

1990

## What Has Pragmatism to Offer Law?

Richard A. Posner

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

Richard A. Posner, "What Has Pragmatism to Offer Law?," 63 Southern California Law Review 1653 (1990).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# WHAT HAS PRAGMATISM TO OFFER LAW?

RICHARD A. POSNER\*

"[T]he great weakness of Pragmatism is that it ends by being of no use to anybody."

—T. S. Eliot<sup>1</sup>

## I.

The pragmatic movement gave legal realism such intellectual shape and content as it had. Then pragmatism died (or merged into other philosophical movements and lost its separate identity), and legal realism died (or was similarly absorbed and transcended). Lately pragmatism has revived, and the question I address in this Article is whether this revival has produced or is likely to produce a new jurisprudence that will bear the same relation to the new pragmatism as legal realism bore to the old. My answer is no on both counts. The new pragmatism, like the old, is not a distinct philosophical movement but an umbrella term for diverse tendencies in philosophical thought. What is more, it is a term for the same tendencies; the new pragmatism is not new. Some of the tendencies that go to make up the pragmatic tradition were fruitfully absorbed into legal realism, particularly in the forms articulated by Holmes and Cardozo; others led, and still lead, nowhere. The tendencies that many years ago were fruitfully absorbed into legal realism can indeed help in the formulation of a new jurisprudence, but it will be new largely in jettisoning the naive politics and other immaturities and excesses of legal realism.<sup>2</sup> This refurbished, modernized realism will owe little or nothing,

---

\* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the revised text of a paper presented at the Symposium on the Renaissance of Pragmatism in American Legal Thought, held at the University of Southern California Law Center on February 23 and 24, 1990. I thank Cass Sunstein for helpful comments on a previous draft.

1. T.S. Eliot, *Francis Herbert Bradley*, in *SELECTED PROSE OF T.S. ELIOT* 196, 204 (F. Kermode ed. 1975) (essay first published in 1927).

2. I present my full argument for this new jurisprudence in my book, *THE PROBLEMS OF JURISPRUDENCE* © 1990.

however, to the new pragmatism—if indeed there is such a thing, as I doubt.

Histories of pragmatism<sup>3</sup> usually begin with Charles Sanders Peirce, although he himself gave credit for the idea to a lawyer friend, Nicholas St. John Green, and anticipations can be found much earlier—in Epicurus, for example.<sup>4</sup> From Peirce the baton is (in conventional accounts) handed to William James, then to John Dewey, George Mead, and (in England) F.S.C. Schiller. Parallel to and influenced by the pragmatists, legal realism comes on the scene, inspired by the work of Oliver Wendell Hohnes, John Chipman Grey, and Benjamin Cardozo and realized in the work of the self-described realists, such as Jerome Frank, William Douglas, Karl Llewellyn, Felix Cohen, and Max Radin. Pragmatism and legal realism join in Dewey's essays on law.<sup>5</sup> But by the end of World War II both philosophical pragmatism and legal realism have expired, the first superseded by logical positivism and other "liard" analytic philosophy, the other absorbed into the legal mainstream and particularly into the "legal process" school that reaches its apogee in 1958 with Hart and Sacks's *The Legal Process*. Then, beginning in the 1960s with the waning of logical positivism, pragmatism comes charging back in the person of Richard Rorty, followed in the 1970s by critical legal studies—the radical son of legal realism—and in the 1980s by a school of legal neopragmatists that includes Martha Minow, Thomas Grey, Daniel Farber, Philip Frickey, and others. The others include myself, and perhaps also, as suggested by Professor Rorty in his comment on this paper, Ronald Dworkin—despite Dworkin's overt hostility to pragmatism<sup>6</sup>—and even Roberto Unger. The ideological diversity of this group is noteworthy.

In the account I am offering (not endorsing), pragmatism, whether of the paleo or neo varieties, stands for a progressively more emphatic rejection of Enlightenment dualisms such as subject and object, mind and body, perception and reality, form and substance; these dualisms being regarded as the props of a conservative social, political, and legal order.

---

3. Illustrated by D. HOLLINGER, IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS 23-32 (1985); J. SMITH, PURPOSE AND THOUGHT: THE MEANING OF PRAGMATISM (1978); H.S. THAYER, MEANING AND ACTION: A CRITICAL HISTORY OF PRAGMATISM (1968).

4. See Nussbaum, *Therapeutic Arguments: Epicurus and Aristotle*, in THE NORMS OF NATURE 31 (M. Schofield & G. Striker eds. 1986); see also *id.* at 41, 71-72.

5. Notably his essay *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

6. See *infra* note 23.

This picture is too simple. The triumphs of science, particularly Newtonian physics, in the seventeenth and eighteenth centuries persuaded most thinking people that the physical universe had a uniform structure accessible to human reason. It began to seem that human nature and human social systems might have a similarly mechanical structure. This emerging world view cast humankind in an observing mold. Through perception, measurement, and mathematics, the human mind would uncover the secrets of nature (including those of the mind itself, a part of nature) and the laws (natural, not positive) of social interaction—including laws decreeing balanced government, economic behavior in accordance with the principles of supply and demand, and moral and legal principles based on immutable principles of psychology and human behavior. The mind was a camera, recording activities both natural and social and alike determined by natural laws, and an adding machine.

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

Without going any further, we can see that "truth" is going to be a problematic concept for the pragmatist. The essential meaning of the

word is observer independence, which is just what the pragmatist is inclined to deny. It is no surprise, therefore, that the pragmatists' stabs at defining truth—truth is what is fated to be believed in the long run (Peirce), truth is what is good to believe (James), or truth is what survives in the competition among ideas (Holmes)—are riven by paradox. The pragmatist's real interest is not in truth at all, but in belief justified by social need.

This change in direction does not necessarily make the pragmatist unfriendly to science (there is a deep division within pragmatism over what attitude to take toward science).<sup>7</sup> But it shifts the emphasis in philosophy of science from the discovery of nature's laws by observation to the formulation of theories about nature that are motivated by the desire of human beings to predict and control their environment. The implication, later made explicit by Thomas Kuhn, is that scientific theories are a function of human need and desire rather than of the way things are in nature, so that the succession of theories on a given topic need not bring us closer to "ultimate reality" (which is not to deny that scientific *knowledge* may be growing steadily). But this is to get ahead of the story, because I want to pause in 1921 and examine the formulation of legal pragmatism that Benjamin Cardozo offered in his book published that year, *The Nature of the Judicial Process*.<sup>8</sup> Most of what Cardozo has to say in this book (and elsewhere) is latent in Holmes's voluminous but scattered and often cryptic academic, judicial, and occasional writings. But the book is worthwhile and important as a clear, concise, and sensible manifesto of legal pragmatism and harbinger of the realist movement.

"The final cause of law," writes Cardozo, "is the welfare of society."<sup>9</sup> So much for the formalist idea, whose scientific provenance and pretensions are evident, of law as a body of immutable principles. Cardozo does not mean, however, that judges "are free to substitute their own ideas of reason and justice for those of the men and women whom they serve. Their standard must be an objective one"—but objective in a pragmatic sense, which is not the sense of correspondence with an external reality. "In such matters, the thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right."<sup>10</sup>

7. See, e.g., Levi, *Escape From Boredom: Edification According to Rorty*, 11 CAN. J. PHIL. 589 (1981).

8. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

9. *Id.* at 66.

10. *Id.* at 88-89.

The thing that counts the most is that legal rules be understood in instrumental terms, implying contestability, revisability, and mutability.

Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function, they are diseased. If they are diseased, they need not propagate their kind. Sometimes they are cut out and extirpated altogether. Sometimes they are left with the shadow of continued life, but sterilized, truncated, impotent for harm.<sup>11</sup>

A related point is that law is forward-looking. This point is implicit in an instrumental concept of law—which is the pragmatic concept of law, law as the servant of human needs, and is in sharp contrast to Aristotle's influential theory of corrective justice. That theory is quintessentially backward-looking. The function of law as corrective justice is to restore a preexisting equilibrium of rights, while in Cardozo's account "[n]ot the origin, but the goal, is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead. . . . The rule that functions well produces a title deed to recognition. . . . [T]he final principle of selection for judges . . . is one of fitness to an end."<sup>12</sup> The "title deed" sentence is particularly noteworthy; it is a rebuke to formalist theories that require that for a law to be valid it must be "pedigreed" by being shown to derive from some authoritative source.

Where does the judge turn for the knowledge that is needed to weigh the social interests that shape the law? "I can only answer that he must get his knowledge . . . from experience and study and reflection; in brief, from life itself."<sup>13</sup> The judge is not a finder, but a maker, of law. John Marshall "gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions."<sup>14</sup>

The focus of *The Nature of the Judicial Process* is on the common law, but in the last quoted passage we can see that Cardozo did not think the creative powers of the judicial imagination bound to wither when confronted by the challenge of textual interpretation. Although the self-described legal realists (from whom Cardozo, conscious of their excesses,

---

11. *Id.* at 98-99.

12. *Id.* at 102-03.

13. *Id.* at 113.

14. *Id.* at 169-70.

carefully distanced himself)<sup>15</sup> added little to what had been said by Cardozo and before him by Holmes, a notable essay by Max Radin<sup>16</sup> clarifies and in so doing emphasizes the parity of statutes and the common law. Judges, it is true, are not to revise a statute, as they are free to do with a common law doctrine. But interpretation is a creative rather than contemplative task—indeed judges have as much freedom in deciding difficult statutory (and of course constitutional) cases as they have in deciding difficult common law cases.

Yet, despite Radin's notable essay and the realists' salutary effort to refocus legal scholarship from the common law to the emergent world of statute-dominated law, legislation proved a challenge to which the realist tradition, from Holmes to the petering out of legal realism in the 1940s and its replacement by the legal process school in the 1950s, was unable to rise. The trouble started with Holmes's well-known description of the judge as an interstitial legislator, a description that Cardozo echoes in *The Nature of the Judicial Process*. The implication is that judges and legislators are officials of the same stripe—guided and controlled by the same goals, values, incentives, and constraints. If this were true, the judicial role would be greatly simplified; it would be primarily a matter of helping the legislature forge sound policy. It is not true. The legislative process is buffeted by interest-group pressures to an extent rare in the judicial process. The result is a body of laws far less informed by sound policy judgments than the realists in the heyday and aftermath of the New Deal believed. It is no longer possible to imagine the good pragmatist judge as one who acts merely as the faithful agent of the legislature. Indeed, the faithful-agent conception has become a hallmark of modern formalism—judges as faithful agents *despite* the perversity of so many of the statutes that they are interpreting.

A closely related failing of legal realism was its naive enthusiasm for government, an enthusiasm that marked legal realism as a "liberal" movement (in the modern, not nineteenth-century, sense) and is part of the legacy of legal realism to today's neopragmatism. As strikingly shown by the other papers and the comments and floor discussion at the Symposium for which this Article was prepared, today's legal pragmatism is so dominated by persons of liberal or radical persuasion as to make the movement itself seem (not least in their eyes) a school of left-wing thought. Yet not only has pragmatism no inherent political

---

15. See B. CARDOZO, *Jurisprudence*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* 7 (M. Hall ed. 1947).

16. See Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863, 884 (1930).

valence, but those pragmatists who attack the pieties of the Right while exhibiting a wholly uncritical devotion to the pieties of the Left (such as racial and sexual equality, the desirability of a more equal distribution of income and wealth, and the pervasiveness of oppression and injustice in modern Western society) are not genuine pragmatists; they are dogmatists in pragmatists' clothing.

Another great weakness of legal realism was the lack of method. The realists knew what to do—think things not words, trace the actual consequences of legal doctrines, balance competing policies—but they didn't have a clue as to how to do any of these things. It was not their fault. The tools of economics, statistics, and other pertinent sciences were insufficiently developed to enable a social-engineering approach to be taken to law.

I want to go back and pick up the thread of philosophical pragmatism. When *The Nature of the Judicial Process* appeared, John Dewey was the leading philosopher of pragmatism, and it is his version of pragmatism that is most in evidence in Cardozo's book and other extrajudicial writings.<sup>17</sup> Dewey continued to be productive for many years, but until the 1960s there was little that was new in pragmatism. Yet much that was happening in philosophy during this interval supported the pragmatic outlook. Logical positivism itself, with its emphasis on verifiability and its consequent hostility to metaphysics, is pragmatic in demanding that theory make a difference in the world of fact, the empirical world. Popper's falsificationist philosophy of science is close to Peirce's philosophy of science; in both, doubt is the engine of progress and truth an ever-receding goal, rather than an attainment. The anti-foundationalism, anti-metaphysicality, and rejection of certitude that are leitmotifs of the later Wittgenstein and of Quine can be thought of as extensions of the ideas of James and Dewey. By the 1970s and 1980s, the streams have merged and we have a mature pragmatism represented by such figures as Davidson, Putnam, and Rorty in analytical philosophy, Habermas in political philosophy, Geertz in anthropology, Fish in literary criticism, and the academic lawyers whom I mentioned at the outset.<sup>18</sup>

---

17. I discuss the matter of Cardozo's pragmatism at greater length in my Cooley Lectures, *CARDOZO: A STUDY IN REPUTATION*, to be published in the fall of 1990 by the University of Chicago Press.

18. For good recent discussions of pragmatism from a variety of perspectives, see *ANTI-FOUNDATIONALISM AND PRACTICAL REASONING: CONVERSATIONS BETWEEN HERMENEUTICS AND ANALYSIS* (E. Simpson ed. 1987); J. MARGOLIS, *PRAGMATISM WITHOUT FOUNDATIONS: RECONCILING REALISM AND RELATIVISM*, in 1 *THE PERSISTENCE OF REALITY* (1961); R. RORTY,

There is little to be gained, however, from calling this recrudescence of pragmatism the "new" pragmatism. That would imply that there were (at least) two schools of pragmatism, each of which could be described and then compared. Neither the old nor the new pragmatism is a school. The differences between a Peirce and a James, or between a James and a Dewey, are profound. The differences among current advocates of pragmatism are even more profound, making it possible to find greater affinities across than within the "schools"—Peirce has more in common with Putnam than Putnam with Rorty, and I have more in common (I think) with Peirce, James, and Dewey than I have with Cornel West or Stanley Fish. What is more useful than to attempt to descry and compare old and new schools of pragmatism is to observe simply that the strengths of pragmatism are better appreciated today than they were thirty years ago and that this is due in part to the apparent failure of alternative philosophies such as logical positivism, but more to a growing recognition that the strengths of such alternatives lie in features shared with pragmatism, such as hostility to metaphysics and sympathy with the *methods* of science as distinct from faith in the power of science to deliver final truths.

If both the old and the new pragmatisms are as heterogeneous as I have suggested, the question arises whether pragmatism has any common core, and, if not, what use the term is. To speak in nonpragmatic terms, pragmatism has three "essential" elements. (To speak in pragmatic, nonessentialist terms, there is nothing practical to be gained from attaching the pragmatist label to any philosophy that does not have all three elements.) The first is a distrust of metaphysical entities ("reality," "truth," "nature," etc.) viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by their consequences, by the difference they make—and if they make none, set aside. The third is 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"

---

CONTINGENCY, IRONY, AND SOLIDARITY (1989); C. WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* (1989); Levi, *supra* note 7; PRAGMATISM: ITS SOURCES AND PROSPECTS (R. Mulvaney & P. Zeltner eds. 1981); Putnam & Putnam, *William James's Ideas*, 8 RARITAN 27 (Winter 1989); RORTY, CONSEQUENCES OF PRAGMATISM (ESSAYS 1972-1980) 160-66 (1982); Rorty, *The Priority of Democracy*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 257 (M. Peterson & R. Vaughan eds. 1988). The work of the new legal pragmatists is illustrated by Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

criteria. These elements in turn imply an outlook that is progressive (in the sense of forward-looking), secular, and experimental, and that is commonsensical without making a fetish of common sense—for common sense is a repository of prejudice and ignorance as well as a fount of wisdom. R.W. Sleeper has helpfully summarized the pragmatic outlook in describing Dewey's philosophy as "a philosophy rooted in common sense and dedicated to the transformation of culture, to the resolution of the conflicts that divide us."<sup>19</sup> Also apt is Cornel West's description of the "common denominator" of pragmatism as "a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action."<sup>20</sup>

## II.

It should be apparent that what I am calling the core of pragmatism or the pragmatic temper or outlook is vague enough to embrace a multitude of philosophies that are profoundly inconsistent at the operating level (anyone who still doubts this after the examples I gave earlier would do well to recall that Sidney Hook and Jürgen Habermas are both distinguished figures in pragmatic philosophy), including a multitude of inconsistent jurisprudences. Indeed there is a serious question—the question raised by the quotation from T.S. Eliot that is the epigraph of this Article—whether pragmatism is specific enough to have any use, specifically in law. To that question I devote the balance of the Article. I shall be brief and summary; the reader is referred to my forthcoming book<sup>21</sup> for elucidation of the points that follow and for necessary references.

1. There is at least one specific legal question to which pragmatism is directly applicable and that is the question of the basis and extent of the legal protection of free speech. If pragmatists are right and objective truth is just not in the cards, this may seem to weaken the case for providing special legal protections for free inquiry, viewed as the only dependable path to truth. Actually the case is strengthened. If truth is unattainable, the censor cannot appeal to a higher truth as the ground for foreclosing further inquiry on a subject; but the libertarian, in resisting censorship, can appeal to the demonstrated efficacy of free inquiry in enlarging knowledge. One can doubt that we shall ever attain "truth," but not that our knowledge is growing steadily. Even if every scientific

---

19. R. SLEEPER, *THE NECESSITY OF PRAGMATISM: JOHN DEWEY'S CONCEPTION OF PHILOSOPHY* 8-9 (1986).

20. C. WEST, *supra* note 18, at 5.

21. *See supra* note 2.

truth that we accept today is destined someday to be overthrown, our ability to cure tuberculosis and generate electrical power and build airplanes that fly will be unimpaired. The succession of scientific theories not only coexists with, but in fact contributes greatly to, the growth of scientific knowledge.

The pragmatist is apt also to be sympathetic to the argument that art and other nondiscursive modes of communication, and the "hot" rhetoric of the demagogue, and even of the flag or draft-card burner, ought to be protected. The pragmatist doubts that there are ascertainable, "objective" standards for establishing the proprieties of expression and therefore prefers to allow the market to be the arbiter. It is a plausible extension of Holmes's marketplace-of-ideas approach—an approach that rests on a pragmatist rejection of the proposition that there are objective criteria of truth.

2. The pragmatic outlook can help us maintain a properly critical stance toward mysterious entities that seem to play a large role in many areas of law, particularly tort and criminal law. Such entities as mind, intent, free will, and causation are constantly invoked in debates over civil and criminal liability. Tested by the pragmatic criterion of practical consequence, these entities are remarkably elusive. Even if they exist, law has no practical means of locating them and in fact ignores them on any but the most superficial verbal level. Judges and juries do not, as a precondition to finding that a killing was intentional, peer into the defendant's mind in quest of the required intent. They look at the evidence of what the defendant did and try to infer from it whether the deed involved advance planning or other indicia of high probability of success, whether there was concealment of evidence or other indicia of likely escape, and whether the circumstances of the crime argue a likelihood of repetition—all considerations that go to dangerousness rather than to intent or free will. The legal factfinder follows this approach because the social concern behind criminal punishment is a concern with dangerousness rather than with mental states (evil or otherwise), and because the methods of litigation do not enable the factfinder to probe beneath dangerousness into mental or spiritual strata so elusive they may not even exist.

Similarly, while interested in consequences and therefore implicitly in causality, the law does not make a fetish of "causation." It does not commit itself to any side of the age-old philosophical controversy over causation, but instead elides the issue by basing judgments of liability on social, rather than philosophical, considerations. People who have

caused no harm at all because their plans were interrupted are regularly punished for attempt and conspiracy; persons may be held liable in tort law when their acts were neither a necessary nor a sufficient condition of the harm that ensued (as where two defendants, acting independently, simultaneously inflict the harm, and only one is sued); and persons whose acts "caused" injury in an uncontroversial sense may be excused from liability because the harm was an unforeseeable consequence of the act. The principle of legal liability can be redescribed without reference to metaphysical entities such as mind and causation. This redescription is an important part of the project of a pragmatic jurisprudence, although it will not please those for whom law's semantic level is its most interesting and important.

There is nothing new about endeavoring to puncture the law's metaphysical balloons. It was a favorite pursuit of the legal realists. But they did it with a left-wing slant. They were derisive of the proposition that a corporation had natural rights, since a corporation is just the name of a set of contracts. But they were not derisive of the idea of corporate taxation, though, since the corporation is not a person, it cannot bear the burden of taxation. The ultimate payors of the corporate income tax are flesh-and-blood persons, by no means all wealthy, for among them are employees as well as shareholders.

3. Pragmatism remains a powerful antidote to formalism, which is enjoying a resurgence in the Supreme Court. Legal 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. It is, therefore, anti-pragmatic as well as anti-empirical. It asks not, What works?, but instead, What rules and outcomes have a proper pedigree in the form of a chain of logical links to an indisputably authoritative source of law, such as the text of the United States Constitution? Those rules and outcomes are correct and the rest incorrect. Formalism is the domain of the logician, the casuist, the Thomist, the Talmudist.

The desire to sever knowledge from observation is persistent and, to some extent, fruitful. Armed with the rules of arithmetic, one can drop a succession of balls into an urn and, if one has counted carefully, one will *know* how many balls there are in the urn without looking into it. Similarly, if the rule of the common law that there are no nonpossessory rights in wild animals can be thought somehow to generalize automatically to the rule that there are no such rights in *any* fugitive natural resource, then we can obtain the "correct" rule for property rights in oil

and gas without having to delve into the economics of developing these resources. The pragmatic approach reverses the sequence. It asks, What is the right rule—the sensible, the socially apt, the efficient, the fair rule—for oil and gas? In the course of investigating this question, the pragmatist will consult the wild animal law for what (little) light it may throw on the question, but the emphasis will be empirical from the start. There will be no inclination to allow existing rules to expand to their semantic limits, engrossing ever greater areas of experience by a process of analogy or of verbal similitude. The tendency of formalism is to force the practices of business and lay persons into the mold of existing legal concepts, viewed as immutable, such as “contract.” The pragmatist thinks that concepts should be subservient to human need and therefore wants law to adjust its categories to fit the practices of the nonlegal community.

4. The current bulwark of legal formalism, however, is not the common law, but statutory and constitutional interpretation. It is here that we find the most influential modern attempts to derive legal outcomes by methods superficially akin to deduction. The attempts are unlikely to succeed. The interpretation of texts is not a logical exercise and the bounds of “interpretation” are so expansive (when we consider that among the verbal and other objects that are interpreted are dreams, texts in foreign languages, and musical compositions) as to cast the utility of the concept into doubt. Pragmatists will emphasize the role of consequences in “interpretation,” viewed humbly as the use of a text in aid of an outcome. They will point out, for example, that one reason we interpret the sentence “I’ll eat my hat” as facetious is that the consequences of attempting to eat one’s hat are so untoward.

In approaching an issue that has been posed as one of statutory “interpretation,” pragmatists will ask which of the possible resolutions has the best consequences, all things (that lawyers are or should be interested in) considered, including the importance of preserving language as a medium of effective communication and of preserving the separation of powers. Except as may be implied by the last clause, pragmatists are not interested in the authenticity of a suggested interpretation as an expression of the intent of legislators or of the framers of constitutions. They are interested in using the legislative or constitutional text as a resource in the fashioning of a pragmatically attractive result. They agree with Cardozo that what works carries with it the best of title deeds; they prefer the sturdy mongrel to the sickly pedigreed purebred.

Take the old jurisprudential chestnut, discussed briefly in *The Nature of the Judicial Process*,<sup>22</sup> whether a "murdering heir" shall be allowed to inherit. The wills statute allows testators who comply with certain formalities to leave their property to whomever they please. There is no exception for the eventuality in which the beneficiary named in the will murders the testator. Should such an exception be interpolated by the courts? The answer, to the pragmatist, depends on the consequences. On the one hand, it can be objected that by interpolating an exception the courts will relax the pressure on legislators to draft statutes carefully and will violate the principle that legislatures rather than courts prescribe the penalties for criminal behavior. On the other hand, there is a natural concern that allowing the murderer to inherit will encourage murder; a reluctance to pile more work on already overburdened legislatures; and recognition that disinheriting the murderer is apt to fulfill, rather than to defeat, the testator's intentions, which is the ultimate purpose of the wills statute. A testator who foresaw the murder would not have made the murderer a beneficiary under the will; so if no exception to the wills statute is recognized, farseeing testators may decide to insert express provisions in their wills disinheriting murdering beneficiaries. The courts can save them the trouble by interpolating such a provision by interpretation. All these consequences have somehow to be analyzed and compared if the courts are to interpret the wills statute pragmatically.

Further complicating the interpretive picture in general is our current understanding of the legislative process, a more critical understanding than reigned when Cardozo, the legal realists, and the realists' successors in the legal process school wrote. We no longer think of statutes as typically, let alone invariably, the product of well-meaning efforts to maximize the public interest by legislators who are devoted to the public interest and who are the faithful representatives of constituents who share the same devotion. The wills statute can probably be viewed in faithful-agent terms, but many other statutes cannot be. The theory of social choice has instructed us about the difficulties of aggregating preferences by the method of voting, while the interest-group theory of politics in the version revived by economists has taught us that the legislative process often caters to the redistributive desires of narrow coalitions and, in so doing, disserves the public interest, plausibly construed. Under pressure of the insights of both theories it becomes unclear where to

---

22. The case is *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), and the discussion is in B. CARDOZO, *supra* note 8, at 41-43.

locate statutory meaning, problematic to speak of judges discerning legislative intent, and uncertain why judges should seek to perfect through interpretation the decrees of the special-interest state. The main choices in "interpretive" theory that the new learning allows are either some version of strict construction or a pragmatic approach in which, recognizing the difficult and problematic nature of statutory interpretation, judges use consequences to guide their decisions, always bearing in mind that the relevant consequences include systemic ones such as debasing the currency of statutory language by straying too far from it.

Mention of systemic concerns should help demolish the canard that legal pragmatism implies the suppression of such concerns in favor of doing shortsighted substantive justice between the parties to the particular case.<sup>23</sup> The relevant consequences to the pragmatist are long run as well as short run, systemic as well as individual, the importance of stability and predictability as well as the importance of justice to the individual parties, and the importance of maintaining language as a reliable method of communication as well as the importance of interpreting statutes and constitutional provisions freely in order to make them speak intelligently to circumstances not envisaged by their drafters.

5. Pragmatism has implications, some already sketched under the rubrics of formalism and interpretation, for the theory of adjudication—of what judges do and should do. Although professional discourse has always been predominantly formalist, most American judges have been practicing pragmatists, in part because the materials for decision in American law have always been so various and conflicting that formalism was an unworkable ideal.<sup>24</sup> But after a bout of conspicuous judicial

---

23. An implication readers might draw from Dworkin's statement in *Law's Empire* that "the pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do." R. DWORKIN, *LAW'S EMPIRE* 161 (1986). This is an impoverished conception of pragmatism, one that merges pragmatism with act utilitarianism.

24. Against the suggestion that "pragmatism provides the best explanations of how judges actually decide cases," Dworkin argues that it "leaves unexplained one prominent feature of judicial practice—the attitude judges take toward statutes and precedents in hard cases—except on the awkward hypothesis that this practice is designed to deceive the public, in which case the public has not consented to it." *Id.* Dworkin is inferring judges' attitude from the rhetoric of judicial opinions, and this is perilous, because judges are not always candid and also because they often are not self-aware. Even if judges are consistently and deliberately deceptive, this would not impair the soundness of the pragmatic *explanation* of judicial behavior. Similarly, a lack of public consent would have nothing to do with the explanatory power of the pragmatic explanation. The issue of consent is in any event artificial, since judicial opinions are with rare exceptions written to be read by lawyers, not by lay people, and have in fact virtually no lay readership. Since Dworkin knows all these things as well as I do, I infer that his discussion of judicial behavior and legitimacy, like so much discussion in law, is itself highly rhetorical.

activism that lasted several decades, there is renewed interest in approaches that favor continuity with the past over social engineering of the future—approaches embraced by many quondam judicial activists eager to conserve the work of the past decades against inroads by conservative judges, and by many conservatives who believe that the judiciary remains committed to liberal policies. There is renewed talk of tradition, of embodied but inarticulate wisdom (embodied in precedent, in professional training, in law's customary language), of the limitedness of individual reason and the danger of precipitate social change. The cautionary stance implicit in these approaches is congenial to the pragmatist, for whom the historical record of reform efforts is full of sobering lessons. But pragmatists are not content with a vague neotraditionalism. They know it will not do to tell judges to resolve all doubts against change and freeze law as it is, let alone to return to some past epoch in legal revolution (1950? 1850?). As society changes, judges, within the broad limits set by the legislators and by the makers of the Constitution, must adapt the law to its altered environment. No version of traditionalism will tell them how to do this. For this they need ends and an awareness of how social change affects the appropriate means—how, for example, the coming of the telegraph and the telephone altered the conditions for regulating contracts. They need, in short, the instrumental sense that is basic to pragmatism.

6. This brings me to the question of the relation between pragmatism and our most highly developed instrumental concept of law, the economic. Among the recurrent criticisms of efforts to defend the economic approach as a worthwhile guide for legal reform is that the defenders have failed to ground the approach securely in one of the great traditions of ethical insight, such as the Kantian or the utilitarian. The criticism is sound as observation, but not as criticism. The economic approach to law that I defend—the idea that law should strive to support competitive markets and to simulate their results in situations in which market-transaction costs are prohibitive—has affinities with both Kantian and utilitarian ethics: with the former, because the approach protects the autonomy of people who are productive or at least potentially so (granted, this isn't everyone); with the latter, because of the empirical relation between free markets and human welfare. Although it is easily shown that the economic approach is neither deducible from nor completely consistent with either system of ethics, this is not a decisive objection from a pragmatic standpoint. Pragmatists are unperturbed by a lack of foundations. We ask not whether the economic approach to law is adequately grounded in the ethics of Kant or Rawls or Bentham or Mill

or Hayek or Nozick—and not whether any of those ethics is adequately grounded—but whether it is the best approach for the contemporary American legal system to follow, given what we know about markets (and we are learning more about them every day from the economic and political changes in Communist and Third World countries), about American legislatures, about American judges, and about the values of the American people.

The economic approach cannot be the whole content of legal pragmatism. Because it works well only where there is at least moderate agreement on ends, it cannot answer the question whether abortion should be restricted, although it can tell us something, maybe much, about the efficacy and consequences of the restrictions. One value of pragmatism is its recognition that there are areas of discourse where lack of common ends precludes rational resolution; and here the pragmatic counsel (or one pragmatic counsel) to the legal system is to muddle through, preserve avenues of change, do not roil needlessly the political waters. On a pragmatic view, the error of *Roe v. Wade*<sup>25</sup> is not that it read the Constitution wrong—for there are plenty of well-regarded decisions that reflect an equally freewheeling approach to constitutional interpretation—but that it prematurely nationalized an issue best left to simmer longer at the state and local level until a consensus based on experience with a variety of approaches to abortion emerged.

7. To those who equate economics with scientism and who consider pragmatism the rejection of the scientific approach to philosophy,<sup>26</sup> my attempt to relate the economic approach to pragmatism will seem perverse. But scientific philosophy—the attempt to construct a metaphysics, a theory of action, an ethical theory, a political theory or what have you that has the rigor and generality that we associate with the natural sciences—is not at all the same thing as social science, which is the application of scientific method to social behavior. Most pragmatists have not disbelieved in the utility of scientific method. Quite the contrary, pragmatism in the style of Peirce and Dewey can be viewed as a generalization of the ethic of scientific inquiry—open-minded, forward-looking, respectful of fact, willing to experiment, disrespectful of sacred cows, anti-metaphysical. And this is an ethic of which law needs more. I am not saying that the economic approach to law is rooted in or inspired by

---

25. 410 U.S. 113 (1973).

26. For a clear statement of this rejection, see Rorty, *Philosophy as Science, as Metaphor, and as Politics*, in *THE INSTITUTION OF PHILOSOPHY: A DISCIPLINE IN CRISIS?* 13 (A. Cohen & M. Dascal eds. 1989).

pragmatism, for in truth it is rooted in and inspired by a belief in the intellectual power and pertinence of economics. But economic analysis and pragmatism are thoroughly, and I think fruitfully, compatible.

8. There is renewed interest in the rhetoric of law.<sup>27</sup> This may appear to have nothing to do with pragmatism, but the appearance is misleading. By making the concept of "objective truth" problematic, the pragmatic distrust of foundations expands the range in which metaphor and other forms of emotive argument may legitimately upset belief. In Holmes's pragmatic metaphor of the marketplace of ideas, competing theorists, ideologues, and reformers hawk their intellectual wares. Knowing how important persuasion is in the market for goods and services, we should not be surprised to find it playing a big role in the market in ideas as well. We should expect change in law to be related not only to politics and economics and not only to the correction of error, but also to new slogans, metaphors, imagery, and other means of bringing about changes in perspective.

### III.

With muddling through offered as one method of pragmatic jurisprudence (see point 6), one may wonder whether that jurisprudence has progressed an inch beyond *The Nature of the Judicial Process*. Certainly the essence of that jurisprudence is in Cardozo's book and indeed can be found much earlier, though in a more elliptical form, in Holmes's writings, especially "The Path of the Law."<sup>28</sup> But there has been some progress since 1921. Reviewing my eight items, we can see that Cardozo had a solid pragmatic grasp of the weakness of formalism (point 3) and a good pragmatic theory of adjudication (point 6), but free speech was not an issue about which he was much concerned (point 1); the critique of intention and causation (point 2) was less developed than it is today and certainly less salient in Cardozo's thinking; he was uninterested in interpretation and unrealistic about the legislative process (point 3); and he was innocent of the economic approach to law as a self-conscious methodology (point 6)—it did not exist in 1921, or indeed until half a century later—but like most good common law judges he had intuitions of it.<sup>29</sup> A closely related point is that the application of scientific method to law

---

27. See R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 269-316 (1988), and references therein.

28. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

29. Professor Landes and I discuss an example—Cardozo's decision in *Adams v. Bullock*, 227 N.Y. 208, 125 N.E. 93 (1919)—in W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 97-98 (1987).

lay in the future (point 7). Cardozo in his judicial opinions was very much the rhetorician (point 8), but his essay on judicial rhetoric<sup>30</sup> is a disappointment—cute, civilized, but unanalytic.

Although pragmatic jurisprudence embraces a richer set of ideas than can be found in *The Nature of the Judicial Process* or “The Path of the Law,” one can hardly say that there has been much progress, and perhaps in the nature of pragmatism there cannot be. All that a pragmatic jurisprudence really connotes—and it connoted it in 1897 or 1921 as much as it does today—is a rejection of a concept of law as grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends. It signals an attitude, an orientation, at times a change in direction. It clears the underbrush; it does not plant the forest.

---

30. B. CARDOZO, *Law and Literature*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* 339 (M. Hall ed. 1947).