty status of "self-evident truths," at least come awfully close. First, a person ought to choose and act so as to produce more rather than less good. Second, any given choice or action can affect what happens in the future but cannot alter what, at the time of the action or decision, has already happened in the past.

Although objectors might find grounds to quarrel with these propositions, most objections can be deflected by clarifying what the propositions assert; and any remaining objections will probably have little appeal anyway. The first proposition, which asserts that a person ought to choose and act so as to promote more rather than less good, is little more than a corollary to what Aquinas called the first principle of practical reasoning: Do good, and avoid evil.<sup>56</sup> If one should do good rather than evil, then it seems to follow that one should do more rather than less good. If someone has a choice between A and B, and if A will produce twice as much good as B, will anyone deny that A is the better choice?

One objection to this reasoning might be that people disagree fiercely over what *is* good. They also disagree about the best ways of pursuing the good. But the first proposition neither denies nor takes sides in such disputes. It does not say, for example, whether goods are irreducibly plural, as in John Finnis' theory,<sup>57</sup> or reducible to a single scale of goodness, as in Bentham's

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55. See *supra* notes 37-39 and accompanying text.

56. T. AQUINAS, *SUMMA THEOLOGICA*, Q.94, A.2, reprinted in *THE POLITICAL IDEAS OF ST. THOMAS AQUINAS* 45 (D. Bigongiari ed. 1953).

57. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 92-94 (1980).

thought.<sup>58</sup> Nor does it say whether the best way to promote good is for individuals to make a fresh calculation in each case, as in act utilitarianism, or for individuals to adopt and follow general rules, as in rule utilitarianism.<sup>59</sup> A critic might conclude that the first proposition does not particularly help resolve specific ethical or legal controversies. But that objection is beside the point, since the first proposition does not purport to resolve such controversies.

A different and more directly challenging objection, arising out of a deontological ethical position, might assert that "goods" or "the good" should not provide the criteria for choice and action; instead, one should act in accordance with principles declaring what is "right." But this deontological contention may plausibly be construed in ways that make it unthreatening to the proposition it purports to challenge. For example, "right," or "rights," may be understood as one species—perhaps an especially important species—of "good."<sup>60</sup> Or principles of "rightness" may be viewed as rules or generalizations designed to further the realization of "goods."<sup>61</sup> By either of these constructions, the deontological contention is fully consistent with the proposition that one should act to produce more rather than less good.

Of course, the deontologist might refuse to accept these reconciling constructions; the "right" is *not*, he might insist, either a kind of good or a way of promoting good.<sup>62</sup> But if the deontologist takes that position, then the deontological position loses much of its appeal. If the "right" is neither a kind of good nor a way of promoting good, then why should anyone feel obliged to respect it? The deontologist can disconnect the right from the good only at the cost of undermining whatever reasons lead us to feel a commitment to the right in the first place.<sup>63</sup>

A third objection might assert that individuals are entitled to pursue their self-interest, even when doing so produces less overall good.<sup>64</sup> One kind of response would simply reject this objection outright: One is never entitled to pursue one's own interests to the detriment of the overall good. A second kind of response would seek to reconcile the objection with the initial proposition. Individuals may have a right to pursue their self-interest, but only because encouraging individuals to pursue their self-interest is generally the best way

58. See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-23 (1948) (reprint of 1823 ed.) (arguing that happiness is fundamental value underlying all human good and moral systems).

59. See Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 18-29 (1955).

60. For an argument to this effect, see Laycock, *The Ultimate Unity of Rights and Utilities*, 64 TEX. L. REV. 407 (1985).

61. See G.E. MOORE, PRINCIPIA ETHICA 146-48 (1954) (1st ed. 1903) (arguing that "'right' does and can mean nothing but 'cause of a good result'").

62. See generally W.D. ROSS, THE RIGHT AND THE GOOD (1930).

63. In a similar vein, J. D. Goldsworthy argues that "any adequate explanation of morality will refer to some good or set of goods which morally virtuous behavior might help an agent achieve." Goldsworthy, *God or Mackie? The Dilemma of Secular Moral Philosophy*, 30 AM. J. JURISPRUDENCE 43, 54 (1985).

64. For a useful discussion of the validity and limits of self-preference, see J. FINNIS, *supra* note 57, at 107-09.

to promote the overall good.<sup>65</sup> Or the proposition and the objection might be reconciled in a different way: one might admit that a “right” to pursue one’s self-interest at the expense of the general good exists, but argue that one nonetheless ought not to do so (just as one ought not to market pornography even though one may have the “right” to do so).

If these responses fail to deflect the objection, I can only try to minimize its force by observing that even if one has a right to pursue one’s self-interest at the expense of the overall good, that right is not likely to pertain to those persons with whom the present discussion is concerned, specifically, judges and public officials acting in their official roles.<sup>66</sup> In the end, therefore, the force of the first proposition seems undeniable: Individuals, and especially public officials, *should* choose and act in ways that produce more rather than less good.

The second proposition, which asserts that our present choices and acts can affect the future but cannot alter what happened in the past, seems even less likely to provoke genuine controversy. Not only the economic wisdom about “sunk costs,” but also popular adages about, for example, spilt milk reflect the proposition; and it is effectively expressed in the logically unassailable maxim, “what’s past is past.” Of course, we can, and often do, *reinterpret* the past. And if one wanted to be clever, one might argue that since the past exists only in our memory and our interpretations of it, by reinterpreting the past we do in fact alter it.<sup>67</sup> Such an argument plays on the paradoxes of tense inherent in talking about *the past* as something that *exists* in the present. But the argument does not really challenge the essential proposition. Millions of people suffered under Hitler, and no amount of reinterpretation on our part can retroactively relieve that suffering. “The Moving Finger writes; and, having writ Moves on.”<sup>68</sup>

In sum, the two propositions have an obvious plausibility and an ability to deflect or withstand apparent objections. And if the two propositions are accepted, the logical conclusion with respect to law is—legal pragmatism. Legal officials should choose and act to promote the greatest good. And since the only

65. See 2 F. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 145 (1976) (arguing that “in fact we generally are doing most good by pursuing gain. . . . [The entrepreneur] is led to benefit more people by aiming for the largest gain than he could if he concentrated on the satisfaction of the needs of known persons.”).

66. Cf. R. DWORKIN, *supra* note 4, at 174 (“We allow officials acting in their official capacity no such area [in which they may act for personal advantage] at all. They must, we say, treat all members of their community as equals, and the individual’s normal latitude for self-preference is called corruption in their case.”).

67. It would seem even more plausible to conclude, however, that if the only past that exists is the one that exists in our memory and interpretations, then the past in the ordinary sense does not “exist” at all. In that case, the second proposition would be intact: If the past does not exist, then clearly our present acts cannot change it.

68. “[N]or all your Piety nor Wit Shall lure it back to cancel half a Line, Nor all your Tears wash out a Word of it.”  
THE RUBAIYAT OF OMAR KHAYYAM 170, verse 71 (E. Fitzgerald trans. 1952).

good that they have any power to affect lies in the future,<sup>69</sup> it follows that they should act to promote the *future* good. Continuity with the past is valuable insofar as it helps to promote good in the future. If it does not serve that purpose, then continuity with the past is not valuable.

This analysis suggests that legal pragmatism, as Dworkin defines it, is, or at least is close to being, a kind of irresistible truth. Of course, that truth leaves a great deal of room for various kinds of disagreements. All the standard disputes about what things are good and how society should realize goods remain intact; pragmatism does nothing to disturb those disputes. Whether judges can better promote the future good by following rules, by employing "situation sense," or by recognizing and enforcing "rights," remains a viable controversy. Diverse views about how to use the past will also continue to flourish; both the Burkean who regards history as a distillation of human wisdom and the cynic who follows Voltaire in believing that history is largely a record of human depravity can claim the label of pragmatist. But pragmatism *does* expose one kind of debate as frivolous. That debate asks whether the law is obligated to count continuity with the past as "valuable for its own sake." It is, in other words, the debate about pragmatism itself.<sup>70</sup>

The present analysis thus suggests that everyone is virtually compelled to be, at some level, a pragmatist. Legal pragmatists like to claim that their movement is antifoundational,<sup>71</sup> but pragmatism itself is in one sense a kind of foundation for political and legal discussion. Or, to paraphrase Dworkin,<sup>72</sup>

69. It should be apparent that I am treating "the present" as an infinitesimally thin line separating past from future. If it seems more natural to treat "the present" as a more extended period, then references to "the future" can be understood to mean "present and future."

70. As this essay was nearing completion, I came across Anthony Kronman's thoughtful article entitled *Precedent and Tradition*, 99 YALE L.J. 1029 (1990). Kronman is even more insistent than Dworkin in pressing the claim that we should respect the past "for its own sake," or "merely because it is the past," or "simply in virtue of its pastness," *id.* at 1036, 1039, 1042, and he is not satisfied even with utilitarian and deontological positions advocating a strong doctrine of precedent because these arguments do not respect the past "for its own sake." *Id.* at 1036-43. Kronman's argument is subtle and provocative, and any peremptory response seems inappropriate. Nonetheless, although much of what Kronman says seems not only correct but even wise, I remain tentatively unconvinced that his argument provides a good reason to respect the past "for its own sake." Kronman builds on Edmund Burke in arguing that the preservation and advance of human culture depend upon continuity with the past. We should therefore respect the past for at least two reasons. First, the past is a source of accumulated wisdom; the culture which it bequeaths to us is therefore valuable. ("A failure to honor the past is . . . foolish or imprudent—the stupidly shortsighted waste of its accumulated wisdom . . ." *Id.* at 1066.) This is an instrumentalist argument, and a pragmatist could accept it without forsaking his pragmatism. Second, and more essentially, Kronman argues that it is culture which makes us distinctively human, and which separates us, as Aristotle said, from the beasts and the gods. Thus, "[w]e must, if we are to be human beings at all, adopt toward the past the custodial attitude Burke recommends." *Id.* But this contention seems less plausible. Would a society that in an instrumental spirit chose to preserve only as much of the past as suited its present purposes cease to be human? Kronman argues that we in fact live in just such a society—that the traditionalism he recommends is not merely unpopular but virtually incomprehensible. *Id.* at 1043-47. Have we all then ceased to be human? And if so, is it clear that "humanness" in the sense Kronman intends is something we want or ought to recover?

71. See *infra* note 73.

72. See R. DWORKIN, *supra* note 4, at 360: "Every conscientious judge, in either of the supposed camps, is an interpretivist in the broadest sense. . . . The great debates of constitutional method are debates within interpretation, not about its relevance."



every conscientious judge and scholar (including Dworkin) in any of the supposed camps, is a pragmatist in the broadest sense. The great debates are debates *within* pragmatism, not about its relevance.

The conclusion that legal pragmatism is irresistible might seem, at least for self-proclaimed pragmatists, too good to be true. In fact, the conclusion is too true to be good. Pragmatism in the sense discussed above is irresistible because it is platitudinous. If the truths offered in the name of pragmatism can be uniformly accepted without disturbing any existing debates (except for the misconceived debate about pragmatism itself), then it would seem that pragmatism is not useful in resolving legal problems. Ironically, a position that has insisted that an idea is true only to the extent that it is useful would be convicted under its own standard. Indeed, if everyone is necessarily a pragmatist, then it seems that pragmatism is not a distinct legal theory at all. Rather than accept this unhappy conclusion, we ought to consider a different interpretation of legal pragmatism.

## II. LEGAL PRAGMATISM AND THE USES OF THEORY

The previous section considered a view that focuses on legal pragmatism's attitude toward *the past*. But scholars also commonly describe pragmatism in terms of its attitude toward *theory*. This description is apt for depicting much contemporary legal pragmatism, which expresses a deep distrust for "abstract theory," "grand theory," "formalism," or "foundationalism."<sup>73</sup> The antiformalist theme is conspicuous in a recent essay by Judge Richard Posner.<sup>74</sup>

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73. See, e.g., Farber, *supra* note 7, at 1342 (opposition to "[f]oundational grand theory"); Grey, *supra* note 14, at 1571 (describing "pragmatist suspicion of foundational theorizing"); Hantzis, *supra* note 7, at 588, 594 (distrust of "abstract doctrine" and "abstract theories"); Kronman, *supra* note 2, at 1570, 1590, 1605 (hostility to "[a]bstract theories," "abstractedness," "abstract theorizing"); Radin, *supra* note 9, at 1707 (pragmatism is "a commitment against abstract idealism, transcendence, foundationalism, and against atemporal universality").

It would probably be an exercise in false precision to try to distinguish carefully among these terms. The philosophical attack on "foundationalism" takes as its target the notion that there is some "theory of knowledge," or Cartesian-type method, which will produce certain or reliable knowledge. See R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 132 (1979) [hereinafter R. RORTY, *MIRROR*]. In legal academic writing, the target is the notion that "theory" can provide us with knowledge of the law, or of what legal texts mean, or of how cases should be decided. In this sense, terms such as "formalism," "grand theory," and "foundationalism" seem to mean approximately the same thing. One would like to say that the meaning of these terms will become clearer as the discussion proceeds. But the reality may be just the opposite: What will become clear as the discussion proceeds is that it is *not* at all clear just what legal pragmatists are opposing when they inveigh against formalism or foundationalism.

74. Of course, Posner ranks among the most prolific legal scholars of our time, and it would thus be unfair to suggest that his essay on pragmatism, see Posner, *supra* note 13, fully or finally represents Posner's thinking on the subject. It surely does not. For a more detailed presentation of Posner's jurisprudential views, see R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990). The essay nonetheless merits examination in its own right both because it constitutes a succinct exposition of pragmatism as Posner understands it, and because it illustrates a common pitfall that, I will argue, pragmatists inevitably encounter.

### A. Posner's Predicament

Posner proclaims himself a pragmatist, and while noting the difficulties of defining pragmatism in any precise way,<sup>75</sup> he emphasizes antiformalism as a central and valuable feature of pragmatic thought.<sup>76</sup> This hostility to formalism gives legal pragmatism practical significance, in Posner's view, because it provides grounds for criticizing and discarding some kinds of solutions to legal problems. In particular, Posner attacks as formalist those approaches to constitutional interpretation or statutory construction that are commonly called "originalist."<sup>77</sup>

But, Posner's hostility to formalism seems less than devout. Perhaps he is, in fact, not fond of the particular version of formalism he criticizes—i.e., "originalist" construction<sup>78</sup>—but that is hardly decisive; formalism comes in a variety of shapes and sizes. Posner's efforts to make law more scientific<sup>79</sup> and his well-known attempts to resolve a multitude of legal problems and to unify numerous and diverse areas of law within the regime of law and economics<sup>80</sup> are arguably instances—indeed, extreme instances—of formalist thinking.<sup>81</sup> And although Posner emphasizes the pragmatic distrust for "metaphysical

75. While noting that pragmatism is "an umbrella term for diverse tendencies," Posner, *supra* note 13, at 1653, he finds three elements to be characteristic of pragmatist thought: (1) "a distrust of metaphysical entities"; (2) "an insistence that propositions be tested by their consequences"; and (3) "an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to 'objective,' impersonal criteria." *Id.* at 1660-61.

76. *Id.* at 1656, 1663-64.

77. *Id.* at 1664-67.

78. Posner has at times *sounded* very much like an originalist in his views on the interpretation of legal texts. See, e.g., Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90 (1986-87); Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1361-75 (1986) [hereinafter Posner, *Literature*]. But he indicates that his adoption of a pragmatic approach to interpretation is a recent development. Posner, *Legislation and its Interpretation: A Primer*, 68 NEB. L. REV. 431, 434 (1989) [hereinafter Posner, *Legislation*].

79. Posner has "encourage[d] the application of scientific methods to the study of the legal system." Posner, *An Afterward*, 1 J. LEGAL STUD. 437, 437 (1972).

As biology is to living organisms, astronomy to the stars, or economics to the price system, so should legal studies be to the legal system: an endeavor to make precise, objective, and systematic observations of how the legal system operates in fact and to discover and explain the recurrent patterns in the observations—the "laws" of the system.

*Id.*

80. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); R. POSNER, *THE ECONOMICS OF JUSTICE* (1981) [hereinafter R. POSNER, *JUSTICE*].

81. For an early criticism that persuasively made this basic point, see Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974). Leff described the first edition of Posner's *Economic Analysis of Law* as "four hundred pages of tunnel vision." *Id.* at 452. For a more recent and even more scathing assessment, see M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 117-18 (1987) (footnotes, and more stinging passages, omitted):

Posner's rather quirky *Economic Analysis of Law* is . . . imperialistic, complete, catechismic. It may offer mind-numbingly off-target answers to many, many questions, but it does have an answer for every legal issue, and, perhaps more important, the answers can be derived from a very short list of normative and descriptive propositions . . . Posner [is] obstinate in his drive for completeness, in his powerful urge to flatten human experience and deny complexity in the service of a desperate Panglossian optimism about the "straight" world of middle-class barter . . .

entities” such as “mind,” “intent,” “free will,” and “causation,”<sup>82</sup> he seems not only comfortable with, but addicted to the equally metaphysical concepts of “preferences” (Is a “preference” more solid or earthy than an “intention”?), or the “hypothetical market,” or the economic conception of “value.”<sup>83</sup> In short, if one were to nominate candidates for the office of leading legal formalist of our era, Richard Posner might well be the frontrunner.

How then can Posner escape the charge of gross inconsistency? One possibility is that Posner *was* a formalist but that he has repented of his former ways. To be sure, Posner has seemed more temperate of late in his advocacy of law and economics,<sup>84</sup> and his interests have turned increasingly to literary theory.<sup>85</sup> Nonetheless, Posner’s penchant for formalist thinking continues to show through. His essay on pragmatism expresses his aspiration to make law more scientific as well as his continued support for economic analysis.<sup>86</sup> Indeed, Posner has recently advocated the extension of economic analysis to a realm of human concern—religious faith—that seems most remote from economic calculations.<sup>87</sup> Moreover, Posner’s fondness for the more formal disciplines of science and economics is manifest even in his discussions of literature and rhetoric; he suggests that literary interpretation is a form of thought suitable primarily for less developed areas in which the social sciences have not yet established themselves.<sup>88</sup>

Hence, if Posner seems less confident of the adequacy of any particular formalist approach to law, he continues to view formalist theory as an ideal toward which law should aspire. Despite a tempering of views, he remains the once and future formalist. And his criticism of formalism in his pragmatism essay accordingly remains problematic.

The real explanation for that criticism, it seems, lies not in any renunciation of Posner’s formalist yearnings, but rather in the loaded definition of formalism

82. Posner, *supra* note 13, at 1660, 1662-63.

83. See, e.g., R. POSNER, *JUSTICE* *supra* note 80, at 60-62.

84. For example, in his 1983 Preface to *THE ECONOMICS OF JUSTICE*, first published in 1981, Posner cautions that his wealth maximization theory of ethics is offered “as a subject of speculation rather than a blueprint for social action,” and he adds: “I hope I have not ‘oversold’ this approach by insufficient attention to the rather bizarre results that its unflinching application could produce.” R. POSNER, *JUSTICE*, *id.*, at v-vi.

85. See, e.g., R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); Posner, *Literature*, *supra* note 78.

86. Posner, *supra* note 13, at 1667-70.

87. McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

88. See Posner, *Literature*, *supra* note 78, at 1375-76. James Boyd White argues that Posner’s formalist mode of thought is evident even in the literary analyses Posner offers. Posner’s “whole book is written,” White contends:

on fundamental understandings, about the nature of literature and of law alike, that seem to me deeply wrong . . . [Posner] is committed to a mode of thought and expression, to a sense of language and law—at its heart it is scientific and economic in character—that prevents him from seeing in the texts he studies the most important part of their meaning.

White, *What Can a Lawyer Learn From Literature?* (Book Review), 102 HARV. L. REV. 2014, 2014-15 (1989).

that he offers. He refers disparagingly to “the formalist idea, whose scientific provenance and pretensions are evident, of law as a *body of immutable principles*.”<sup>89</sup> Later in the essay he asserts that “[l]egal formalism is the idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact.”<sup>90</sup> By offering starkly pejorative definitions of formalism, Posner provides himself with a possible escape from the charge that his own economic approach is formalist; he can assert that *his* theories are founded on empirical observation—on “more than a superficial examination of their relation to the world of fact”—and thus are not “formalist.”

Unfortunately, by offering pejorative definitions of formalism, Posner also creates problems for his pragmatist position. In the first place, he deprives himself of the pleasure of having respectable opponents.<sup>91</sup> Does anyone today contend that law is “a body of immutable principles”?<sup>92</sup> Are there serious contemporary scholars who maintain that “legal questions can be answered by inquiry into the relation between concepts . . . without need for more than superficial examination of their relation to the world of fact”? Posner may believe, of course, that some views or theories *in fact* have only a “superficial” grounding in fact or experience, just as his critics make the same charge against *his* theories.<sup>93</sup> And at that point, the relevant disagreements once again occur

89. Posner, *supra* note 13, at 1656 (emphasis added).

90. *Id.* at 1663.

91. See Rorty, *supra* note 11, at 1812 (arguing that even under a broad definition of formalism, “it is not so easy to find a good example of a formalist among legal theorists”); cf. Posner, *Law and Economics Is Moral*, 24 VAL. U.L. REV. 163, 163 (1990) (“[I]t makes [some people] feel good to denounce the causes, the organizations, the activities, and the ideologies of which there are, after all, no present-day defenders in respectable society. That to me is not a very interesting activity.”).

92. Perhaps Posner means to target that usual formalist villain—Christopher Columbus Langdell. Langdell was one of those figures who, if he had not existed, would have to be invented; and for all I know, it is entirely possible that the Langdell we have been taught to hold in contempt *was* invented. See Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1729 (1990) (noting that “Langdell . . . has served as a strawperson and lightning rod for attacks against the possibility of rational foundations”). In any event, Langdell is long dead; a respectable and significant legal theory deserves a less musty opponent.

Or perhaps, as one of his comments implies, Posner means to go after the natural law thinking of a philosopher like Thomas Aquinas. See Posner, *supra* note 13, at 1663 (asserting that formalism is “the domain of the logician, the casuist, the Thomist, the Talmudist”). If so, two observations are pertinent. First, one may fairly doubt the significance of a theoretical position that has to go back to the thirteenth century to find a suitable opponent. Second, Posner does not actually find an opponent even in Aquinas, since to suggest that the Thomist natural law tradition regards law as “a body of immutable principles” would be little more than a naive parody of a highly sophisticated position. For a useful discussion explaining the natural law concept of *determinatio* and thus showing the error of equating Thomist natural law with a belief that law is immutable and universal, see Finnis, *On “The Critical Legal Studies Movement”*, 30 AM. J. JURISPRUDENCE 21 (1985).

93. Arthur Leff argued:

[I]t must immediately be noted, and never forgotten, that [Posner’s] basic propositions are really not empirical propositions at all. They are all generated by “reflection” on an “assumption” about choice under scarcity and rational maximization. . . . Nothing merely empirical could get in the way of such a structure because it is definitional. That is why the assumptions can predict how people behave: in *these* terms there is no other way they can behave.

Leff, *supra* note 81, at 457.

within pragmatism, not about it. In short, by defining his own pragmatic position by reference to a straw man formalism that no one actually advocates, Posner renders his prescriptions indistinct and useless.

But Posner's antiformalism is not merely useless; it is potentially pernicious. His arguments facilitate an unfortunate equivocation upon two different senses of the term "formalism." One sense is descriptive: A "formalist" theory or way of thinking is one that attempts to provide a structured way of answering legal questions. A formalist might, for example, spell out a procedure to be used in answering certain questions; or she might offer a substantive rule, or "formula," that has the effect of requiring decisionmakers to act in accordance with specified criteria and to disregard other criteria. Pragmatists can hardly afford to claim that views or theories that are formalist in this descriptive sense are necessarily defective.<sup>94</sup> Indeed, structured theories—and it is hard to see how any theory can avoid being structured and still be a "theory" in any meaningful sense—can be and typically are justified in pragmatic terms; particular rules, formulas, or theories are defended on the ground that they are useful for achieving desired objectives. For example, Frederick Schauer's recent tentative defense of a rule-oriented formalism is not only consistent with, but appears to grow out of, a pragmatic perspective.<sup>95</sup> Schauer argues that a rule-focused law may serve valuable objectives such as avoiding abuses of power and promoting certainty and predictability in human affairs.<sup>96</sup> Likewise, Posner provides highly formalist economic theories, at least in the descriptive sense.

However, "formalism" is also, and more commonly, used in a second, pejorative sense to refer to thinking that is not only structured, but that is unduly rigid or impervious to experience or new information. The pejorative connotation that the term "formalism" has acquired<sup>97</sup> permits an unfortunate equivocation. A critic of a particular theory may characterize the theory as "formalist" in the *descriptive* sense—this is easy enough to do, since all theories are formalist in that sense—and then quickly shift to the *pejorative* sense. In this way, the critic manages to dismiss the disfavored theory without ever doing the critical work that ought to be necessary to secure the desired conclusion.

Posner's attack on originalist construction illustrates this kind of equivocation. Posner attacks "originalism" on the ground that it is "formalist."<sup>98</sup> And of course originalism is "formalist" in the descriptive sense; it provides a structure for statutory and constitutional construction, and it attempts to limit the kinds of factors that judges performing those tasks could consider. But one

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94. For an insightful essay by a pragmatist scholar showing that *all* decisionmaking is inevitably structured, see Wells, *supra* note 92.

95. Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

96. *Id.* at 539-44.

97. See, e.g., *id.* at 510-11, 547-48. Schauer's essay is an effort to recover the descriptive sense of the term, thus rescuing a potentially useful concept from the pejorative sense that currently prevents it from being freely used.

98. Posner, *supra* note 13, at 1664-66.

can hardly conclude just from this structured quality that the originalist approach is not justified, or even that it is not pragmatic. Whether an originalist approach to legal interpretation will generate better legal and political consequences than a nonoriginalist approach presents a controversial question that can hardly be resolved just by observing that the originalist approach is “formalist.”<sup>99</sup>

Indeed, Posner himself points out that a pragmatic or consequentialist law would consider, among the relevant consequences, systemic consequences;<sup>100</sup> and these might justify a “rule of law” approach to adjudication which, by preventing judges from considering particular factors, might seem inconsistent with a more naive pragmatism. Posner’s correct observation about systemic consequences might well support a similar, systemic defense of originalist interpretation. Indeed, Posner is aware of, and elsewhere addresses, that possibility.<sup>101</sup> The critical point, therefore, is not that Posner believes he has disposed of the question of originalism by calling originalist interpretation “formalist.” In fact, he has much more to say on the subject. The important point, rather, is that calling originalist interpretation “formalist” does not advance, but only confuses the discussion. The accusation is simply a rhetorical point which properly understood, should not count either for or against the originalist position.

In the end we are left with the Jekyll-and-Hyde spectacle of Posner assuming the role of antiformalist, at least for rhetorical purposes, when he wants to criticize a view that he does not favor and then reappearing as a formalist when he wants to offer a constructive proposal or theory of his own. But this depiction is hardly applicable to Posner alone. Legal pragmatism in general faces Posner’s predicament.

### B. *The Pragmatist’s Predicament*

The predicament that confronts aspiring pragmatists such as Posner can be described simply: Pragmatists dislike and distrust theory. Pragmatists also like and need theory. Consequently, pragmatists will always inveigh against theory, and then they will go back to theorizing. Even worse, pragmatists cannot offer any method or criterion for theorizing different from the methods and criteria already employed by nonpragmatists.

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99. Cf. Alexander, *Essay: Of Two Minds About Law and Minds*, 88 MICH. L. REV. 2444 (1990) (arguing that “[t]he pragmatist may (pragmatically) opt for originalism”); Stick, *supra* note 7, at 385 (arguing that constitutional originalists can be pragmatists).

100. Posner, *supra* note 13, at 1666.

101. Posner has suggested that pragmatic judges should construe statutes so as to carry out the will of the legislature except in “the rare case where the gains in substantive justice from ignoring or denying the will of the legislature will exceed the loss in impairing interbranch relations and injecting uncertainty into the legislative process.” Posner, *Legislation*, *supra* note 78, at 449-50. This acknowledgement makes Posner’s easy and apparently broad condemnation of originalist interpretation as “formalist” all the more puzzling.

Pragmatists know that theory can impose, distort, or mislead. Theory limits our perspective, prompts us to ask some questions but to overlook others; it can serve as a tool of suppression and oppression. Perceiving these dangers, the pragmatist wants to flee from theory, or, in Grey's phrase, to achieve "freedom from theory-guilt";<sup>102</sup> he wants to return to the innocence of "experience" and "context." At the same time, pragmatists know that theory is both valuable and necessary. We cannot simply receive raw data from experience and leave that data unprocessed; we inevitably categorize, classify, and explain. In short, we theorize. Moreover, even if we could somehow avoid theorizing, we surely would not want to, because without the structure and order provided by theory our lives would be frighteningly chaotic and meaningless.

This dilemma confounds in law as in other areas of life. Legal theory can mislead and distort. But legal theory is also necessary and valuable.<sup>103</sup> For example, pragmatists surely do not believe that judges should simply decide each case on the basis of an unguided gestalt; like everyone else, they believe that some kinds of factors are relevant to the judicial decision and that other factors are irrelevant, or that some ways of deciding cases should be encouraged while other ways of deciding cases should be discouraged. Similarly, the pragmatist does not favor leaving common law or constitutional decisions as a mass of particular, unprocessed controversies and results; he wants "as much system as possible"<sup>104</sup> and hence will try to make connections, offer explanations, and identify valuable categories for understanding and using the raw material. And as soon as the pragmatist begins to talk about how judges should decide cases or about how common law or constitutional decisions should be understood, he will have embarked on a new project of theory-building.

Faced with this theorizing imperative, pragmatists may claim that they propound a distinctively pragmatic way of doing theory. The claim, however, cannot be made good. Pragmatists recurrently emphasize themes such as "experience," avoidance of abstraction, "intuition," "dialogue," and "contextualism." But upon inspection, none of these themes supplies any distinctively pragmatic way of constructing or evaluating theories.

### 1. *The Priority of Experience*

Pragmatists commonly insist that theories must be grounded in experience.<sup>105</sup> Taken at face value, this counsel seems unexceptionable. It is so

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102. Grey, *supra* note 14, at 1569; *cf.* Hantzis, *supra* note 7, at 564 (using language reminiscent of Lord's Prayer to describe Holmes' pragmatic approach as one that will "guard us from the temptation to resolve legal questions by means of speculative philosophy").

103. *See, e.g.*, Farber, *supra* note 7, at 1349; Radin, *supra* note 9, at 1701 (recognizing from pragmatist-feminist perspective, that "ideal theory is also necessary").

104. Farber, *supra* note 7, at 1349.

105. *E.g.*, Farber, *supra* note 7, at 1341 ("The heart of pragmatist thought is the view that the ultimate test is always experience."); Radin, *supra* note 9, at 1707 ("Pragmatism and feminism largely share, I think,

unexceptionable, in fact, that one must wonder whether anyone disagrees or, assuming someone wanted to disagree, whether anyone could devise a theory that is not grounded in experience. Try it for yourself: invent a theory that does not arise from or relate to anything in your experience. What would such a theory even address? Distributive justice in the Martian economy? Sexual relations in the sixth dimension? Surely this is not the kind of theorizing that pragmatists are criticizing when they solemnly insist that theories are defective if they are not grounded in experience. But then what *are* they criticizing?

Some pragmatists seem to understand their point as one about chronological priority: rather than imposing our preestablished theoretical categories upon experience, we should *start* with experience, and only afterwards construct categories to fit experience. Judge Posner asserts that for the pragmatist, “the emphasis will be empirical *from the start*,” and that the pragmatist, in contrast to the formalist, will not try to force experience into preexisting categories.<sup>106</sup> In the same vein, Daniel Farber explains that “[t]he difference between the pragmatist and the foundationalist is not that the pragmatist disavows legal theory, but rather that the pragmatist takes no position *in advance* about how broad in scope such theory should be.”<sup>107</sup>

But the “experience first—conceptualize later” position reflects an unrealistic view of how experience relates to theorizing. This view implies a sort of *tabula rasa* notion of knowledge construction: the theorist first collects, in neutral fashion, a mass of theory-innocent data, and then constructs categories to make use of such data. But the reality is clearly more complex. We are always already endowed with categories and ideas given to us by our culture. And we can never gather data or consult experience in an atheoretical way.<sup>108</sup> Conse-

the commitment to finding knowledge in the particulars of experience.”).

106. Posner, *supra* note 13, at 1664 (emphasis added).

107. Farber, *supra* note 7, at 1349 (emphasis added). Despite (or perhaps because of) their commonsensical quality, statements like this one leave it far from clear just whom or what the pragmatists think they are criticizing. What exactly does Farber have in mind when he suggests that one should not take a theoretical position “in advance”? He explains that with respect to contract law or promissory estoppel doctrine one must first become acquainted with the cases, and only thereafter construct theories on the “level of generality [that] works best.” *Id.* Such a course seems sensible enough; indeed, it seems inevitable. How *could* anyone construct a theory of contract law or promissory estoppel “in advance” of encountering some contract or promissory estoppel cases? Does anyone arrive at law school innocent of contract or estoppel cases, but with a theory, worked out “in advance,” of contract or promissory estoppel?

108. William James understood and expressed this point clearly and repeatedly:

Experience merely as such doesn't come ticketed and labelled, we have first to discover what it is. . . . What we usually do is first to frame some system of concepts mentally classified, serialized, or connected in some intellectual way, and then to use this as a tally by which we “keep tab” on the impressions that present themselves. When each is referred to some possible place in the conceptual system, it is thereby “understood.”

W. JAMES, *Pragmatism*, in *PRAGMATISM AND OTHER ESSAYS* 76 (1963). Elsewhere James argued that: Every hour brings its new percepts, its own facts of sensation and relation, to be truly taken account of; but the whole of our *past* dealings with such facts is already founded in the previous truths. It is therefore only the smallest and recentest fraction of the first two parts of reality that comes to us without the human touch, and that fraction has immediately to become humanized in the sense of being squared, assimilated, or in some way adapted, to the humanized mass already there. As a matter of fact we can hardly take in an impression at all, in the absence of a precon-



quently, the process of constructing, criticizing, and revising theories inevitably involves a back-and-forth motion in which experience-based theory is adjusted in light of theory-laden experience. The world cannot be divided into two camps of theorists, one of which starts with experience and then constructs theory, while the other camp constructs theory and then imposes the theory upon experience.<sup>109</sup> Instead, we have a chicken-and-egg situation, but one in which the chicken is never clearly distinguishable from the egg.<sup>110</sup>

Ironically, pragmatist philosophers have taken the lead in arguing that experience is never concept-free, and that thinking is always historically and culturally situated.<sup>111</sup> Thus, if legal pragmatists such as Posner and Farber actually mean to advocate a chronological priority of experience, they betray a central pragmatist insight. Their view in fact seems more like the “foundationalist” view that knowledge should mirror nature, a view that pragmatist philosophers such as Rorty have tellingly criticized.<sup>112</sup>

Alternatively, legal pragmatists may view their arguments about the priority of experience as a point about levels of abstraction. The argument might go like this: although every theory arises from and relates to experience, it also abstracts from experience. We construct a category—say, “contract law” or “promissory estoppel”—after examining cases, but we then use that category to organize and understand new cases. Instead of examining the material fresh, we come to it with preestablished categories which cause us to see some features but to overlook others. In this way, the theoretical category produces an abstracted image of the material. And although such abstraction is both inevitable

ception of what impressions there may possibly be.

When we talk of reality “independent” of human thinking, then, it seems a thing very hard to find. It reduces to the notion of what is just entering into experience and yet to be named, or else to some imagined aboriginal presence in experience, before any belief about the presence had arisen, before any human conception had been applied. It is what is absolutely dumb and evanescent, the merely ideal limit of our minds. We may glimpse it, but we never grasp it; what we grasp is always some substitute for it which previous human thinking has peptonized and cooked for our consumption. If so vulgar an expression were allowed us, we might say that wherever we find it, it has already been *faked*.

*Id.* at 109. Other pragmatist philosophers have insisted on the same point. See, e.g., R. RORTY, *MIRROR*, *supra* note 73, at 154 (observing that “we are never conscious of unsynthesized intuitions [i.e., sense impressions], nor of concepts apart from their application to intuitions”); R. RORTY, *CONSEQUENCES OF PRAGMATISM* xxxix (1982) [hereinafter R. RORTY, *PRAGMATISM*] (suggesting that we “never encounter[] reality *except under a chosen description*”) (emphasis in original). “John Dewey likewise insisted, ‘I know nothing of a perceptual order apart from a conceptual.’” *Id.* at 79 (quoting Dewey).

109. Of course, one can always depict a particular theorist as imposing theory upon practice by focusing upon a point in the theorizing process when the theorist *is* doing that. But choosing a particular point to focus upon is arbitrary or tendentious; it is never a complete depiction.

110. For an illuminating discussion by a legal pragmatist, see Wells, *supra* note 92. After identifying two competing models of legal decisionmaking, which she calls “structured decisionmaking” and “contextual decisionmaking,” Wells persuasively argues that every legal decision necessarily involves both processes. *Id.* at 1737. Thus, attempts to distinguish between decisionmaking processes using terms such as “abstract,” “rational,” “universal,” and “rule-bound” on the one hand, and “concrete,” “intuitive,” “particular,” or “case-specific” on the other are, Wells argues, misleading. *Id.* at 1737-39.

111. John Stick asserts that “the whole point of pragmatism and Rorty’s argument is that we cannot start over, and we cannot see things fresh.” Stick, *supra* note 7, at 396.

112. See generally R. RORTY, *MIRROR*, *supra* note 73.

and useful, it also has its costs—i.e., the costs of overlooking potentially significant features of experience. At some point, those costs will exceed the benefits of abstraction, and our theories will then become more harmful than helpful. Such a view seems to inform the pragmatists' frequent condemnation of "abstraction" or "abstract theory."

Unlike the argument about the chronological priority of experience, this point about the risks of excessive abstraction seems to be correct. Since every theory abstracts to some degree, however, the pragmatist cannot afford to condemn abstraction *per se*.<sup>113</sup> She can only condemn theories that are *excessively* or *unhelpfully* abstract. But once the pragmatist adds this qualification, a familiar difficulty reappears: everyone presumably agrees that theories should not be excessively or unhelpfully abstract. The real disputes that arise do not challenge this standard, but rather disagree about whether particular theories actually *are* unhelpfully abstract. And on this question, although pragmatists will of course have their individual opinions in particular cases, they have no general guidance to give.

Indeed, it seems unlikely that pragmatists ever could say much in general about how to determine the proper level of theoretical abstraction. In the first place, there is no scale for measuring a theory's abstractness. Even if such a scale existed, moreover, one probably cannot specify any general standard for deciding how much abstraction is too much. ("Ackerman's theory of social justice measures 6.5 on the Piercean Scale, thus exceeding the optimal level of 5.3 for constitutional theories.") Consequently, legal pragmatists are confined to asserting that theories should be constructed on the "level of generality [that] works best."<sup>114</sup> That contention is surely compelling, and it will become significant just as soon as serious scholars begin to urge that theories be constructed on levels of generality that do not work best.

In sum, pragmatist propositions about the priority of experience do not helpfully distinguish between the kind of theorizing we should do and the kind we should not do. One might as well say, paraphrasing Farber, that "the difference between the pragmatist and the foundationalist is not that the pragmatist disavows legal theory, but rather that the pragmatist favors *good* theories while the foundationalist favors *bad* theories." Such a distinction is not exactly meaningless; it is merely useless. Some theories *are* bad, perhaps because they are excessively abstract or insufficiently grounded in experience. For example, some pragmatists evidently believe that scholars like Bruce Ackerman are led astray by ambitious theoretical aspirations.<sup>115</sup> They may be right. But so long as Ackerman and the pragmatists agree (as they presumably do) that theories should be adequately grounded in experience, a position that merely condemns

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113. See Wells, *supra* note 92, at 1738; see also Minow & Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1624-25, 1628 (1990).

114. Farber, *supra* note 7, at 1349.

115. See, e.g., *id.* at 1331 n.4 (by implication); Kronman, *supra* note 2, at 1607.

excessive abstraction and favors experiential grounding fails to delineate among competing theories in a useful way.

## 2. Pragmatist "Method"

The pragmatists' recurring invocation of "intuition," "dialogue," and "contextualism" may suggest that pragmatists apply a distinctive method of—or, if "method" sounds too regimented and precise, "approach" to—theorizing. For example, pragmatists sometimes talk about the importance of using "intuition" in solving problems.<sup>116</sup> But "intuition" hardly constitutes a "method" of, or even an "approach" to, theorizing.<sup>117</sup> The hard questions, after all, are not whether to use "intuition," but rather what "intuition" means, which "intuitions" to accept, how much weight to give them, and how to put "intuitions" to constructive use. Pragmatism provides no method of answering these questions. Indeed, pragmatists have no special claim to "intuition"; on the contrary, they are rather ambivalent about the usefulness of intuition. The perspectivist theme in pragmatic thought emphasizes that all thinking, and presumably all feelings and intuitions, are culturally and historically situated.<sup>118</sup> This emphasis on the historical and cultural determinants of belief undermines any view that treats "intuition" as a special faculty that can provide correct answers to legal questions.<sup>119</sup> For all these reasons, pragmatists cannot hold out "intuition" as a distinctively pragmatic approach to theorizing.<sup>120</sup>

Pragmatists also stress the importance of "dialogue" in evaluating experience and in constructing and criticizing theories.<sup>121</sup> But the appeal to "dialogue" encounters the same difficulties as the appeal to "intuition." First, the recommendation of dialogue hardly constitutes a "method" or "approach" for theorizing. The hard question is not whether people should talk, but rather what they should say and what (among the various ideas communicated) they should

116. See, e.g., Farber, *supra* note 7, at 1334-35 (listing "intuitionism" among group of rough synonyms for legal pragmatism); Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1878 (1988) (associating legal pragmatism with reliance on intuition).

117. Alasdair MacIntyre comments that "one of the things that we ought to have learned from the history of moral philosophy is that the introduction of the word 'intuition' by a moral philosopher is always a signal that something has gone badly wrong with an argument." A. MACINTYRE, *AFTER VIRTUE* 69 (rev. ed. 1984).

118. See Grey, *supra* note 7, at 798-801.

119. Thus, Robin West observes that although the pragmatist should take intuitions seriously, including the "conservative" intuition of the moral worth of the fetus, "[n]othing follows from the conservative's intuition that human life in all its forms, including fetal, is sacred other than the fact that he has it . . ." West, *supra* note 1, at 735 (emphasis in original).

120. Cf. R. RORTY, *PRAGMATISM*, *supra* note 109, at xxix-xxx ("Of course we have such [realist] intuitions. How could we escape having them? We have been educated within an intellectual tradition built around such claims . . . The pragmatist is urging that we do our best to *stop having* such intuitions . . .") (emphasis in original).

121. See, e.g., Farber, *supra* note 7, at 1343; Radin, *supra* note 9, at 1725; cf. Grey, *supra* note 14, at 1591 (asserting that "the first pragmatist precept . . . is one familiar to every lawyer: 'hear the other side'").

believe. Prescribing "dialogue" fails to answer these hard questions. Second, pragmatists have no special claim to "dialogue." Not just pragmatists, but also radical critics,<sup>122</sup> civic republicans,<sup>123</sup> ethical naturalists,<sup>124</sup> feminists,<sup>125</sup> legal process theorists (both old and new),<sup>126</sup> liberal neutrality theorists,<sup>127</sup> and professed antipragmatists<sup>128</sup> favor "dialogue." Indeed, "dialogue" seems to have become the all-purpose elixir of our time. Such agreement only shows, the pragmatist might contend, that everyone is in fact a pragmatist. That observation may be correct, but it also leaves us with the same old problem: the counsels of pragmatism turn out to be merely platitudinous, and hence unhelpful in resolving live legal controversies.

Pragmatists also commonly emphasize the theme of "contextualism"; we should consider and resolve legal problems "in context."<sup>129</sup> Such a course seems sensible and, indeed, inescapable. Is there any *other* way to consider problems—any way to consider a problem outside of any context? Contextualists assure us that there is not—that *all* thinking and argumentation is contextual<sup>130</sup>—and they seem to be right. We often charge an opponent with taking a statement or question "out of context," but we clearly do not mean "out of *any* context." Rather, we mean that someone has not viewed the statement or question in what we regard as the *proper* context. The real question is never "context or no context?" but rather "*which* context?"<sup>131</sup>

But if we inevitably consider questions and problems in a context, then the counsel to "be contextual" merely urges us to do what we cannot help doing anyway. Pragmatism would nonetheless be useful if it could provide guidance about how to select the proper context for controversial issues; but on that question, unfortunately, pragmatists offer little help. Their failure to provide enlightenment on this issue does not reflect any lack either of charity or of reflection; rather, there are at least two reasons why nothing very useful can be said on that question. First, generalizations explaining how to choose the

122. See, e.g., Hutchinson, *Talking the Good Life: From Free Speech to Democratic Dialogue*, 1 YALE J. L. & LIBERATION 17, 18 (1989) (advocating "Democratic dialogism" as means of social transformation).

123. See, e.g., Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503-05, 1524-32 (1988) (advocating republican vision of "dialogic constitutionalism").

124. See M. PERRY, MORALITY, POLITICS, AND LAW 51-54, 152-58 (1988).

125. See Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CALIF. L. REV. 1011, 1074 (1989) (advocating "feminist-theological dialogue").

126. For a useful discussion, see Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 241-48 (1983).

127. See B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 96-104 (1983) (emphasizing centrality of "liberal dialogue" in construction of legal values); B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 4-5 (1980) (proposing "comprehensive insistence on dialogue" as basic method for resolving issues of politics and justice).

128. See R. DWORKIN, *supra* note 34, at 70-71 (advocating active use of judicial review as way of generating public debate on matters of principle).

129. See, e.g., Kronman, *supra* note 2, at 1571; Minow & Spelman, *supra* note 113; Wells, *supra* note 92, at 1734-36, 1745-46.

130. See Minow & Spelman, *supra* note 113, at 1627, 1651.

131. See *id.* at 1629 (asserting that "once the pretended distinction between context and abstraction is discarded, the important question becomes which context should matter").

proper context might themselves, precisely by virtue of their generality, deviate from the contextualist prescription. Second, the question “which context?” presumably must itself be addressed in a context, thus forcing us to ask what is the proper context for addressing that question; and one quickly confronts an infinite regress.<sup>132</sup> Consequently, although proponents of contextualism can and do express their views about the most helpful contexts for considering particular problems, they can say little of a general nature about how to select proper contexts. For example, Minow and Spelman are interested in a kind of contextual analysis that underscores “legacies of power and oppression.”<sup>133</sup> If they are right that every contextual analysis reflects background moral, political, and epistemological theories,<sup>134</sup> then Minow’s and Spelman’s emphasis must reflect background theories that specify the importance of “power” and “oppression” in legal and social phenomena. And if their background theories are sound, then their particular emphasis on these factors is appropriate as well. But there is nothing in a concern for contextualism itself that produces an emphasis on “legacies of power and oppression.”

In short, the pragmatist suggests that in dealing with the practical and theoretical problems of law, we should use “intuition,” which seems, at least from a pragmatist perspective, much akin to “good judgment.” We should talk things over, and we should look at problems in context. All of this seems eminently sensible. Who does—who *could*—disagree?<sup>135</sup> But such counsel hardly constitutes a method or approach to theorizing, much less a distinctively pragmatic method or approach.<sup>136</sup> It is as if a philosopher grandly announced that he had discovered a method for resolving all of the conceptual conundrums

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132. In their essay *In Context*, Minow and Spelman allude to this possibility when they note, “[a]s we turn to address the meaning of ‘context’ in these contexts, we are pointedly aware of a plausible question likely to occur to a sensitive reader: what is the context of our inquiry?” Minow & Spelman, *supra* note 113, at 1597. It seems correct, as they imply, that questions such as “which context?” cannot themselves be acontextual. But if every first-order question requires consideration of the proper context, and if the second-order question (i.e., what is the proper context for addressing the first-order question?) requires consideration of the context for addressing the second-order question, no apparent reason exists to stop at two removes from the first-order question; the question “And what is the proper context for addressing *that* question?” leads on forever.

133. *Id.* at 1601.

134. *Id.* at 1626.

135. A pragmatist might point out, of course, that even if nearly all lawyers and scholars purport to accept pragmatist counsels about experience, dialogue, and context, they do not all articulate and talk about these concerns. Although that observation may turn out to be significant, see *infra* Section III, the nonpragmatist might respond that he does not often talk explicitly about the need to use experience and to think in context for the same reason that he does not go around pointing out that the sky is overhead rather than underfoot or that in North America July tends to be warmer than January. Such observations would be correct, and they register significant facts. But since everyone is fully aware of these facts, there seems little reason to point them out. Indeed, the person who *does* suddenly declare that “the sky is over us” will likely be regarded as (to put it charitably) a latecomer, not a source of wisdom or insight.

136. In a similar vein, although Richard Rorty plainly admires and agrees with much in John Dewey’s criticism of the philosophical tradition, he also observes that Dewey had a “habit of announcing a bold new positive program” but in fact could offer only “a series of resounding but empty slogans.” R. RORTY, *PRAGMATISM*, *supra* note 108, at 78.

that have plagued humans for centuries and, when asked to describe the method, explained gravely: "Careful, correct thinking." Well, yes—but . . .<sup>137</sup>

### C. *The Pragmatic Temperament*

The discussion thus far suggests that although legal pragmatists express a distrust of theory, they can neither avoid theorizing nor articulate any distinctively pragmatic method or set of criteria for theorizing. Nonetheless, it seems undeniable that pragmatists at least *feel* differently about theory. This attitudinal difference may indicate a real distinction between the pragmatist and the nonpragmatist. Thomas Grey has recently emphasized the importance of learning "what it feels like" to be a pragmatist.<sup>138</sup> In a similar vein, Judge Posner describes pragmatism as "an attitude, or orientation,"<sup>139</sup> and Anthony Kronman has indicated the importance of "attitude" or "temperamental disposition"<sup>140</sup> in the Burkean version of pragmatism that he calls "prudentialism."<sup>141</sup> And hostility to abstract theory is a central feature in the pragmatic temperament. Like the "grand theorist," the pragmatist theorizes. He does not theorize joyously, however, but rather out of necessity, and with constant misgivings.<sup>142</sup> Forced to articulate what makes a theory adequate, the pragmatist and the grand theorist may *say* similar things. But they harbor radically different attitudes. The grand theorist, but not the pragmatist, has faith in and love for theory. The grand theorist takes delight when an ambitious theory succeeds; the pragmatist rejoices to see a pretentious theory humbled.<sup>143</sup>

These contrasting attitudes might be viewed in reference to a temperamental need for order. We theorize, after all, in large measure to satisfy our own need to understand life and experience as somehow orderly and coherent. However, as an inspection of the offices of a handful of randomly selected law professors should demonstrate, individuals differ dramatically in their need for order. The grand theorist harbors a deep need for coherence. The pragmatist, by contrast,

137. All of this brings to mind the nursery rhyme:

Which is the way to London Town?  
Which is the way to London Town?  
One foot up, the other foot down.  
That is the way to London Town.

138. Grey, *supra* note 14, at 1570.

139. Posner, *supra* note 13, at 1670.

140. Kronman, *supra* note 2, at 1569, 1598.

141. This emphasis on attitude as an important distinguishing feature is characteristic of pragmatists. William James began his lectures on pragmatism by arguing that the competing positions taken on a variety of longstanding philosophical issues could usefully be understood as expressions of contrasting philosophical temperaments. W. JAMES, *supra* note 108, at 6-9.

142. See Grey, *supra* note 7, at 815 (describing pragmatists as "theoreticians armed with a presumptive suspicion of neat theories").

143. This diagnosis no doubt oversimplifies a more complex psychological reality. In some cases, the pragmatist scholar may be particularly susceptible to the attractions of grand theory, and may consciously embrace pragmatism in an effort to resist the temptations of theory.

is content with a lower degree of order.<sup>144</sup> Thus, in the abstract, both may agree that theories should be constructed on “the level of generality that works best.” But for the grand theorist, this standard dictates a relatively encompassing theory, because a more modest theory will fail to satisfy the theorist’s appetite for coherence, and thus will not “work best.” The pragmatist, by contrast, is not as hungry for overarching order; she may even relish the freedom of a world in flux, and thus nurture an ingrained resentment toward theories which offer too much order.<sup>145</sup> For her, therefore, a more localized, less pretentious theory will “work best.”<sup>146</sup>

This interpretation would explain not only the pragmatists’ hostility to “grand theory,” but also their complacent reaction to the revelation that law is to some degree disorderly, internally contradictory, or indeterminate. For nonpragmatists, such disorder may be deeply troubling; it means that the law is unworthy of respect, and thus bereft of moral authority or legitimacy. This conclusion may drive the nonpragmatist to strategies of desperation. He may enlist the aid of a mythical demigod in the struggle to show that the law can be viewed as the expression of a single, comprehensive vision of justice, and that it does yield a correct answer to every legal question.<sup>147</sup> Or, finding such visions of order to be an unsustainable illusion, he may denounce the legal

144. By this standard, it seems that Ronald Dworkin is correct in claiming that he is *not* a pragmatist; his desire for overall coherence is a recurring theme in his work. Similarly, despite his avowed pragmatism, it seems that Judge Posner is not of a pragmatic disposition; his economic analysis, in particular, evinces a powerful need to reduce the disparate materials of law to a coherent system.

145. Such an attitude is conspicuous in the writing of William James, who recoiled from the notion of a “universe [that] is absolutely secure,” preferring a “loose universe” that “is still pursuing its adventures” and that is “unfinished, growing in all sorts of places.” W. JAMES, *supra* note 108, at 113-14. James ascribed this preference to temperament, observing that the pragmatist is averse to too much order because he is a “happy-go-lucky anarchistic sort of creature.” *Id.* at 114.

146. Of course, most real human beings will have both pragmatic and nonpragmatic moods and moments. Holmes is a prime example. Current pragmatist scholars find in Holmes a primary source of legal pragmatism. *See, e.g., supra* note 7. At the same time, a good deal in Holmes’ thinking and practice seems antithetical to the precepts of pragmatism. Thus, while struggling to distinguish Holmes’ use of theory from Langdell’s, Grey concedes that both men were conceptualists and formalists, Grey, *supra* note 7, at 822, and that Holmes “loved the logical manipulation of doctrine for its own sake nearly as much as Langdell did, and this could lead him astray in practice.” *Id.* at 819. By his own admission, Holmes “hate[d] facts” and exalted “general propositions.” *Id.* at 842. He reconciled himself to the study of law because he believed it might “open[] a way to philosophy.” *Id.* at 840. He admitted that in judging cases he worried little about “the practical effect of the decision,” concentrating instead on the decision’s “relation to the theory and philosophy of the law.” *Id.* at 848. There is no reason to suppose that Holmes’ vacillations and deviations were unique to himself. Insofar as such inconsistencies reflect a human need both for order and for freedom, it seems likely that everyone will be both pragmatic and nonpragmatic in varying degrees.

As William James pointed out:

Most of us have a hankering for the good things on both sides of the line. Facts are good, of course—give us lots of facts. Principles are good—give us plenty of principles. . . . And so forth—your ordinary philosophic layman never being a radical, never straightening out his system, but living vaguely in one plausible compartment of it or another to suit the temptations of successive hours.

W. JAMES, *supra* note 108, at 9-10.

147. *See R. DWORKIN, TAKING RIGHTS SERIOUSLY* 81-130 (1977).

system as deeply illegitimate.<sup>148</sup> To the more pragmatic lawyer or scholar, on the other hand, a certain degree of indeterminacy does not necessarily threaten the basic legitimacy of the legal system; indeed, it may provide desirable flexibility within which a fact-responsive equity has room to operate.<sup>149</sup>

Similarly, if the issue concerns the legitimacy of nonoriginalist judicial review, some theorists will feel driven to develop elaborate theories of creative interpretation or "representation reinforcement."<sup>150</sup> They may even resort to assigning a "prophetic" calling to federal judges.<sup>151</sup> A pragmatist, by contrast, will find these theories exotic and unnecessary; he will be content to defend nonoriginalist judicial review on the less pretentious grounds of prudence and historical practice.<sup>152</sup>

Despite its explanatory power, however, an interpretation which depicts legal pragmatism as an "attitude" or "temperament" leaves pragmatists with a serious problem: the interpretation undermines the pragmatic criticism of "grand theory." The pragmatist's significant point, it turns out, is not that theory should be grounded in experience, or that theory should be contextual and should avoid excessive abstraction. On those points, everyone agrees. The pragmatist could better express his real concern by saying: "I feel no need for, nor do I take any joy in, elegant or comprehensive theories." To which the grand theorist can easily respond: "I do." And once one understands pragmatism as an expression of temperament, the legal pragmatist has no effective rebuttal to the grand theorist's position. Matters of temperament, after all, are typically not promising material for intellectual debate. Ambitious theories, like stormy evenings, Super Bowls, or presidential campaigns, will leave some people excited and others depressed; but there is little in such reactions that one can usefully argue about.<sup>153</sup>

Indeed, legal pragmatism actually legitimates the grand theorist's position. A nonpragmatist might argue that the law (or the universe) just does not exhibit or support the kind of comprehensive order that the grand theorist purports to

148. For an illuminating discussion of the association of indeterminacy and illegitimacy by critical legal scholars, see Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 285-95 (1989). Cf. H.L.A. HART, *THE CONCEPT OF LAW* 135 (1961) (speculating that legal skeptics of his day were often "disappointed absolutist[s]").

149. See Kress, *supra* note 148, at 294. See generally K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

150. The references are to theorists such as Dworkin and to John Ely. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

151. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

152. See Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 20 (1984).

153. One can believe that certain kinds of attitudes are admirable or appropriate (reverence on sacred occasions, perhaps) or inappropriate (levity at a funeral). Such appropriateness or inappropriateness seems to rest more on ethical or even aesthetic than on epistemological grounds. Thus, legal pragmatists might be better advised to develop a pragmatic aesthetic instead of treating pragmatism as a *theory* of law with propositional content. Though he asserts that legal pragmatism is a theory, and indeed the truest and best theory, Thomas Grey's recent turn to poetry as a vehicle for expressing the meaning of pragmatism may represent a step in this direction. See Grey, *supra* note 14.



describe. But pragmatism, having insisted that the test of a theory is not its correspondence to any objective reality but rather its capacity to fulfill “human needs,”<sup>154</sup> cannot so readily offer this objection. On the contrary, if grand theory effectively satisfies a human need for order and meaning, the pragmatist ought to applaud the accomplishment.<sup>155</sup> He can observe, of course, that *he personally* feels no such need. But that is hardly a criticism at all, any more than it is a criticism of diabetes research to say that I personally don’t have diabetes.

Thus, interpreting legal pragmatism as an expression of temperament leaves pragmatists with nothing of significance to say—or, at least, with nothing significant of a propositional nature that is characteristically pragmatic. And the question that emerges from this interpretation is why pragmatists keep on talking. Or, more precisely, why do they keep talking *about pragmatism*?<sup>156</sup>

#### D. *Legal Pragmatism as Self-Deception?*

One possible answer to the question might suggest that legal pragmatists continue to talk about pragmatism because they are deceived; they *think* that pragmatism has something distinctive and valuable to say even though it actually does not. Perhaps pragmatism attracts them because it is one version of the old dream that the questions which plague and divide us might somehow be banished if we could just get answers directly—without distorting conceptual mediation—from nature itself. Thoughtful pragmatists would disavow any such notion, of course; indeed, they may regard the impossibility of any unmediated apprehension of nature as a special pragmatist insight.<sup>157</sup> But having an insight is one thing; faithfully acting on that insight is another. Reading the discussions of legal pragmatists, one sometimes has the sense that even though the pragmatists *say* they accept the inevitability of mediating theory, they cannot quite bring themselves to believe it. They act as if through the incantatory repetition of sacred words—“experience,” “context,” “perspective,” “dialogue”—self-validating answers would finally, somehow, just spring forth.

If pragmatists practice self-deception in this way, they would hardly be the first to do so. In Carl Becker’s classic depiction, the philosophers of the

154. See, e.g., Posner, *supra* note 13, at 1660; Stick, *supra* note 7, at 393.

155. See Grey, *supra* note 7, at 804 (observing that “a wise pragmatist will also accept as legitimate the ‘philosophical’ human need to generate such [all-encompassing meta-accounts]”).

156. Of course, legal pragmatists may have all sorts of interesting and valuable things to say on particular subjects; the question is whether these more particular insights and ideas are products of legal pragmatism. Thomas Grey, in suggesting that legal pragmatism is “banal” and “truistic” on an abstract level, see *supra* note 12 and accompanying text, implies that legal pragmatism is *not* banal on a more concrete level. And it is certainly true that persons who call themselves legal pragmatists—Grey is an outstanding example—offer valuable insights on a variety of issues. But if the general propositions of legal pragmatism are mere truisms that virtually everyone accepts (including people who might not share Grey’s more particular views), then the connection between Grey’s particular views and the utterable propositional content of his pragmatism is at least problematic.

157. See *supra* notes 102-07 and accompanying text.

Enlightenment period bear a striking resemblance to some modern legal pragmatists. The *philosophes* were of a reforming bent; they were driven by “the humanitarian impulse to set things right.”<sup>158</sup> They wanted to make use of the past but also to free themselves from the traditions and superstitions—from entrenched conceptions and institutions—that the past had bequeathed to them.<sup>159</sup> And the way to achieve this freedom, they believed, was to turn directly to human nature and experience.<sup>160</sup> Thus, the *philosophes* studied history so that they could “establish the rights suitable to man’s nature on the facts of human experience.”<sup>161</sup>

In searching history and human experience for answers to political and ethical questions, however, the *philosophes* encountered an obstacle. Experience and history form a capacious net that gathers in facts, ideas, lessons, and observations of all kinds. The *philosophes* “wished to get rid of the bad ideas and customs inherited from the past; quite as obviously they wished to hold fast to the good ones, if any good ones there were.”<sup>162</sup> But how could they make this distinction? The bare facts of history did not distinguish between the “naturally good” and the “naturally bad” in experience.<sup>163</sup> But if history could not itself provide the standard for making the requisite distinction, only one alternative remained available: the philosophers would have to supply the standard themselves. Paradoxically, they could *learn from* human experience the distinction between the good and the bad only by *bringing to* human experience a standard for making that distinction. Thus, “the principles they are bound to find are the very ones they start out with.”<sup>164</sup>

Becker relishes the irony:

Is it, then, possible that the Philosophers were not really interested in establishing the rights suitable to man’s nature on the facts of human experience? Is it possible that they were engaged in that nefarious medieval enterprise of reconciling the facts of human experience with truths already, in some fashion, revealed to them?

• • • •

Alas yes, that is, indeed, the fact! The eighteenth-century Philosophers, like the medieval scholastics, held fast to a revealed body of knowledge, and they were unwilling or unable to learn anything from

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158. C. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS* 41 (1932).

159. *See id.* at 93.

160. Even when the *philosophes* continued to use the language of “natural law,” Becker argues, their usage was vastly different than Aquinas’. Enlightenment philosophers associated Nature not with *a priori* or theological first principles, but rather with “the actual behavior of nature”; they sought “not a logical concept, but a substantial reality.” *Id.* at 56-57.

161. *Id.* at 101.

162. *Id.* at 95.

163. *Id.* at 86.

164. *Id.* at 104.

history which could not, by some ingenious trick played on the dead, be reconciled with their faith.<sup>165</sup>

But Becker is charitable in his final judgment. "It is apparent that . . . they are deceiving us, these philosopher-historians. But we can easily forgive them for that, since they are, even more effectively, deceiving themselves."<sup>166</sup>

One can easily discern a close parallel between the eighteenth-century philosophers and, for example, Posner's argument that a more sure knowledge is available if we will just *start with* empirical observation rather than imposing our categories on experience.<sup>167</sup> The parallel becomes even tighter in the case of Robin West's argument for "pragmatic liberalism." West favors "pragmatic experientialism."<sup>168</sup> She argues that "the good life is a function of our inherent nature."<sup>169</sup> And, like the *philosophes*, West urges us to "seek[] an understanding of the good from an *empirical* understanding of what it has meant to be human"<sup>170</sup> by, for example, studying history; we must not try to "deduce [the nature of the good] from arbitrarily adopted premises."<sup>171</sup> And how will history and empirical study reveal to us the "good" or the good life? West argues that "we learn from experience that some past preferences and the choices based upon them are more conducive to happiness and to the good life than others."<sup>172</sup>

At this point West's position risks appearing like a historically oriented version of utilitarianism; the task is to figure out from historical study which policies will make people feel happy, and then to promote such policies. But West quickly fends off any vulgar utilitarian interpretation by distinguishing between "apparent happiness" and "true happiness."<sup>173</sup> To the pragmatist, liberalism seeks "the liberation of human potential for the good life, not the maximization of individual preferences."<sup>174</sup> "Human nature" evinces tendencies conducive to this kind of life, but it also harbors destructive tendencies such as lust, greed, and envy.<sup>175</sup> Hence, not *all* "natural, historical human inclinations" are to be respected—only those natural inclinations that lead to "the

165. *Id.* at 101-02.

166. *Id.* at 103. For a parallel interpretation, see A. MACINTYRE, *supra* note 117, at 47-49.

167. *See supra* note 107 and accompanying text.

168. West, *supra* note 1, at 680.

169. *Id.* at 696. Apparently, however, our nature is not so "inherent" as this language might suggest, since in the same sentence West asserts that our "nature is subject to change."

170. *Id.* at 724 (emphasis added). *See also id.* at 736 (arguing that we must "investigate human nature empirically"); cf. C. BECKER, *supra* note 158, at 101-03 (discussing eighteenth-century ambition to discover "human nature" empirically, and futility of that ambition).

171. West, *supra* note 1, at 681.

172. *Id.* at 680.

173. *Id.* at 689, 718.

174. *Id.* at 717.

175. *See id.* at 718.

good life." And only "human nature, *properly understood*,"<sup>176</sup> can lead us to discern "the good life."

How then are we to decide which parts of human nature to exalt and which parts to rebuke and restrain? How are we to decide which empirical reports of happiness to accept and which to reject as merely reporting "apparent happiness"? West argues that we must make a "discriminating assessment of experience."<sup>177</sup> We cannot take people's choices or preferences at face value; rather, we must make judgments about those choices, recognizing that some choices, such as "the 'choice' of a purchase or of a religious denomination or of a line of work may be part of a process of addiction and self-annihilation rather than self-definition and self-enhancement."<sup>178</sup> We do not just take history or experience raw, but instead season, sift, and refine it using the "method of intelligence."<sup>179</sup>

This discussion contains two prescriptions in obvious tension. First, the "empirical" strain in West's discussion tells us to get our values and our understanding of the good life *from* experience and to refrain from imposing our ideas or values *on* experience. Second, the "intelligence" part of the discussion suggests that we cannot take experience at face value, but instead must evaluate experience with the use of judgment and discrimination. But evaluation, judgment, and intelligence mean reflectively applying our ideas and values *to* experience. Thus, the second prescription cannot be fully reconciled with the first. West's position resembles that of the *philosophes* in suggesting that conclusions reached on the basis of judgment, intelligence, and discrimination can still be viewed as "empirical," free from the taint of values imposed on experience.<sup>180</sup> West's liberal pragmatist echoes the "objective" journalist who insists, "I don't let my own views or values influence my reporting in any way; I only report the facts . . . (as seen, selected, and interpreted by me)."<sup>181</sup>

176. *Id.* at 736 (emphasis added).

177. *Id.* at 681.

178. *Id.* at 711.

179. *Id.* at 694. Although the "method of intelligence" remains obscure in its operational details, it evidently involves reflection, experimentation, and broad social discussion. *See id.* at 694-96.

180. For an account of John Dewey's similar misadventures in his quest for a "metaphysics of experience," see R. RORTY, *PRAGMATISM*, *supra* note 108, at 72-85. Rorty argues that Dewey "was never able to escape the notion that what he himself said about experience described what experience itself looked like, whereas what others said of experience was a confusion between the data and the products of their analyses." *Id.* at 79-80.

181. Of course, West's pragmatism essay may not represent her more developed views. Indeed, while West once endorsed pragmatism but doubted that the legal community would adopt a pragmatic view of law, it is even possible that during the intervening half-decade the roles have been reversed: The legal community now regards pragmatism with favor, but West has moved beyond pragmatism. In a recent article West describes pragmatism or instrumentalism as one of three important strands in American jurisprudence, but she does not appear to endorse pragmatism as the preferred and superior view. *See West, Progressive and Conservative Constitutionalism*, 88 *MICH. L. REV.* 641, 659 (1990). She *does*, however, continue to cite her pragmatism essay with apparent approval. *Id.* at 670 n.75. More importantly, her recent article seems suspiciously heavy on abstract categorization. Constitutional scholars are divided into two camps: progressives and conservatives. Each camp neatly subdivides into three smaller groups, and each of these smaller groups has a characteristic position on three issues: politics, jurisprudence, and constitutional interpretation.

Throughout this discussion I have tried to use the conditional mood in suggesting that pragmatism might be a form of deception. Pragmatists may be engaged in deception, or self-deception, but they need not be. When one encounters pragmatists making ambitious claims for their position, by suggesting, for example, that pragmatism can actually provide solutions to legal problems, one should be wary. But pragmatists are not required to make this claim. In that case, however, the old, pesky question returns: if legal pragmatism cannot provide solutions to legal questions, and if it has only innocuous things to say about how solutions should be found, then why do pragmatists continue to talk about pragmatism?

### III. PRAGMATISM AS EXHORTATION

Thus far, the search for a distinct and potentially valuable pragmatic position has proven disappointing. There may well be a pragmatic temperament or attitude, but this attitude does not issue in useful propositions or criticisms; indeed, it undermines the pragmatist criticism of "grand theory." Pragmatists also provide recurring themes: forward-looking instrumentalism, the priority of experience, contextualism, and perspectivism. But these themes turn out upon inspection to be either empty or innocuous. At best, it seems, pragmatists are telling us what we already take for granted; at worst, insofar as pragmatists *think* they are saying something distinctive and useful, legal pragmatism is a project in self-deception.

Before dismissing pragmatism on these grounds, however, we should ask: what is so bad about being platitudinous? If a theorist or scholar purports to offer some new revelation or novel insight but then proceeds to recite pious generalities that everyone already acknowledges, we will naturally be disappointed. Similarly, insofar as legal pragmatism claims to be a distinctive, valuable position or theory about law, but in fact offers only platitudes, then it has failed to deliver on its promises. On the other hand, platitudes are eminently suited to perform certain functions such as exhortation.

A more familiar example illustrates the nature of this exhortatory function. Start with some quality—let us say, "cowardice"—that virtually everyone regards as a vice. Even the universal condemnation of this quality would hardly mean that cowardice presents human beings with no problems. On the contrary, the concept of "cowardice" raises at least two different kinds of problems. The intellectual problem involves deciding what kinds of conduct or attitude constitute "cowardice." After all, while condemning this vice, most people also allow that a healthy regard for one's safety is not only permissible but praiseworthy.

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The overall structure, abstract and internally coherent, is presented in a series of 2 x 3 and 3 x 3 grids. For myself, I find West's schemas at least interesting, often plausible and illuminating, and aesthetically appealing. (I've always been partial to tripartite categorization schemes.) But I'm not sure that a devout pragmatist would have much patience for all this abstract categorization and conceptual symmetry.

How then do we distinguish between a contemptible “cowardice” on the one hand and an appropriate “caution” on the other? How do we decide whether Rambo behavior is inspirational or ridiculous? What separates “courage” from “cowardice” at one end of the boldness continuum, and from “recklessness” or “foolhardiness” at the other?

The vice of cowardice also generates a less intellectual, more practical kind of problem. Even if one is certain that it would be cowardly to shrink from a particular danger, one may nevertheless shrink from it—because one lacks the courage to confront it. Most vices—cowardice, gluttony, greed, selfishness, dishonesty—are unfortunately all too pervasive; and the principal reason for this problem is not that we do not realize that such things are wrong, but that we find it hard to live up to our moral ideals. To be sure, this kind of moral failure has a cognitive element. Not liking to think of ourselves as cowardly or wicked, we are prone to excuse, rationalize, or simply refuse to think about our moral failings. Nonetheless, the root problem stems from weakness of will and deviant practice, not inability to comprehend the vice.

Because the intellectual and practical problems differ in nature, they call for different kinds of remedies. The first kind of problem may be amenable to theoretical treatment; an ethical philosopher might give us, if not a formula for distinguishing “cowardice” from proper caution, at least criteria or guidance to help make that distinction. Conversely, exhortation—a coach’s pre-game pep talk, for example, or a poem urging the reader to “Be a hero in the strife”—would offer little help with respect to the intellectual problem. We already know, after all, that we should not be cowardly; the intellectual question is what constitutes cowardice.

On the other hand, exhortation may be helpful to soldiers who know that they must go into battle and are struggling to muster up the courage to do so. Moral exhortation is directed to problems of practice; it seeks to strengthen the will to live up to ideals, or it prevents people from conveniently excusing or forgetting to think about their shortcomings. And with respect to this function, one can hardly object that the exhorter’s message is platitudinous, or that the listeners already believe that cowardice or greed or gluttony should be avoided. On the contrary, exhortation is by its very nature platitudinous in that sense; its purpose is to sharpen people’s sense of and commitment to ideals they already hold. Conversely, a theoretical discussion of ethical philosophy would be ill-suited for that function. Generals typically do not prepare an army for battle by assigning the troops to study Book III of the *Nichomachean Ethics*.

Recognizing the function of exhortation suggests that the criticisms of legal pragmatist themes offered earlier in this article may be misdirected. Such criticisms assert that many of the things that legal pragmatists typically say are propositions which everyone already takes for granted. Insofar as pragmatists are trying to offer criteria or principles for evaluating legal theories, that conclusion suggests that pragmatism offers little of value. But imagine a

different function for pragmatism; perhaps the purpose of pragmatist writing is to exhort scholars and judges to avoid intellectual vices that they already acknowledge as such but are nonetheless prone to commit.

For example, everyone may agree that theories should be firmly grounded in experience. Theorists generally start with experience, not only because they believe they should but because that is the only place they *can* start. Once conceived, however, a theory may acquire a vitality of its own. Rather than helping the scholar to understand or deal with experiential reality, the theory *becomes* the scholar's reality. This sort of theorizing resembles the religious vice of idolatry. The worshipper creates an image to help focus her thoughts and feelings on a more ultimate reality; but she concludes by worshipping the image itself. In the same way, a legal scholar may come to regard his theory as, like Dworkin's past, "valuable for its own sake"; he thereby succumbs to "a piece of perverse abstraction worship."<sup>182</sup> And pragmatism operates as a kind of exhortation, reminding the scholar of proper priorities, calling him back to experiential reality.<sup>183</sup>

One can easily misperceive the exhortatory function of legal pragmatism because the vices against which it admonishes—excessive abstraction, unwarranted generalization, formalistic rigidity, insensitivity to context—occur in theorizing (or, more loosely, in thinking). If theories remedy intellectual or theoretical problems and exhortation remedies problems of practice, then it might seem that pragmatism, which addresses intellectual problems, must be a kind of theory rather than a form of exhortation. In this instance, however, the distinction between theoretical problems and problems of practice is likely to confuse. Pragmatism is concerned with problems that occur in the *practice of theorizing*. It does not supply distinctive standards for constructing or evaluating theories, but instead admonishes thinkers to adhere to standards that they already accept. And it is precisely the oft-noted platitudinous character of the pragmatists' counsels that reveals the essentially exhortatory function of legal pragmatism.

Pragmatists may not rejoice in a view that depicts them primarily as exhorters. But exhortation performs a potentially useful function; "bad" theorizing—theorizing that deviates from the theorist's own standards—might be just as pervasive as other kinds of immoral practice, and just as deserving of rebuke. Indeed, insofar as we will always be engaged in theorizing, we will always potentially require reminding of the vices associated with that activity.

Nonetheless, a message which is urgently needed on one occasion or by one audience may be less useful in other situations. The value of preaching, as pragmatists should be pleased to acknowledge, depends upon context. For

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182. W. JAMES, *supra* note 108, at 115.

183. Whether intended or not, Grey's suggestion that pragmatism is "freedom from theory-guilt" expresses this sense of pragmatism as a way of avoiding the vices associated with theorizing. We generally feel guilt, after all, when we do what we already know to be wrong.

example, we view "frugality" as a venerable virtue, and one may appropriately preach it to one's teenage son or daughter. But it would be pointless, and perhaps injurious, to direct the same sermon on frugality to a pre-visitation Ebenezer Scrooge. In the same way, pragmatic admonishment is a proper prescription for an era that has been overindulgent towards the theorizing impulse. But pragmatism may be just the wrong remedy for a legal and judicial style that already suffers from theoretical timidity. The critical question, therefore, focuses on the diagnosis applicable to legal thinking today.

#### IV. CONCLUSION: IS THE PRAGMATIST SERMON THE ONE WE NEED NOW?

The resurgence of pragmatism in legal thought reflects a widespread perception that in recent years legal thinking has been unduly theoretical and abstract. One familiar explanation—albeit only a partial one—for this tendency suggests that *Brown v. Board of Education*<sup>184</sup> and later *Roe v. Wade*<sup>185</sup> prompted a crisis of constitutional legitimacy and provoked constitutional scholars to ever loftier flights of theoretical abstraction in their efforts to defend those decisions.<sup>186</sup> A whole generation of theorists was born out of the struggle over what Alexander Bickel called "the countermajoritarian difficulty."<sup>187</sup> The ambitious theories of scholars such as Ely, Dworkin, Rawls, Ackerman, and Perry stand as the landmark achievements of that generation.

In the long run, however, this project of theory-building has proven unsatisfying. Each of the landmarks mentioned above has been severely eroded, if not entirely overthrown. The movement toward "grand theory," it may now seem, represented a wrong turn; and it is time for retrenchment to the more solid ground of experience, practice, and common sense. This diagnosis, which views legal thought as emerging from (or perhaps still entangled in) a period of "grand theory," helps to account for the revival of legal pragmatism. It suggests that the pragmatists' message is not only timeless, but also timely.

A counter diagnosis, however, deserves to be considered. Note first the insecure status of the theories of Ely, Dworkin, Rawls, and Ackerman within the realm of "grand theory." Such theories were indeed elaborate, lengthy, and sweeping in scope; by those criteria they would qualify as "grand theory." In a different sense, however, such theorizing does not appear "grand" at all, but rather peculiarly and deliberately modest. John Ely's position, emphasizing a "concern with process in a broader sense,"<sup>188</sup> attempted to spare the judge, and the theorist, the difficult task of addressing questions of substantive justice

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184. 347 U.S. 483 (1954).

185. 410 U.S. 113 (1973).

186. For two expressions of this interpretation of the proliferation of constitutional theorizing, see M. TUSHNET, RED, WHITE, AND BLUE vii (1988); Bobbitt, *Is Law Politics?* (Book Review), 41 STAN. L. REV. 1233, 1237 (1989) (reviewing M. TUSHNET, RED, WHITE, AND BLUE (1988)).

187. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

188. J. ELY, *supra* note 150, at 74.



or morality. The theories of Rawls, Ackerman, and Dworkin, while seemingly more "substantive," studiously avoided addressing the perennial ethical, existential, or theological issues such as "the nature of man," or of "the good," or the meaning or purpose of life. On the contrary, at their core, the theories suggested that government and law (and hence legal theory) must not take positions on questions such as these.<sup>189</sup> Such theories did not merely decline to address such questions, but devoted themselves to insulating the law from moral and theological thinking that might arise in other disciplines or in the culture generally. Hence, by contrast with the true "grand theories" in the classical sense—i.e., to philosophies such as those of Plato, Aristotle, and Aquinas—recent legal thought has been decidedly timid; it may plausibly be viewed not as "grand theory," but rather as a kind of *anti*-"grand theory."

This alternative characterization of recent theorizing suggests several conclusions that clash with those of the pragmatist diagnosis. First, the theorizing of Ely, Rawls, Dworkin, and Ackerman arguably has proven unsatisfying not because it was too ambitious, but rather because it was so aggressively unambitious. Such theorizing was precluded in advance from providing satisfying answers to legal and political questions precisely because it refused to confront essential issues such as the nature of the good life, hiding instead behind an illusory "neutrality."<sup>190</sup> Second, legal pragmatism may plausibly be viewed not as challenging or replacing this theoretical quest for "neutrality," but rather as carrying on that quest in a slightly altered guise. The underlying instinct—one that avoids making difficult and controversial substantive judgments upon fundamental human questions—seems very much the same.<sup>191</sup> After all, what could be safer and less likely to give offense than a legal philosophy that principally offers innocuous advice such as "Respect human experience," "Listen to all sides," and "Be sensitive to context"?

Finally, if this analysis is accurate, then the pragmatist diagnosis and prescription are misconceived. The remedy, if there is one, for the failures of recent theorizing lies not in a pragmatic flight from theory, but rather in better and more courageous theorizing. And the more promising recent development

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189. See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 11 (1980); R. DWORKIN, *supra* note 34, at 191-92, 222 (1985); R. DWORKIN, *supra* note 147, at 266, 273 (1977); J. RAWLS, *A THEORY OF JUSTICE* 212 (1971).

190. The neutrality notion central to such theories has been widely criticized. For my own discussion of some of these criticisms, see Smith, *The Restoration of Tolerance*, 63 CALIF. L. REV. 305, 313-29 (1990).

191. Indeed, from this perspective, current legal pragmatism seems much closer to the grand theory it purports to oppose than to the thinking of a pragmatist like William James. James began his lectures on pragmatism by declaring that "the most practical and important thing about a man is still his view of the universe. . . . [T]he question is not whether the theory of the cosmos affects matters, but whether in the long run anything else affects them." W. JAMES, *supra* note 108, at 5. And throughout these lectures, James did not avoid addressing cosmic questions, but enthusiastically confronted them.

in legal thought lies not in the revival of legal pragmatism, but rather in the renewal of interest in what is awkwardly called "natural law."<sup>192</sup>

We have, then, two diagnoses of what ails our current legal culture. One diagnosis points to theoretical cockiness and prescribes pragmatic humility as the remedy. A counter-diagnosis would attribute our ills to theoretical diffidence; we have feared to confront the hard, elusive, but nonetheless essential human questions. This diagnosis suggests that the pragmatist sermon is not the message we need to hear now.

However, these competing prescriptions may, at least over time, converge. The second diagnosis, by calling for more fearless theorizing, implies that pragmatist exhortation will be urgently needed. To be sure, it is difficult to predict what direction natural law thinking might take. Even a proponent of natural law must admit that at present the propositions generated by naturalist approaches often seem at least as platitudinous and practically unhelpful as those issued by legal pragmatism;<sup>193</sup> and it may be that we simply lack the moral and metaphysical resources to get beyond such banalities. But if legal theorists ever begin to offer—or, what is more likely, incorporate—significant answers to fundamental ethical and existential questions, then one thing seems certain: The pragmatic admonitions to be cautious and humble in our theorizing, to keep in close touch with experience, to appreciate the richness of human contexts, and to exercise tolerance and empathy toward opposing viewpoints will be more imperative than ever.

In the end, therefore, the verdict on legal pragmatism remains an ambivalent one. We can benefit from pragmatism—but only if we do not expect much from it. The pragmatist sermon is one that we need to hear, or that we *will* need to hear, or both. On the other hand, it is a mistake to expect legal pragmatism to take us very far; it cannot solve our problems, nor even provide us with a method for solving our problems. Legal pragmatism is valuable primarily as an admonishment to avoid theoretical pretentiousness; and it should heed its own counsels.

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192. See, e.g., J. FINNIS, *supra* note 57; Perry, *supra* note 124; L. WEINREB, *NATURAL LAW AND JUSTICE* (1987); Johnson, *Some Thoughts About Natural Law*, 75 CALIF. L. REV. 217 (1987); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

193. See, e.g., M. PERRY, *supra* note 124, at 11-23 (advocating commitment to "flourishing"); *id.* at 52 (concluding after considerable analysis that "moral discourse ought to be tried"); Johnson, *supra* note 192, at 224 (proposing "some unoriginal and possibly platitudinous propositions about the rational life"). For my own offering in this vein, see Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113, 131 (1988) (proposing naturalist view of law whose central contention is that "social problems and controversies need not be resolved only through naked power in the service of purely subjective preferences, but that human reason can be applied in resolving such matters").

