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CONTRIBUTIONS†

PRAGMATIC ADJUDICATION

*Richard A. Posner**

Pragmatism is at one level a philosophical position, just as scientific realism, transcendental idealism, existentialism, utilitarianism, and logical positivism are. It is the level well illustrated by a recently published book in which Richard Rorty and his critics go at each other hammer and tongs over such questions as whether language reflects reality, whether free will is compatible with a scientific outlook, and whether such questions are even meaningful.¹ It is not the level at which this paper is pitched. My concern is with an issue in “applied” pragmatism, although after listening to Professor Grey’s talk at the conference about the independence of legal from philosophical pragmatism I realize that this term may be inapt.² I shall take up that issue at the end. The “applied” issue

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* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This paper is the revised text of a talk given on November 3, 1995, at a conference on “The Revival of Pragmatism” sponsored by the Center for the Humanities of the City University of New York. I thank Scott Brewer, William Eskridge, Lawrence Lessig, Martha Nussbaum, Eric Posner, and Cass Sunstein, along with the commenters and other conference participants, for very helpful suggestions on an earlier draft.

¹ RICHARD RORTY, *RORTY & PRAGMATISM: THE PHILOSOPHER RESPONDS TO HIS CRITICS* (Herman J. Saatkamp, Jr. ed., 1995). Professor Putnam’s talk at the conference was very much of this character.

² See also Matthew H. Kramer, *The Philosopher-Judge: Some Friendly Criticisms of Richard Posner’s Jurisprudence*, 59 MOD. L. REV. 465 (1996):

Metaphysical or philosophical pragmatism is a relativist position which denies that knowledge can be grounded on absolute foundations. Methodological or intellectual pragmatism is a position that attaches great importance to lively debate and open-mindedness and flexibility in the sciences, the humanities and the arts. Political pragmatism is a position that attaches great importance to civil liberties and to tolerance and to flexible experimentation in the discussions and institutions that shape the arrangements of human intercourse [T]hese three modes of pragmatism do not entail one another.

Id. at 475-78.

that is my subject till then is whether adjudication—particularly appellate adjudication—can or should be pragmatic.

The issue is at once spongy and, for me at least, urgent. It is spongy because “pragmatism” is such a vague term. Among the Supreme Court Justices who have been called “pragmatists” are Holmes, Brandeis, Frankfurter, Jackson, Douglas, Brennan, Powell, Stevens, White, and now Breyer;³ others could easily be added to the list. Among theorists of adjudication, the label has been applied not only to those who call themselves pragmatists, of whom there are now quite a number,⁴ but also to Ronald Dworkin,⁵ who calls pragmatism, at least Rorty’s conception of pragmatism, an intellectual meal fit only for a dog⁶ (and I take it he does not much like dogs). Some might think the inclusion of Frankfurter in my list even more peculiar than the inclusion of Dworkin. But it is justified by Frankfurter’s rejection of First Amendment absolutism, notably in the flag-salute cases, and by his espousal of a “shocks the conscience” test for substantive due process. This is a refined version of Holmes’s “puke” test⁷—a statute or other act of government violates the Constitution if and only if it makes you want to throw up. Can it be an accident that Frankfurter announced his test in a case about pumping a suspect’s stomach for evidence?⁸

The “puke” test is shorthand for Holmes’s more considered formulation in his dissent in *Lochner*: a statute does not work a deprivation of “liberty” without due process of law “unless it can be said that a rational and fair man necessarily would admit that the statute proposed [opposed?] would infringe fundamental principles as they have been understood by the traditions of our people and our law.”⁹ By “fundamental principles” Holmes meant principles of morality so deeply rooted in the judge’s being that the judge would find their rejection incomprehensible. The qualification “the traditions of our people and our law” is significant, however, as I shall explain later.

What makes the issue of whether adjudication is or should be pragmatic an urgent one for me is that my critics do not consider

³ See, e.g., Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163.

⁴ For a list, see RICHARD A. POSNER, *OVERCOMING LAW* 388–89 (1995).

⁵ See Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in *PRAGMATISM IN LAW AND SOCIETY* 89 (Michael Brint & William Weaver eds., 1991).

⁶ Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY*, *supra* note 5, at 359, 360.

⁷ See POSNER, *supra* note 4, at 192.

⁸ *Rochin v. California*, 342 U.S. 165 (1952).

⁹ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

my theory of adjudication pragmatic at all. They think it is in the spirit of logical positivism, from which pragmatists try to distance themselves. The logical positivists believed that moral assertions, because they are neither tautological¹⁰ nor verifiable empirically, have no truth value at all—are matters purely of taste or of unreasoned emotion. Jeffrey Rosen, for example, argues that my book *Overcoming Law* endorses a visceral, personalized, rule-less, free-wheeling, unstructured conception of judging.¹¹ And well before I thought of myself as a pragmatist, I was criticized for being “a captive of a thin and unsatisfactory epistemology,”¹² which is just the sort of criticism that a purely emotive theory of judging would invite. Am I, then, backsliding? I had better try to make clear what I think pragmatic adjudication is.

I.

An initial difficulty is that pragmatic adjudication cannot be derived from pragmatism the philosophical stance. For it would be entirely consistent with pragmatism the philosophy *not* to want judges to be pragmatists, just as it would be entirely consistent with utilitarianism not to want judges to conceive their role as being to maximize utility. One might believe, for example, that overall utility would be maximized if judges confined themselves to the application of rules, because discretionary justice, with all the uncertainty it would create, might be thought on balance to reduce rather than to increase utility. Similarly, a pragmatist committed to judging a legal system by the results the system produced might think the best results would be produced if the judges did not make pragmatic judgments but simply applied rules. This pragmatist might, by analogy to rule utilitarians, be a “rule pragmatist.”

So pragmatic adjudication will have to be defended—pragmatically—on its own terms rather than as a corollary of philosophical pragmatism. (This would be necessary anyway, because of the vagueness of the philosophical concept.) But what exactly is to be defended? I do not accept Dworkin’s definition: “[t]he pragmatist

¹⁰ Some are—for example, “murder is bad,” since badness is built into the definition of “murder” (as distinct from “killing”), at least the popular as distinct from the legal definition. The distinction is important, because some forms of murder in the legal sense, such as a cuckold’s killing the adulterer *in flagrante delicto*, are not considered morally wrong by a significant part of the community.

¹¹ Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 584–96 (1995).

¹² Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. CHI. L. REV. 1146, 1161 (1985) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)).

thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do.”¹³ That is Dworkin the polemicist speaking. But if his definition is rewritten as follows—“a pragmatist judge always tries to do the best he can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past”—then I can accept it as a working definition of the concept of pragmatic adjudication. On this construal the difference between, say, a judge who is a legal positivist in the strong sense of believing that the law is a system of rules laid down by legislatures and merely applied by judges, and a pragmatic judge, is that the former is centrally concerned with securing consistency with past enactments, while the latter is concerned with securing consistency with the past only to the extent that such consistency may happen to conduce to producing the best results for the future.

II.

What does the pragmatic approach to judging entail? What are the pros and cons (pragmatically evaluated, of course)? And is it, on balance, the right approach for judges to take?

Consider, to begin with, the differences in the way the judicial positivist and the judicial pragmatist might weight or order the materials bearing on the decision of a case. By “judicial positivist” I mean a judge who believes not only that the positivist account of law is descriptively accurate—that the meaning of law is exhausted in positive law—but also that the positivist account *should* guide judicial decision-making, in the strong sense that no right should be recognized or duty imposed that does not have its source in positive law. (A weaker sense will be considered later.) The judicial positivist would begin and usually end with a consideration of cases, statutes, administrative regulations, and constitutional provisions—all these and only these being “authorities” to which the judge must defer in accordance with Dworkin’s suggestion that a judge who is not a pragmatist has a duty to secure consistency in principle with what other officials have done in the past. If the authorities all line up in one direction, the decision of the present case is likely to be foreordained, because to go against the authorities would—unless there are compelling reasons to do so—violate the duty to the past. The most compelling reason would be that

¹³ RONALD DWORKIN, *LAW’S EMPIRE* 161 (1986).

some other line of cases had adopted a principle inconsistent with the authorities directly relevant to the present case. It would be the judge's duty, by comparing the two lines and bringing to bear other principles manifest or latent in case law, statute, and constitutional provision, to find the result in the present case that would promote or cohere with the best interpretation of the legal background as a whole.

The pragmatist judge has different priorities. That judge wants to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case. The pragmatist is not uninterested in past decisions, in statutes, and so forth. Far from it. For one thing, these are repositories of knowledge, even, sometimes, of wisdom, and so it would be folly to ignore them even if they had no authoritative significance. For another, a decision that destabilized the law by departing too abruptly from precedent might have, on balance, bad results. There is often a trade-off between rendering substantive justice in the case under consideration and maintaining the law's certainty and predictability. This trade-off, which is perhaps clearest in cases in which a defense of statute of limitations is raised, will sometimes justify sacrificing substantive justice in the individual case to consistency with previous cases or with statutes or, in short, with well-founded expectations necessary to the orderly management of society's business. Another reason not to ignore the past is that often it is difficult to determine the purpose and scope of a rule without tracing the rule to its origins.

The pragmatist judge thus regards precedent, statutes, and constitutions both as sources of potentially valuable information about the likely best result in the present case and as signposts that must not be obliterated or obscured gratuitously, because people may be relying upon them. But because the pragmatist judge sees these "authorities" merely as sources of information and as limited constraints on his freedom of decision, he does not depend upon them to supply the rule of decision for the truly novel case. For that he looks also or instead to sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify.

Some years ago the Supreme Court held that if there are two possible grounds for dismissing a suit filed in federal court, one being that it is not within the court's jurisdiction and the other being that the suit has no merit, and if the jurisdictional ground is

unclear but the lack of merit is clear, the court can dismiss the suit on the merits without deciding whether there is jurisdiction.¹⁴ This approach is "illogical." Jurisdiction is the power to decide the merits of a claim; so a decision on the merits presupposes jurisdiction. The pragmatic justification for occasionally putting the merits cart before the jurisdictional horse begins by asking *why* federal courts have a limited jurisdiction and have made rather a fetish of keeping within its bounds. The answer I think is that these are extraordinarily powerful courts and the concept of limited jurisdiction enables them both to limit the occasions for the exercise of power and to demonstrate self-restraint.¹⁵ But if the case clearly lacks merits, a decision so holding will not enlarge federal judicial power but will merely exercise it well within its outer bounds. So if the question of jurisdiction is unclear in a case whose lack of merit is clear, the prudent and economical course may be to skip over the jurisdictional question and dismiss the case on the merits.

Here is another example of the difference between positivistic and pragmatic adjudication. When oil and gas first became commercially valuable, the question arose whether they should be treated like other "mobile" resources, such as wild animals, where the rule of the common law was (and is) that you have no property right until you take possession of the animal, or, instead, like land and other "stable" property,¹⁶ title to which can be obtained by recording a deed in a public registry or by some other paper record without the owner having to take physical possession of the good.¹⁷ A judicial positivist who was asked whether only possessory rights should be recognized in oil and gas would be likely to start with the cases on property rights in wild animals and consider whether oil and gas are enough "like" them to justify subsuming these minerals under the legal concept of *ferae naturae*, meaning that only property rights obtained by possession would be enforced. (So no one could own oil until it was pumped to the surface.) The pragmatic judge would be more inclined to start with the teachings of natural resources economists and oil and gas engineers, to use their expert

¹⁴ Norton v. Mathews, 427 U.S. 524, 532 (1976).

¹⁵ To quote Isabel in *Measure for Measure*: "O, it is excellent to have a giant's strength, but it is tyrannous to use it like a giant!" WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 2.

¹⁶ A chair, for example: it moves only when someone moves it, whereas gravity or air pressure will cause oil and gas to flow into an empty space even if no (other) force is applied. I think that when the animal rules were first applied to oil and gas, these resources were erroneously thought to have an internal principle of motion, to "move on their own," like animals.

¹⁷ I set to one side property that is not physical at all, *i.e.*, intellectual property.

advice in deciding which regime of property rights (possessory or title) would produce the better results when applied to oil and gas, and only then to examine the wild-animal cases and other authorities to see whether they might block, by operation of the doctrine of stare decisis, the decision that would be best for the exploitation of oil and gas.

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

My third example is a current focus of controversy: the issue of the enforceability of contracts of surrogate motherhood. In holding them unenforceable the Supreme Court of New Jersey, in the *Baby M* case,¹⁸ engaged in a labored and rather windy tour of legal sources and concepts, overlooking the two issues, both factual in the broad sense, that would matter most to a pragmatist. The first is whether women who agree to be surrogate mothers typically or at least frequently experience intense regret when the moment comes to surrender the newborn baby to the father and his wife. The second is whether contracts of surrogate motherhood are typically or frequently exploitive in the sense that the surrogate mother is a poor woman who enters into the contract out of desperation. If the answers to both questions are "no," then, given the benefits of the contracts to the signatories, the pragmatist judge would probably enforce such contracts.¹⁹

These examples should help us see that while both the positivist and the pragmatist are interested in the authorities *and* the facts

¹⁸ *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

¹⁹ See generally RICHARD A. POSNER, *SEX AND REASON* 420-28 (1992).

(broadly construed—I am not talking only or even mainly about the facts developed at a trial through testimony, exhibits, and cross-examination), the positivist starts with and gives more weight to the authorities, while the pragmatist starts with and gives more weight to the facts. This is the most succinct description of pragmatic adjudication that I can come up with and it helps incidentally to explain two features of Holmes's judicial philosophy that seem at first glance antipathetic to pragmatic adjudication: his lack of interest, of which Brandeis complained, in economic and other data, and his reluctance to overrule previous decisions. A pragmatic judge believes that the future should not be a slave to the past, but he need not have faith in any particular bodies of data as guides to making the decision that will best serve the future. If like Holmes you lacked confidence that you or anyone else had any very clear idea of what the best decision on some particular issue would be, the pragmatic posture would be one of reluctance to overrule past decisions, since the effect of overruling would be to sacrifice certainty and stability for a merely conjectural gain.

I have said nothing about the pragmatic judge exercising a "legislative" function, although the kind of facts that he would need in order to decide the oil and gas case in pragmatic fashion would be the kind that students of administrative law call "legislative" to distinguish them from the sort of facts ("adjudicative") that judge and jury, cabined by the rules of evidence, are called upon to find. Holmes said that judges were "interstitial" legislators whenever they were called upon to decide a case the outcome of which was not dictated by unquestioned authorities. This is a misleading usage because of the many differences in procedures, training, experience, outlook, knowledge, tools, timing, constraints, and incentives between judges and legislators; scope is not the only difference, as Holmes's formulation suggests. What he should have said was that judges are rulemakers as well as rule appliers. A judge is a different kind of rulemaker from a legislator. An appellate judge has to decide in particular cases whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new rule. If he is a pragmatist his decision-making process will be guided by the goal of making the choice that will produce the best results. To make that choice he will have to do more than consult cases, statutes, regulations, constitutions, conventional legal treatises, and other orthodox legal materials.

III.

I want to examine a little more systematically the objections to the pragmatic approach to judging. One objection to inviting the judge, as I just did, to stray beyond the boundaries of the orthodox legal materials of decision is that judges are not trained to analyze and absorb the theories and data of social science. The example of Brandeis is not reassuring. Although Brandeis was a brilliant man of wide intellectual interests, his forays into social science—whether as advocate or as judge—were far from an unqualified success. Indeed, most social scientists today would probably agree that Brandeis's indefatigable industry in marshaling economic data and viewing them through the lens of economic theory was largely misguided. It led him to support (and to try to make a part of the law) such since discredited policies as limiting women's employment rights, fostering small business at the expense of large, and encouraging public utility and common carrier regulation. Holmes, as I have said, had reservations about the reliability of social scientific theories, but his unshakable faith in the eugenics movement, an early twentieth-century product of social and biological theory, undergirds his most criticized opinion (incidentally one joined by Brandeis)—*Buck v. Bell*.²⁰ One of the deformities of the majority opinion in *Roe v. Wade*²¹ is that the opinion makes it seem that the issue of abortion rights is a medical one and that the reason for invalidating state laws forbidding abortion is simply that they interfere with the autonomy of the medical profession—a “practical” angle reflecting Justice Blackmun's long association with the Mayo Clinic. The effects of abortion laws on women, children, and the family, which are the effects that are important to evaluating the laws, are not considered.

A second and related objection to the use of nonlegal materials to decide cases is that it is bound often to degenerate into “gut reaction” judging. I think that this appraisal is basically correct—provided the phrase “gut reaction” is taken figuratively rather than literally—but that the word “degenerate” is too strong. Cases do not wait upon the accumulation of some critical mass of social scientific knowledge that will enable the properly advised judge to arrive at the decision that will have the best results. The decisions of the Supreme Court in the area of sexual and reproductive autonomy, for example, came in advance of reliable, comprehensive, and

²⁰ 274 U.S. 200, 207 (1927) (“Three generations of imbeciles are enough”).

²¹ 410 U.S. 113 (1973).

accessible scholarship on sexuality, the family, and the status of women. The Court had to decide whether capital punishment is cruel and unusual punishment at a time when the scientific study of the deterrent effects of capital punishment was just beginning. When the Court decided to redistrict the nation according to the "one man, one vote" principle it cannot have had a clear idea about its effects, on which political scientists still do not agree more than thirty years later. The examples are not limited to the Supreme Court or to constitutional law. Common law judges had to resolve such issues as whether to extend the domain of strict liability, substitute comparative negligence for contributory negligence, simplify the rules of occupiers' liability, excuse breach of contract because of impossibility of performance, limit consequential damages, enforce waivers of tort liability, and so forth long before economists and economically minded lawyers got around to studying the economic consequences of these choices. When judges try to make the decision that will produce the "best results," without having any body of organized knowledge to turn to for help in making that decision, it seems they must rely on their intuitions.

The fancy term for the body of bedrock beliefs that guide decision is natural law. Does this mean that the pragmatic approach to adjudication is just another version of the natural law approach? I think not. The pragmatist does not look to God or other transcendental sources of moral principle to validate his departures from statute or precedent or other conventional "sources" of law. He does not have the confidence of secure foundations and this should make him a little more tentative, cautious, and piecemeal in imposing his vision of the Good on society in the name of legal justice. If Holmes really thought he was applying a "puke" test to statutes challenged as unconstitutional rather than evaluating those statutes for conformity with transcendental criteria, it would help explain his restrained approach to constitutional adjudication. On the other hand, a pragmatic Justice such as Robert Jackson, who unlike Holmes had a rich background of involvement in high-level political questions, was not bashful in drawing upon his extrajudicial experience for guidance to the content of constitutional doctrine.²² The pragmatic judge is not always a modest judge.

²² Quite the contrary. As he said in his famous concurrence in the steel-seizure case, "That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experi-

The reason that using the “puke” test or one’s “gut reactions” or even one’s pre-judicial high-governmental experiences to make judicial decisions sounds scandalous²³ is that the legal profession, and particularly its academic and judicial branches, want the added legitimacy that accrues to the decisions of people whose opinions are grounded in expert knowledge. The expert knowledge of another discipline is not what is wanted, although it is better than no expert knowledge at all. Both the law professor and the judge feel naked before society when the positions they take on novel cases—however carefully those positions are dressed up in legal jargon—are seen to reflect unstructured intuition based on personal and professional (but nonjudicial) experiences, and on character and temperament, rather than on disciplined, rigorous, and articulate inquiry.

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

ence, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

²³ Making the statement by Justice Jackson that I quoted in the preceding footnote remarkable for its candor; but am I mistaken in sensing a faintly apologetic tone?

pellate courts are councils of wise elders and it is not completely insane to entrust them with responsibility for deciding cases in a way that will produce the best results in the circumstances rather than just deciding cases in accordance with rules created by other organs of government or in accordance with their own previous decisions, although that is what they will be doing most of the time.

Nor do I flinch from another implication of conceiving American appellate courts in the way I have suggested: these courts will tend to treat the Constitution and the common law, and to a lesser extent bodies of statute law, as a kind of putty that can be used to fill embarrassing holes in the legal framework. Such an approach is not inevitable. In the case of property rights in oil and gas, a court could take the position that it had no power to create new rules and must therefore subsume these newly valuable resources under the closest existing rule, the rule governing wild animals. It might even take the position that it had no power to enlarge the boundaries of existing rules, and in that event no property rights in oil and gas would be recognized until the legislature created a system of property rights for these resources. Under this approach, if Connecticut has a crazy law (as it did until *Griswold v. Connecticut*²⁴ struck it down) forbidding married couples to use contraceptives, and no provision of the Constitution limits state regulation of the family, the crazy law will stand until it is repealed or the Constitution amended to invalidate it. Or if the Eighth Amendment's prohibition against cruel and unusual punishments has reference only to the *method* of punishment or to the propriety of punishing *at all* in particular circumstances (for example, for simply being poor, or an addict), then a state can with constitutional impunity sentence a sixteen-year old to life imprisonment without possibility of parole for the sale of one marijuana cigarette—which in fact seems to be the Supreme Court's current view,²⁵ one that I find very difficult to stomach. I do not think a pragmatic Justice of the Supreme Court *would* stomach it, although he or she would give due weight to the implications for judicial caseloads of bringing the length of prison sentences under judicial scrutiny, and to the difficulty of working out defensible norms of proportionality. The pragmatic judge is unwilling to throw up his hands and say "sorry, no law to apply" when confronted with outrageous conduct that the Constitution's framers neglected to foresee and make specific provision for.

²⁴ 381 U.S. 479 (1965).

²⁵ See *Harmelin v. Michigan*, 501 U.S. 957 (1991).

Oddly, this basic principle of pragmatic judging has received at least limited recognition by even the most orthodox judges in the case of statutes. It is accepted that if reading a statute the way it is written would produce absurd results, the judges may in effect rewrite it.²⁶ Most judges do not put it quite this way—they say statutory interpretation is a search for meaning and Congress can't have meant the absurd result—but it comes to the same thing. And, at least in this country, common law judges reserve the right to “rewrite” the common law as they go along. I am merely suggesting that a similar approach, prudently employed, is the pragmatic approach to constitutional adjudication as well.

I do not belittle the dangers of the approach. People can feel very strongly about a subject and be quite wrong. Certitude is not the test of certainty. A wise person realizes that even his unshakable convictions may be wrong—but not all of us are wise. In a pluralistic society, moreover, which America seems to be more and more every year, a judge's unshakable convictions may not be shared by enough other people that he can base a decision on those convictions and be reasonably confident it will be accepted. So the wise judge will try to check his convictions against those of some broader community of opinion, as suggested by Holmes in his dissent in *Lochner*. It was not irrelevant, from a pragmatic standpoint, to the outcome of *Brown v. Board of Education*²⁷ that official racial segregation had been abolished outside the South²⁸ and bore a disturbing resemblance to Nazi racial laws. It was not irrelevant to the outcome of *Griswold v. Connecticut* that, as the Court neglected to mention, only one other state (Massachusetts) had a similar law. If I were writing an opinion invalidating the life sentence in my hypothetical marijuana case I would look at the punishments for this conduct in other states and in the foreign countries, such as England and France, that we consider in some sense our peers. If a law could be said to be contrary to world public opinion I would consider this a reason, not compelling but not negligible either, for regarding a state law as unconstitutional even if the Constitution's text had to be stretched a bit to cover it. The study of other laws, or of world public opinion as crystallized in foreign law and practices, is a more profitable inquiry than trying to find some bit of eighteenth-century evidence that maybe the

²⁶ See, e.g., *Burns v. United States*, 501 U.S. 129, 136-37 (1991); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

²⁷ 347 U.S. 483 (1954).

²⁸ Which for these purposes, however, included the District of Columbia! See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

framers of the Constitution wanted courts to make sure punishments prescribed by statute were proportional to the gravity, or difficulty of apprehension, or profitability, or some other relevant characteristic of the crime. If I found such evidence I would think it a valuable bone to toss to a positivist or formalist colleague but I would not be embarrassed by its absence because I would not think myself duty-bound to maintain consistency with past decisions.

I would even think it pertinent to the pragmatic response to my hypothetical marijuana case to investigate or perhaps even just to speculate (if factual investigation proved fruitless) about the psychological and social meaning of imprisoning a young person for his entire life for the commission of a minor crime. What happens to a person in such a situation? Does he adjust? Deteriorate? What is the likely impact on his family, and on the larger society? How should one feel as a judge if one allows such a punishment to be imposed? And are these sentences "for real," or are preposterously severe sentences soon commuted? Could it be that the deterrent effect of so harsh a sentence will be so great that the total number of years of imprisonment for violation of the drug laws will be reduced, making the sacrifice of this young person a utility-maximizing venture after all? Is utility the right criterion here? Is the sale of marijuana perhaps far more destructive than some ivory-tower judge or professor thinks? Do judges become callous if a large proportion of the criminal cases they review involve very long sentences? Need we fear that if a defendant appealed who received "only" a five-year sentence the appellate judge's reaction would be: "Why are you complaining about such a trivial punishment?"²⁹

The response to the hypothetical case of the young man sentenced to life for selling marijuana is bound in the end to be an emotional rather than a closely reasoned one because so many imponderables enter into that response, as my questions were intended to indicate. But emotion is not pure glandular secretion. It is influenced by experience,³⁰ information, and imagination,³¹ and can thus be, to some extent anyway, disciplined by fact. Indignation or disgust founded on a responsible appreciation of a situation

²⁹ I believe in fact that this is increasingly the reaction of federal appellate judges, as federal sentences become ever longer and the number of criminal appeals ever greater.

³⁰ I refer the reader once again to the striking quotation from Justice Jackson, *supra* note 22.

³¹ This is the theme of Martha C. Nussbaum's 1993 Gifford Lectures. See MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: A THEORY OF THE EMOTIONS* (forthcoming 1997) (on file with author).

need not be thought a disreputable motive for action, even for a judge; it is indeed the absence of any emotion in such a situation that would be discreditable. It would be nice, though, if judges and law professors were more knowledgeable practitioners or at least consumers of social science (broadly defined to include history and philosophy), so that their "emotional" judgments were better informed.

My earlier reference to the ages of judges suggests another objection to pragmatic adjudication. Aristotle said, and I agree, that young people tend to be forward-looking. Their lives lie mainly ahead of them and they have only a limited stock of experience to draw upon in coping with the future, while old people tend to be backward-looking because they face an opposite balance between past and future.³² If, therefore, a pragmatic judge is forward-looking, does that mean we should invert the age profile of judges? Should Holmes have been made a judge at thirty and put out to pasture at fifty? Or, on the contrary, do not judges perform an important "balance wheel" function, one that requires them to be backward-looking, one that is peculiarly apt, therefore, for the aged? Have I not argued this myself³³ and also pointed out that, contrary to the conventional view, the great failing of the German judges in the Nazi period was not their positivism but their insistence on interpreting and applying the laws of the New Order to further the aims and the spirit of those laws?³⁴

These criticisms pivot on an ambiguity in the term "forward-looking." If it is meant to carry overtones of disdain for history, origins, and traditions, then the criticisms I have mentioned are entirely just. But I do not myself understand "forward-looking" in that sense. I understand it to mean that the past is valued not in itself but only in relation to the present and the future. That relation may be a very important one. The best the judge can do for the present and the future may be to insist that breaks with the past be duly considered. That would be entirely consistent with pragmatism; it would be positivism-as-pragmatism. All that would be missing would be a sense of reverence for the past, a felt "duty" of continuity with the past. That reverence, that sense of duty, would

³² I elaborate upon Aristotle's view in my book *Aging and Old Age*. See RICHARD A. POSNER, *AGING AND OLD AGE* ch. 5 (1995).

³³ See *id.* at ch. 8.

³⁴ POSNER, *supra* note 4, at 155. I would not be inclined to swing to the other extreme and blame Nazi jurisprudence on pragmatism. National Socialism was not a pragmatic faith.

be inconsistent with the forward-looking stance, and hence with pragmatism.

I think likewise that pragmatism is wholly neutral with regard to the question whether the law should be dominated by rules or by standards. The pragmatist rejects the idea that law is not law unless it consists of rules, because that kind of conceptual analysis is not pragmatic. But he is open to any pragmatic argument in favor of rules, for example that judges cannot be trusted to make intelligent decisions unless they are guided by rules, or that decisions based on standards produce uncertainty disproportionate to any gain in flexibility. A pragmatic judge thus need not be recognizable by a distinctive style of judging. What would be distinctive would be that the style (of thinking—he might decide to encapsulate his thoughts in positivist or formalist rhetoric) owed nothing to ideas about the nature of law or the moral duty to abide by past decisions or some other nonpragmatic grounding of judicial attitudes. I likewise leave open the criteria for the “best results” for which the pragmatic judge is striving. They are not what is best for the particular case without consideration of the implications for other cases. Pragmatism will not tell us what is best but, provided there is a fair degree of value consensus among the judges, as I think there still is in this country, it can help judges seek the best results unhampered by philosophical doubts.

The greatest danger of judicial pragmatism is intellectual laziness. It is a lot simpler to react to a case than to analyze it. The pragmatic judge must bear in mind at all times that he is a judge and that this means he must consider all the legal materials and arguments that can be brought to bear upon the case. If legal reasoning is modestly defined as reasoning with reference to distinctive legal materials such as statutes and legal doctrines and to the law’s traditional preoccupations, for example with stability, the right to be heard, and the other “rule of law” virtues,³⁵ then it ought to be an ingredient of every legal decision, though not necessarily the decision’s be-all and end-all. Just as some people think an artist must prove he is a competent draftsman before he can be taken seriously as an abstract artist, so I believe that a judge must prove—*anew* in every case—that he is a competent legal reasoner before he can be taken seriously as a pragmatic judge.

To put this point differently, the pragmatic judge must never forget that he is a judge and that the role of a judge is constraining

³⁵ As in Joseph Raz, *On the Autonomy of Legal Reasoning*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 310 (1994).

as well as empowering. Several years ago the Chicago public schools were unable to open at the beginning of the school year because the state refused to approve the school district's budget. An injunction was sought to compel the schools to open on the ground that their closure violated a judicial decree forbidding de facto racial segregation in the city's public schools. The argument was not that the state's refusal to approve the budget had been motivated by any racial animus—there was no suggestion of that—but that the ultimate goal of the desegregation decree, which was to improve the education and life prospects of black children in Chicago, would be thwarted if the schools were not open to educate them. The trial judge granted the request for an injunction on an avowedly pragmatic ground: the cost to Chicago's schoolchildren, of whatever race, of being denied an education. My court reversed.³⁶ We could not find any basis in federal law for the injunction. The desegregation decree had not commanded the City to open the public schools on some particular date, or for that matter to open them at all, or even to *have* public schools, let alone to flout a state law requiring financial responsibility in the administration of the public school system. It seemed to us that what the judge had done was not so much pragmatic as lawless. Even if one rejects the view, as do I, that pragmatism requires judges to eschew pragmatic adjudication, they must not ignore the good of compliance with settled rules of law. If a federal judge is free to issue an injunction that has no basis in federal law merely because he thinks the injunction will have good results, then we do not have pragmatic adjudication; we have judicial tyranny, which few Americans consider acceptable even if they are persuaded that the tyrant can be counted on to be generally benign.

The judge in the Chicago school case was guilty of what might be called myopic pragmatism, which may be Dworkin's conception of pragmatism. The only consequence the judge took into consideration in deciding whether to issue the injunction was that children enrolled in the public schools would be deprived of schooling until the schools opened. The consequence that he ignored was the consequence for the political and governmental systems of granting federal judges an uncanalized discretion to intervene in political disputes. Had the power that the judge claimed been upheld, you can be sure that henceforth the financing of Chicago's public schools would be determined by a federal judge rather than by elected officials. The judge thought that unless he ordered the

³⁶ *United States v. Board of Educ.*, 11 F.3d 668 (7th Cir. 1993).

schools to open, the contending parties would never agree on a budget. The reverse was true. Only the fact that the schools were closed exerted pressure on the parties to settle their dispute. And indeed, as soon as the court of appeals lifted the injunction, the parties came to terms and the schools opened. The consequence the judge ignored was a consequence for the schoolchildren as well as for other members of society, so that it is possible that even the narrowest group affected by the decree would, in the long run, have been hurt had the decree been allowed to stand.

If intellectual laziness is a danger of pragmatic adjudication, and I think it is, it is also a danger of not being pragmatic. The conventional judge is apt not to question his premises. If he thinks that "hate speech" is deeply harmful, or that banning hate speech would endanger political liberty, he is not likely to take the next step, which is to recognize that he may be wrong and to seek through investigation to determine whether he is wrong.³⁷ The deeper the belief—the closer it lies to our core values—the less likely we are to question it. Our disposition will be not to question but to defend. As Peirce and Dewey emphasized, doubt rather than belief is the spur to inquiry; and doubt is a disposition that pragmatism encourages, precisely in order to spur inquiry. One reason that attitudes toward hate speech are held generally as dogmas rather than hypotheses—one reason that so little is known about the actual consequences of hate speech—is that a pragmatic approach has not been taken to the subject.

IV.

I have been trying to explain my conception of pragmatic adjudication and to defend it against the critics of pragmatic adjudication. But I would not like to leave the impression that I think pragmatic adjudication is *the* right way for *all* courts to go. Philosophical pragmatism—although one can find echoes or anticipations of it in German philosophy and elsewhere (Hume, Nietzsche, and Wittgenstein, for example)—is basically an American philosophy, and it may not travel well to other countries. The same may be true for pragmatic adjudication. Concretely, the case for such adjudication is weaker in a parliamentary democracy than in a U.S.-style checks-and-balances federalist democracy. Many parlia-

³⁷ My discussion of this subject was stimulated by a very interesting paper by Michel Rosenfeld. See Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97 (1996).

mentary systems (notably the English, which is the one I know best) are effectively unicameral and, what is more, the parliament is controlled by the executive. The legislative branch of so highly centralized a system can pass new laws pretty easily and rapidly and word them clearly. If the courts identify a gap in existing law, they can be reasonably confident that it will be quickly filled by Parliament, so that only a temporary injustice will be done if the judges refrain from filling the gap themselves. Thus English judges can afford to be stodgier, more rule-bound, less pragmatic than our judges; the cost in substantive injustice is lower.

Some parliamentary systems have a federal structure, some have constitutional review, and some have both. Some, the English for example, have neither. The ones that have neither have much clearer law, whereas to determine someone's legal obligation in the United States will often require consideration of state law (and perhaps the laws of several states), federal statutory law (and sometimes federal common law), and state and federal constitutional law. Our government is one of the most decentralized in the world. We have effectively a tricameral federal legislature, since the President through his veto power and his role in either of the major political parties is a full participant in the legislative process. This tricameral structure makes it extremely difficult to pass laws, let alone clearly worded laws (unclear wording in a contract or a statute facilitates agreement on the contract or statute as a whole by deferring resolution of the most contentious points). Moreover, the tricameral federal structure is layered on top of similarly three-headed state legislatures. American courts cannot, if they want "the best results," leave all rulemaking to legislatures, for that would result in legal gaps and perversities galore. The lateral-entry character of the American judiciary, the absence of uniform criteria for appointment, the moral, intellectual, and political diversity of the nation (and hence, given the previous two points, of the judges), the individualistic and anti-authoritarian character of the population, the extraordinary complexity and dynamism of the society—all are further obstacles to American judges confining themselves to the application of rules laid down by legislatures, regulators, or the framers of the Constitution.

I am exaggerating the differences between the systems. But it is more natural for an English or an Austrian or a Danish judge to think of himself or herself as mainly just a rule applier than it is for an American judge to do so, and since there are good pragmatic arguments in favor of judicial modesty, it is far from clear that Eng-

lish or Austrian or Danish judges would be right, on pragmatic grounds, to become pragmatic adjudicators. I do not think that American appellate judges have a choice.

V.

I said I would come back to the question whether it is accurate to describe this as a paper in "applied" pragmatism. I conjecture two relations between philosophical and legal pragmatism. First, the tendency of most philosophical speculation—and it is what makes philosophy, despite the remoteness of most of it from quotidian concerns, a proper staple of college education—is to shake up a person's presuppositions, so that if he happens to be a judge or lawyer reading philosophy he is likely to feel the presuppositions that define his professional culture shift beneath him. Philosophy, especially the philosophy of pragmatism, incites doubt, and doubt incites inquiry, making the judge less of a dogmatic, more of a pragmatic, adjudicator.

Second, philosophy, theology, and law have to a significant extent parallel conceptual structures. This is not surprising, since Christian theology was so heavily influenced by Greek and Roman philosophy, and Western law by Christianity. The orthodox versions of the three systems of thought contain rather similar positions on matters such as scientific and moral realism, free will, and mind-body dualism. A challenge to any of the systems, therefore, is a challenge to all three. Pragmatism in its role (which it shares with logical positivism—and here it should be pointed out that to the nonspecialist the similarities among the characteristic modern schools of philosophy are more conspicuous than the differences³⁸) as skeptical challenger to orthodox philosophy encourages a skeptical view of the foundations of orthodox law with its many parallels to orthodox philosophy. That is why Rorty, who rarely discusses legal issues, is cited so frequently in law reviews.

Philosophical pragmatism does not dictate legal pragmatism or any other jurisprudential stance. But it may play a paternal and enabling role in relation to pragmatic theories of law, including the theory of pragmatic adjudication that I have tried to sketch in this paper.

³⁸ Hilary Putnam's brand of pragmatism, for example, as was plain from his talk at the conference, is a position within, rather than against, analytic philosophy.