

LEGAL PRAGMATISM, AN IDEAL SPEECH SITUATION, AND THE FULLY EMBODIED DEMOCRATIC PROCESS

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I. INTRODUCTION

Few philosophies can rival pragmatism in its influence on American popular culture. Pundits routinely invoke this down-to-earth creed to label certain twentieth century intellectual currents, although they disagree on whether pragmatism bears good tidings. A pragmatic attitude comes in handy, many feel, when we confront a problem that defies easy solutions and calls for a novel, experimental approach. Others see pragmatism as a slippery slope that will lead astray undisciplined minds unwilling to fortify their judgment with firm principles. Which position one takes depends in part on one's political leanings.

Few commentators on the right would go as far as Edward Cline in condemning pragmatism as "the school of thought which dispenses with the need for moral values,"¹ but it is common for conservative pundits to lament the baleful impact of this philosophical movement on American legal thought. Witness Thomas Bowden's derisive comments about "the grandfather of Supreme Court Pragmatism, Justice Oliver Wendell Holmes," whose distaste for formal reasoning has reverberated throughout twentieth century jurisprudence and is now starkly on display in the Rehnquist Court which succumbed to "pragmatism, the philosophy that claims there are no absolutes and no principles, only subjective opinions guided by expediency."²

Critics on the left are also uneasy about pragmatism, seeing its penchant for compromise as a sell-out. The so-called "moderate," explains one commentator, is apt to slip "into the managerial technique that constitutes pragmatism in recent American politics: succumbing to the delusion that he has transcended ideology, he accepts status quo injustice in the name of hardheaded realism."³ The Clinton administration came into criticism for its excessive pragmatism from those on the left of the political continuum. "Stephen Breyer was the candidate who could win praise from Orrin Hatch," Lincoln Caplan noted wryly, as he berated Bill Clinton for his failure to "display principles," "a need-

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¹ Edward Cline, *Acclaimed Films Not at Bottom of the Barrel, But Beneath It*, LAS VEGAS REV.- J., Apr. 9, 1995, at 3C.

² Thomas A. Bowden, *An Overview of Nation's Highest Court*, LAS VEGAS REV.- J., Dec. 28, 1997, at 1E.

³ Jackson Lears, *Golden Mean*, N.Y. TIMES, Dec. 15, 1996, §7, at 28 (reviewing ALAN WOLFE, *MARGINALIZED IN THE MIDDLE* (1996)).

less sacrifice of idealism,” and a precipitous slide into the “paralyzing, even cynical, pragmatism that many have criticized in the Administration [and that] has shown up unmistakably in its handling of legal issues.”⁴

Political moderates, by contrast, have few qualms about the pragmatic sensibilities which shaped the legal culture of the Clinton era, as evidenced by the welcome they gave to Breyer’s appointment to the Supreme Court. “His legal culture is more liberal, and his very flexible pragmatism will enable him to give things a gentle spin in a liberal direction,” opined David Margolick, adding only half in jest that Breyer “is a person without deep roots of any kind. He won’t develop a vision.”⁵ Linda Greenhouse, *The New York Times*’ legal correspondent, concurred:

Stephen G. Breyer is a judge of moderate leanings, a self-described pragmatist interested more in solutions than in theories . . . His avoidance of any single approach to legal interpretation places judge Breyer squarely within the tradition of legal pragmatism that, on the Supreme Court, has included Justices like Oliver Wendell Holmes and Benjamin N. Cardozo.⁶

If news analysts disagree about the pragmatist promise, so do scholars, who are divided about the meaning of pragmatism and its value for the field of law. Once they are through compiling a glossary of key concepts, legal scholars dabbling in pragmatism and pragmatist philosophers expounding the law are quick to caution against expecting much from this creed. “[T]o say that one is a pragmatist is to say little,” admonishes Richard Posner, a prominent figure in the legal pragmatist camp.⁷ Richard Rorty concurs, “I agree with Posner that judges will probably not find pragmatist philosophers – either old or new – useful.”⁸ “Indeed, if you take the antifoundationalism of pragmatism seriously,” Stanley Fish pushes the argument a step further, “you will see that there is absolutely nothing you can do with it.”⁹

Skepticism about legal pragmatism may carry a sharper edge. Donald Dworkin, who gave a good deal of credit to legal pragmatism in his *Laws’ Empire*,¹⁰ has little use for self-described pragmatists like Posner, whose work he finds “erudite, punchy, knock-about, witty, and relentlessly superficial.”¹¹ Dworkin is equally blunt about Rorty’s philosophy, for “what Professor Rorty calls ‘new’ pragmatism has nothing to contribute to legal theory, except to provide yet another way for legal scholars to be busy while actually doing nothing.”¹²

A more upbeat brand of legal pragmatism is associated with the German political philosopher Jürgen Habermas who developed an elaborate discourse

⁴ Lincoln Caplan, *Lawyers Without a Cause*, N.Y. TIMES, Aug. 10, 1994, at A19.

⁵ David Margolick, *Scholarly Consensus Builder*, N.Y. TIMES, May 14, 1994, at A1.

⁶ Linda Greenhouse, *Portrait of a Pragmatist*, N.Y. TIMES, Jul. 14, 1994 at A1.

⁷ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 28 (1993).

⁸ Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in *PRAGMATISM IN LAW AND SOCIETY* 89, 92 (Michael Brint & William Weaver eds., 1991).

⁹ Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin*, in *PRAGMATISM IN LAW AND SOCIETY*, *supra* note 8, at 47, 63.

¹⁰ RONALD DWORKIN, *LAW’S EMPIRE* (1988).

¹¹ Ronald D. Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY*, *supra* note 8, 359, 385 n.17.

¹² *Id.* at 359.

concept of law.¹³ A group of American legal scholars influenced by Habermas has been pushing his discourse theoretic framework in new directions, applying it to a broad range of democratic processes.¹⁴ What is interesting about this movement is that its proponents seek to transcend the court-centered approach with its adversarial culture and practice law in a pragmatist key in alternative dispute resolution forums where pragmatist insights are applied to grass root democratic processes. A lecture Carrie Menkel-Meadow recently gave at the Saltman Center for Conflict Resolution at the William S. Boyd School of Law highlights a wide range of experiments currently underway that promise to give legal pragmatism a wider resonance.¹⁵

This paper is about jurists' encounter with pragmatism and pragmatist philosophers' grappling with law. It reviews the range of discursive and nondiscursive practices associated with the pragmatic perspective on law and democracy. Section II begins with Kant's legal philosophy and its peculiar relevance for pragmatism as a negative reference frame. Section III shows how philosophers responded to Kant. Section IV tracks the jurists' reaction to pragmatism. Section V analyzes recent trends in legal pragmatism. Section VI discusses the place of principles in pragmatic jurisprudence. Section VII focuses on attempts to reclaim the Kantian insights in the discourse theory of law and democracy. And Section VIII joins issues with the process theorists of democracy and appeals to the legacy of John Dewey and George Herbert Mead as theoreticians of the fully embodied democratic process.

II. KANT'S JURIDICAL MORALISM

Pragmatism and transcendental idealism are commonly seen as antithetical creeds in philosophy, one committed to a priori principles independent from experience, the other sacrificing philosophical abstractions to practical wisdom. Thus, it is all the more intriguing that Charles Peirce, the pioneer of pragmatist thought, not only spoke highly of Kant but also saw him as something of a precursor. "Kant (whom I *more* than admire) is nothing but a somewhat confused pragmatist,"¹⁶ intimated Peirce, who did not mean this as a backhanded compliment.

Kant was probably the first to use "pragmatic" as a philosophical term, notably in his *Critique of Pure Reason*, where he juxtaposed "*pragmatic laws . . . recommended to us by the senses*" and "*practical laws . . . given by reason*

¹³ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 84 (William Rehg trans., 1998).

¹⁴ Joshua Cohen, *Reflections on Habermas on Democracy*, 12 *RATIO JURIS* 385 (1999); STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (Princeton Univ. Press 2000); Carrie Menkel-Meadow, *The Trouble with the Adversarial System in a Postmodern, Multicultural World*, 38 *WM. & MARY L. REV.* 5 (1996); JON ELSTER, *SOLOMONIC JUDGMENTS: STUDIES IN LIMITATIONS OF RATIONALITY* (Cambridge Univ. Press 1989).

¹⁵ Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 *NEV. L. J.* 347 (2005).

¹⁶ CHARLES S. PEIRCE, *PHILOSOPHICAL WRITINGS OF PEIRCE* 299 (Justus Buchler ed., Dover Publ'ns 1955) (1940).

entirely a priori.”¹⁷ This opposition recurs in all three of Kant’s *Critiques*, as well as in his *Metaphysical Elements of Justice, Doctrine of Virtue*, and his lesser known *Anthropology from a Pragmatic Point of View*, which draws a contrast between pragmatic (*pragmatisch*) considerations rooted in everyday experience and practical (*praktisch*) motives ennobled by theoretical reflection.

Another angle that makes Kant a good starting point for the present inquiry is the pervasive legalism of his thought. Legal metaphors are among Kant’s favorite. When he is groping for rhetorical tools equal to the task he set for himself in his path breaking *Critique of Pure Reason*, he summons legal imagery to communicate the exalted place critical reason is destined to play in human affairs. “The critique of pure reason may really be looked upon as the true tribunal for all disputes of reason . . . [which] secures to us the peace of a legal status, in which disputes are not to be carried on except in the proper form of a *lawsuit*.”¹⁸ Positive or civil law has a power to coerce conduct, but it does not have the dignity that the testimony of pure reason lends to our decisions. Substantive law must perfect itself by hewing closely to the a priori moral principles dormant in every citizen who, upon transcendental reflection, discovers “that he has a universal legislation within himself”¹⁹ and imposes his rational will on the world at large.

Kant’s strategy here is to intermesh as much as possible law and morality. He is cognizant of the fact that law can be immoral and moral action illegal, but he sees the best hope for the future in suffusing legal matters with moral precepts and imparting formal-logical rigor to moral reasoning. The result is a kind of “juridical moralism” or “ethical legalism” which endows conscience with legislative powers and turns every citizen into a lawgiver.

While morality and law are mutually constitutive in a perfectly rational state – the former asserts the dignity and universal rights of every human being, the latter backs the dictates of reason with administrative power – the relationship between the two is not symmetrical. Civil courts apply the extant corpus of laws without passing judgment on their wisdom. Moral practical reason, by contrast, gives laws their ultimate justification by furnishing an a priori true foundation for the entire legal edifice. While the tribunal of practical reason cannot prescribe laws their empirical content, reason enlightened by transcendental reflection is well equipped to formulate its constitutive principles, such as respect for civil rights, reverence for human dignity, abhorrence of violence, and control over the legitimate means of coercion. Hence, Kant draws a rather invidious comparison between “civil court” and the “court of conscience,”²⁰ the “authorization [that] is wholly external” and “freedom according to universal laws,”²¹ and the “mere agreement or disagreement of an action with the law

¹⁷ IMMANUEL KANT, *CRITIQUE OF PURE REASON* 513 (F. Max Muller trans., Anchor Books 1966) (1781).

¹⁸ *Id.* at 486.

¹⁹ IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 16 (John Ladd trans., Macmillan Pub. Co. 1965) (1797).

²⁰ *Id.* at 41.

²¹ *Id.* at 36.

. . . called *legality*” and conduct motivated by “the Idea of duty . . . [that] is called the *morality* of the action.”²²

Politically, Kant is treading here on ground well traveled by natural law theorists who sought constitutional limits on political absolutism. He is particularly indebted to Rousseau, who blended a sovereign and a subject into a citizen called upon to obey no law except the self-legislated one. Such a citizen will reside in a blessed republic where the general will coincides with the will of everyone.

Kant, however, parts company with his predecessors on several fronts when he deals with practical (“pragmatic” in his terms) adjudication and what we would call today “judicious temperament.” People well versed in theoretical matters may follow general rules, but they are not necessarily good judges when it comes to particulars, Kant astutely observes – “the faculty of judgment is a special talent which cannot be taught, but must be practiced.”²³ Hence, his advice to judges is to take special care “in order to guard the faculty of judgment against mistakes (*lapsus iudicii*).”²⁴ Even supple minds should heed this advice when they step into the pragmatic domain: “A physician, therefore, a judge, or a politician, may carry in his head many beautiful pathological, juridical, or political rules, nay, he may even become an accurate teacher of them, and he may yet in the application of these rules commit many a blunder”²⁵ To guard against *lapsus iudicii* one has to cultivate a judicious temper that eschews negative emotions and cultivates “the habitually cheerful heart,”²⁶ a “kind of *hygiene* that man should practice to keep himself morally *healthy*.”²⁷ Kant is adamant about temperamental preconditions for sound judgment. He calls upon all citizens, professional or otherwise, to exercise a judicious attitude, which requires taming emotions and ruthlessly suppressing passions:

Passions are cancerous stores for pure practical reason, and most of them are incurable Therefore passions are not, like emotions, merely unfortunate moods teeming with many evils, but they are without exception bad. Even the most well-intended desire if it aims . . . at what belongs to virtue, that is, to charity, is nevertheless . . . as soon as it changes to passion, not merely pragmatically pernicious, but also morally reprehensible.²⁸

If passion is the enemy of reason, then freedom is first and foremost freedom from passion – indeed, from negative affect in general, for “what we do cheerlessly and merely as compulsory service has no intrinsic value for us.”²⁹ Even when it comes to positive emotions, reason has to assert its mastery. Moral practical reason has nothing to learn from affect. However benign this affect might be, it will not pass the test of practical reason unless it is thor-

²² *Id.* at 19.

²³ See KANT, *supra* note 17, at 119. “Deficiency in the faculty of judgment is really what we call stupidity, and there is no remedy for that.” *Id.*

²⁴ *Id.* at 120.

²⁵ *Id.* at 119.

²⁶ IMMANUEL KANT, *THE DOCTRINE OF VIRTUE: PART II OF THE METAPHYSICS OF MORALS* 159 (Mary J. Gregor trans., Harper & Row 1964) (1797).

²⁷ *Id.*

²⁸ IMMANUEL KANT, *ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW* 174 (Victor Lyle Dowdle trans., S. Ill. Univ. Press 1978) (1798).

²⁹ See KANT, *supra* note 26, at 158.

oughly infused with a sense of duty. Helping a friend out of sympathy would be morally reprehensible on this account, as would be tending for a child with mere affection as a guide. In a juridically moral state based on the categorical imperative we all can be “cheerful in the consciousness of our restored freedom,”³⁰ as every citizen’s action attests to “the purity of his moral purpose and the sincerity of his attitude.”³¹

There is a political dimension to Kant’s thought that has appealed even to those who rejected his philosophical method, a dimension that foregrounds free inquiry and promotes speech conditions conducive to democracy. At least in theory, Kant is committed to a deliberative process in which “everybody has a vote,”³² which allows “no other judge but universal human reason,”³³ and which “grant[s] to reason the fullest freedom, both of enquiry and of criticism.”³⁴ Closely related to this theme is the strategically important distinction between an act of “justification” which grounds a policy in moral concerns for universal rights and an act of “adjudication” which squares off conduct with existing laws without questioning their *raison d’être* (reason). This activist approach explains the continuous relevance of Kant to the ongoing debates about deliberative democracy. The pragmatic question that Kant bequeathed to his successors is whether society can be organized around the discursive principles grounded in moral concerns, and if so, how we go about instituting such a society.

Kant is fully aware that history falls short of what pure practical reason mandates, that “what one himself recognizes on good grounds to be just will not receive confirmation in a court of justice” and “what he must judge unjust in itself will be treated with indulgence by the court.”³⁵ Still, Kant is sanguine about the pragmatic import of his theory. He stakes his hopes on social pedagogy, on a broadly conceived educational practice that cultivates respect for human autonomy, rouses moral imagination, promotes peace in international relations through a “league of nations,”³⁶ and pursues similar lofty causes. The concept of human liberty under universal law might be utopian, Kant admits at some point, but at the very least it can serve as a worthy ideal.

The problem with Kant’s theory is that it does not square very well with his more specific recommendations. Contemporary readers are bound to wince when they follow Kant into the pragmatic realm and check his path-breaking intellections against his legal and political opinions. I am not talking about the misogynistic witticisms jumping from the pages of Kant’s *Anthropology From the Pragmatic Standpoint* where he pokes fun at “scholarly women . . . [who] use their books somewhat like a watch, . . . [which they wear] so it can be noticed that they have one, although it is usually broken or does not show the correct time.”³⁷ Nor is it his questionable endorsement of “the people’s duty to

³⁰ *Id.* at 159.

³¹ *Id.* at 52.

³² KANT, *supra* note 17, at 486.

³³ *See id.*

³⁴ *Id.* at 482.

³⁵ *Id.*, KANT, *supra* note 19, at 42.

³⁶ *Id.* at 116.

³⁷ *See* KANT, *supra* note 26, at 221.

endure even the most intolerable abuse of supreme authority³⁸ or his support of the estate-based society with “a superior class (entitled to command) and an inferior class (which, although free and bound only by public law, is predestined to obey the former).”³⁹ Inconsistent though such judgments are with Kant’s appeal to universal human dignity, they might have something to do with his anxiety about the Prussian authorities’ reaction to his free-spirited discourse, the reaction that was decidedly negative at times. What makes one cringe, however, is the cruelty ingrained in specific legal opinions he ventured at the time. For the very man who theorized human dignity enthusiastically endorsed the death penalty, insisted that a woman should die rather than submit to rape,⁴⁰ and ranted about “the disgrace of an illegitimate child . . . [who] has crept surreptitiously into the commonwealth (much like prohibited wares [contraband]), so that its existence as well as its destruction can be ignored.”⁴¹ Equally troubling are his ravings against *crimen carnis contra naturam*, which cover among other things homosexuality and masturbation, two crimes against nature Kant went to a great length to expose, condemning the former as a disgrace to the human race and the latter as an abomination worse than suicide.⁴²

To the modern conscience such counsel sounds like the very *lapsus judicii* Kant warned against in his theoretical discourse. What his legal opinions show is that, for all his bold theoretical statements, Kant could not escape the hermeneutical horizons of his time, that he shared the prejudices of his age which drove him to pragmatic judgments inconsistent with his theoretical views. The broader issue that this pragmatic-discursive misalignment raises is whether Kant erred in assigning priority to abstract formula over pragmatic considerations. The late nineteenth and early twentieth centuries saw a robust philosophical critique of Kant. One philosophy that challenged Kant’s apriorism and influenced legal thought in early twentieth century America was “pragmatism.”

III. PRAGMATISTS RESPOND TO KANT

Before we examine the issues over which pragmatist philosophers parted company with Kant, let’s review the premises they all share. One such premise is “universalism” which asserts that knowledge is public, that the knower who raises a truth claim brings it on behalf of the entire community. Herein lies the sociological import of the judgment a priori: it is made by an individual but

³⁸ KANT, *supra* note 19, at 86.

³⁹ *See id.* at 95-6.

⁴⁰ According to Kant, if “a woman cannot preserve her life any longer except by surrendering her person to the will of another, she is bound to give up her life rather than dishonour humanity in her own person, which is what she would be doing in giving herself up as a thing to the will of another.” IMMANUEL KANT, LECTURES ON ETHICS 156 (Louis Infield trans., 1979 ed., Hackett Publ’g Co. 1980) (1930).

⁴¹ *See* KANT, *supra* note 19, at 106.

⁴² *See* KANT, *supra* note 40, at 124. Kant views masturbation as perverse desire stirred up by illicit imagination: “Lust is called *unnatural* if one is aroused to it not by a real object but by his imagining it, so that he himself creates one, contrapurposively [sic]; . . . for in this way imagination brings forth a desire contrary to nature’s end” IMMANUEL KANT, THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT, PRACTICAL PHILOSOPHY, THE METAPHYSICS OF MORALS 178-79 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797).

stakes a claim valid for everyone. We see the shades of this conviction in Peirce, who thought that the knowledge pragmatists strive for – whether they labor in the vineyards of philosophy, politics, or law – must be valid for the entire human race. The pragmatic attitude embedded in logic and guiding public affairs, according to Peirce, “inexorably requires that our interests shall not be limited,” that they “embrace the whole community. The community, again, must not be limited, but must extend to all races of beings with whom we can come into immediate or mediate intellectual relation. It must reach, however vaguely, beyond the ideological epoch, beyond all bonds.”⁴³

Another pragmatist insight traceable to Kant concerns the key role pragmatists assign to free inquiry as fodder for scientific and social progress. John Dewey tirelessly spread the gospel of inquiry as a tool for gaining knowledge and furthering commonwealth. Science, in this respect, is not so much a store of reliable truths as a model of democracy in action, a blueprint for a community where free discourse flourishes and all assertions are subject to critical inquiry: “[F]reedom of speech, toleration of diverse views, freedom of communication, the distribution of what is found out to every individual as the ultimate intellectual consumer, are involved in the democratic as in the scientific method.”⁴⁴

A quintessentially modern belief in the authority of every citizen to participate in the national conversation and directly inform the political process is yet another point on which Kant and pragmatists converged: “The idea of democracy as opposed to any conception of aristocracy is that every individual must be consulted in such a way, actively not passively, that he himself becomes a part of the process of authority.”⁴⁵

One more paradigmatic conviction that pragmatists share with Kant is that education rather than coercion is the way to improve social conditions and bring about a better social order. The prospect for a better future “rests upon persuasion, upon ability to convince and be convinced,”⁴⁶ upon “the improvement of the methods and conditions of debate, discussion and persuasion. That is *the* problem of the public.”⁴⁷

Besides these similarities, several philosophical, methodological, and political tenets separate pragmatists from Kant. The latter’s apriorism came under attack for its tendency to anoint as transcendently valid precepts that passed for settled knowledge at one point in time, be this women’s inferiority, crimes against nature, or immovable ether permeating physical space. To this speculative approach pragmatists juxtaposed an experience-oriented philosophy that acknowledged the constitutive role reason plays in production of the meaningful world but that fastened attention on the socio-historical nature of the categories and practices humans rely on to find their way in the continuously evolving universe. The pragmatist alternatives to the Kantian transcendental

⁴³ 7 CHARLES S. PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (1931-58) 398 (Charles Hartshorne & Paul Weiss eds., Harvard Univ. Press 1960) (1931).

⁴⁴ JOHN DEWEY, FREEDOM AND CULTURE 102 (Capricorn Books 1963) (1939).

⁴⁵ JOHN DEWEY, PROBLEMS OF MEN 35 (Phil. Libr., Inc. 1968) (1946).

⁴⁶ John Dewey, *Organization in American Education*, 17 TCHRS COLL. REC. 127, 134 (1916).

⁴⁷ DEWEY, *supra* note 44, at 102.

idealism can be summed up under the following headings: (1) philosophical antifoundationalism, (2) epistemological consequentialism, (3) emergent determinism, (4) embodied rationalism, (5) social perspectivism, and (6) political progressivism.⁴⁸

A. *Philosophical Antifoundationalism*

Philosophical antifoundationalism rejects the notion that our knowledge must be grounded in the immutable principles discovered a priori via transcendental reflection, logical deliberation, or any other abstract theoretical procedure. Kant's metaphysics draws attention away from the empirical world, wasting an inordinate amount of time on first principles and a priori categories. Pragmatists, by contrast, shun "terms abstracted from all their natural settings."⁴⁹ Pragmatist philosophy "has no dogmas, and no doctrines save its method," according to William James; it is "*looking away from first things, principles, 'categories,' supposed necessities; and of looking towards last things, fruits, consequences, facts.*"⁵⁰ General principles and abstract ideas have their place in knowledge, but only insofar as they prove themselves in experience, in public affairs.

B. *Epistemological Consequentialism*

Epistemological consequentialism counsels caution regarding truth claims whose status cannot be empirically validated. While Kant opposed "inferring the truth of some knowledge from the truth of its consequences,"⁵¹ pragmatists turn such an inquiry into a maxim. They will not admit a synthetic (nonanalytical) statement as true unless it can be demonstrated in concrete situations, through practical consequences vouching for the proposition's validity. "The truth of an idea is not a stagnant property inherent in it. Truth happens to an idea. It *becomes* true, is *made* true by events Its validity is the process of its valid-ation."⁵² Peirce extends epistemological consequentialism to all scientific concepts, whose meaning he proposes to ascertain via this famous pragmatist maxim: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object."⁵³ James, who did much to popularize Peirce (sometimes to the latter's great consternation), rephrases this maxim as follows: "the meaning of any proposition can always be brought down to some particular consequence in our future practical

⁴⁸ A more detailed discussion of the pragmatist premises can be found in Dmitri N. Shalin, *Pragmatism and Social Interactionism*, 51 AM. SOC. REV. 9 (1986). See also HANS JOAS, *PRAGMATISM AND SOCIAL THEORY* (1993); EUGENE ROCHBERG-HALTON, *MEANING AND MODERNITY: SOCIAL THEORY IN THE PRAGMATIC ATTITUDE* (1986); RICHARD SHUSTERMAN, *PRACTICING PHILOSOPHY: PRAGMATISM AND PHILOSOPHICAL LIFE* (1997).

⁴⁹ WILLIAM JAMES, *THE MEANING OF TRUTH* 283 (Univ. of Mich. Press, 1970) (1909).

⁵⁰ WILLIAM JAMES, *PRAGMATISM & FOUR ESSAYS FROM THE MEANING OF TRUTH* 47 (Ralph B. Perry ed., Meridian Books 1955) (1907).

⁵¹ See KANT, *supra* note 17, at 507.

⁵² See JAMES, *supra* note 50, at 133.

⁵³ See PEIRCE, *supra* note 16, at 31.

experience, whether passive or active.”⁵⁴ That is, we should not admit in scientific discourse concepts which cannot be spelled out in operational terms, nor should we waste time on propositions which stake demonstrably unverifiable truth claims.

C. *Emergent Determinism*

Emergent determinism rejects the idealist view of the universe as fully determined in its internal structure and waiting to be apprehended in a final theoretical schema. “[F]or rationalism reality is ready-made and complete from all eternity while for pragmatism it is still in the making.”⁵⁵ Our world is in flux, its natural state is that of indeterminacy, and it remains indeterminate until the knower terminates this “buzzing confusion” by imposing on it a terminological scheme that foregrounds some elements just as it backgrounds others. Or as James put it in one of his poetic moments: “Other sculptors, other statues from the same stone! Other minds, other worlds from the same monotonous and inexpressive chaos! My world is but one in a million alike embedded, alike real to those who may abstract them.”⁵⁶ We can put this precept in a more contemporary idiom by saying that reason is a participant observer, an agency that leaves its mark on the world, even though the agent is often oblivious of its constitutive role. “[A]ny view that holds that man is part of nature, not outside it,” explains Dewey, “will certainly hold . . . that indeterminacy in human experience, once experience is taken in the objective sense of interacting behavior and not as a private conceit added on to [sic] something totally alien to it, is evidence of some corresponding indeterminateness in the process of nature within which man exists (acts) and out of which he arose.”⁵⁷ Whatever determinacy we find in this “pluralistic universe”⁵⁸ is of our own making. We put a perspective on the world to render it meaningful, make a choice between conflicting experiences to make sense of them, and choose a terminological frame to bring out one or another pattern submerged in chaotic crosscurrents.

D. *Embodied Rationalism*

Embodied rationalism reconnects reason to the rest of the human body. Reason is at its best when it harnesses its affect, reins in its cold-blooded abstractions through intelligence native to sentiment. For a rationalist like Kant, reason is a disembodied agency that deliberately suppresses its passions to gain a clear picture of objective reality. Pragmatists, on the other hand, protest the “hypostatiz[ation] of cognitive behavior,”⁵⁹ warn against “imminent extinction at the hand of unhinged reason,”⁶⁰ and claim along with Peirce that

⁵⁴ See JAMES, *supra* note 49, at 210.

⁵⁵ See *id.* at 167.

⁵⁶ 1 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 289 (Dover Publ’n 1950) (1890).

⁵⁷ See DEWEY, *supra* note 45, at 351.

⁵⁸ WILLIAM JAMES, ESSAYS IN RADICAL EMPIRICISM AND PLURALISTIC UNIVERSE (P. Smith 1967) (1912).

⁵⁹ RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 201 (1982).

⁶⁰ EUGENE ROCHBERG-HALTON, MEANING AND MODERNITY: SOCIAL THEORY IN THE PRAGMATIC ATTITUDE 144 (1986).

“[r]eason, anyway, is a faculty of secondary rank. Cognition is but the superficial film of the soul, while sentiment penetrates its substance.”⁶¹ “‘Reason’ as a noun,” Dewey concurs, “signifies the happy cooperation of a multitude of dispositions, such as sympathy, curiosity, exploration, experimentation, frankness, pursuit – to follow things through – circumspection, to look about context, etc., etc.”⁶² New pragmatists like Richard Rorty built on this premise their critique of conventional rationality: “Another meaning of ‘rational’ is, in fact, available. In this sense, the word means something like ‘sane’ or ‘reasonable’ rather than ‘methodical.’ It names a set of moral virtues: tolerance, respect for the opinions of those around one, willingness to listen, reliance on persuasion rather than force.”⁶³ This pragmatist emphasis on the noncognitive sources of intelligence thematizes the discrepancy between our discursive and affective performances. It also rehabilitates passion as an embodied state compatible with virtue and conducive to social change.

E. *Sociological Perspectivism*

Sociological perspectivism reminds us that, contrary to Kant, the knower does not cogitate in isolation, alongside equally autonomous subjects, that “the very origin of the conception of reality shows that this conception essentially involves the notion of community,”⁶⁴ and the real problem is “how to fix belief, not in the individual merely, but in the community.”⁶⁵ The individual belongs to society, and society stamps each mind with its blueprints, so that “the mind that appears *in* individuals is not as such [an] individual mind.”⁶⁶ A modern individual belongs to several groups at once, each one furnishing a different perspective on reality. It is on the intersection of such publicly defined perspectives that we discover what reality is, and this reality is bound to be multiple, pluralistic, tinged with uncertainty, and open to conflicting interpretations. Our take on the world is mediated by a historically constituted collectivity that supplies us with terminological frames in terms of which we terminate indeterminacy to produce a meaningful world. As community members, we rely on language, and “[l]anguage does not simply symbolize a situation or object which is already there . . . it makes possible the existence or the appearance of that situation or object, for it is a part of the mechanism whereby that situation or object is created.”⁶⁷ This approach to reality as socially bound and continuously emergent engenders a pragmatist conception of society as social interaction. Institutional realities, according to pragmatist sociology,

⁶¹ 4 CHARLES S. PEIRCE, *THE NEW ELEMENTS OF MATHEMATICS*, at xxi (Carolyn Eisele ed., 1976).

⁶² JOHN DEWEY, *HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY* 196 (Modern Library ed., Random House 1950) (1922).

⁶³ Richard Rorty, *Science as Solidarity*, in *THE RHETORIC OF THE HUMAN SCIENCES: LANGUAGE AND ARGUMENT IN SCHOLARSHIP AND PUBLIC AFFAIRS* 40 (John S. Nelson et al. eds., 1987).

⁶⁴ See PEIRCE, *supra* note 16, at 247.

⁶⁵ *Id.* at 13.

⁶⁶ JOHN DEWEY, *EXPERIENCE AND NATURE* 219 (Dover ed., Dover Publ'ns 1958) (2d ed. 1929).

⁶⁷ GEORGE HERBERT MEAD, *MINDS, SELF AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* 78 (1934).

should not be treated as entities hovering above our heads. Social structures must be traced all the way down to face-to-face interactions and redeemed in experiential terms and affect-laden observations. "Society not only continues to exist *by* transmission, *by* communication, but it may be fairly said to exist *in* transmission, *in* communication."⁶⁸

F. Political Progressivism

Political progressivism is one more feature present in historical pragmatism, whose proponents are generally open to change and social amelioration. At the same time, pragmatists do not espouse a definite political creed or urge specific policies. Peirce was probably the least progressivist in his political instincts. He disdained trade unionism, fretted about "the lowest class insist[ing] on enslaving the upper class," and expressed "hopes that the governing class will use some common sense to maintain their rule."⁶⁹ His fellow pragmatists were more in tune with the changing times and mores, convinced that the social structure of American capitalism had to be updated, that "ideas are worthless except as they pass into actions which rearrange and reconstruct in some way, be it little or large, the world in which we live."⁷⁰ Toward the end of his life, James came close to endorsing "the more or less socialistic future towards which mankind seems drifting."⁷¹ Dewey was also deeply impressed with socialism before he rallied behind a robust social democratic agenda premised on the notion that "liberalism must become radical in the sense that, instead of using social power to ameliorate the evil consequences of the existing system, it shall use social power to change the system."⁷² Today's pragmatists stress with Richard Posner that pragmatist philosophy has "no inherent political valence,"⁷³ an observation borne out by a broad spectrum of political beliefs found among pragmatists, ranging from Rorty's aesthetically tinged libertarianism⁷⁴ to Cornell West's "prophetic pragmatism."⁷⁵ This political ambivalence notwithstanding, pragmatist thinkers of the old and new school have been critical of existing institutions and open to ameliorative social change, even though the direction of this change and its specific forms are subject to a continuous debate.

A note of caution about the suggested six-point list is in order – it should not be taken as exhaustive. The best way to see it is as an "ideal type" or a theoretical construct which judges an empirical phenomenon by the extent to

⁶⁸ JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 5 (1916).

⁶⁹ Charles S. Peirce, *Letter to Victoria Welby* (Dec. 14, 1908), in *SEMIOTICS AND SIGNIFICS: THE CORRESPONDENCE BETWEEN CHARLES S. PEIRCE AND LADY WELBY* 79 (Charles S. Harwick ed., 1977).

⁷⁰ JOHN DEWEY, *QUESTS FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION* 138 (Capricorn Books ed., G.P. Putnam Son's 1960) (1929).

⁷¹ William James, *The Moral Equivalent of War*, in *THE PROGRESSIVE YEARS: THE SPIRIT AND ACHIEVEMENT OF AMERICAN REFORM* 488 (Otis Pease ed., 1962).

⁷² See DEWEY, *supra* note 45, at 136.

⁷³ See POSNER, *What Has Pragmatism to Offer Law?*, in *PRAGMATISM IN LAW AND SOCIETY*, *supra* note 8, at 29, 35.

⁷⁴ RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

⁷⁵ CORNELL WEST, *THE CORNELL WEST READER* 147 (1999).

which it approximates the construct, even though no claim is made that the case in point is a pure instance of a given kind.⁷⁶ Pragmatists do not see eye to eye on every issue. Some may well disavow a particular premise on the six-point list.⁷⁷ With the possible exception of Habermas, few would endorse today Peirce's Kantian belief that "[t]he opinion which is fated to be ultimately agreed by all who investigate, is what we mean by truth, and the object represented in this opinion is the real."⁷⁸ Nor is every pragmatist comfortable with James's free-wheeling pragmatism that "is willing to take anything, to follow either logic or the senses and to count the humblest and most personal . . . [even] mystical experiences if they have practical consequences."⁷⁹ In today's pragmatist camp, some are uneasy about Rorty's libertarian aestheticism, others feel Fish has gone too far deploring theory, and quite a few disavow Posner's market-knows-best perspective on law. What pragmatists share is a set of attitudes present to various degrees in individual thinkers, yet revealing enough of a common ferment to suggest a "family resemblance[]."⁸⁰ I borrow this last metaphor from Ludwig Wittgenstein, whom pragmatists readily claim as their own.⁸¹ If we push this metaphor a bit further, we can say that things aren't always tranquil in the pragmatist family. Indeed, they get rather nasty at times, as family members fight for a competitive advantage and promote their own brand of pragmatism. With this in mind, we now turn to legal pragmatism.

IV. JURISTS RESPOND TO PRAGMATISM

The term "legal pragmatism" is of relatively recent vintage. It did not come into wide circulation until the 1980's, though the phenomenon itself is at least a hundred years old, dating back to Oliver Wendell Holmes and Benjamin Cardozo, two distinguished American legal minds who gave pragmatic jurisprudence a strong impetus still felt today. Holmes was a founding member of the Metaphysical Club (along with Peirce, James, Green, and Chauncey Wright), where the pragmatist salvo first sounded in the early 1870's. Yet, Holmes had few good things to say about fellow pragmatists. He found James's *Pragmatism* superfluous and confided to a friend that "the judging of law by its effects and results did not have to wait for W[illiam] J[ames] or Pound for its existence."⁸² Although Cardozo was more indebted to legal realism than to pragmatism, he, unlike Holmes, cited Dewey and James as philo-

⁷⁶ See MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 104-05 (Edward A. Shils & Henry A. Finch trans., Free Press 1949).

⁷⁷ "Neither the old nor the new pragmatism is a school," writes Posner. "The differences between a Peirce and 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.'" Posner, *supra* note 73, at 34.

⁷⁸ See PEIRCE, *supra* note 16, at 38.

⁷⁹ See JAMES, *supra* note 50, at 61.

⁸⁰ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 32e (G.E.M. Anscombe trans., 2d ed. 1958) (1953).

⁸¹ See RORTY, *supra* note 8, at 96 n.17; POSNER, *supra* note 7, at 464.

⁸² Richard A. Posner, *Introduction* to OLIVER WENDELL HOLMES JR., *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.*, at xxiv (Richard A. Posner ed., 1992).

sophical authorities and fondly repeated the pragmatist maxim.⁸³ When it comes to their pronouncements on law and specific legal holdings, however, both Holmes and Cardozo displayed the signature pragmatic skepticism about immutable principles, a respect for changing community mores, an appetite for fact-finding inquiry, and a willingness to support reform. Holmes's celebrated opening in his *Common Law* can be read as a creedal statement of legal pragmatism:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.⁸⁴

From his early years as a private attorney and throughout his distinguished service on the Supreme Judicial Court of Massachusetts and the United States Supreme Court, Holmes practiced the jurisprudence of pragmatic compromise, refusing to privilege civil rights, judicial discretion, political expediency, or any other principle while drawing freely on them when the situation warranted. In keeping with epistemological consequentialism, Holmes redefined concepts like "right," "liberty," "contract," and "property" in a way that stripped them of their metaphysical halo and brought to the fore their hard-boiled practical implications. "But for legal purposes a right is only the hypostasis of a prophecy," proclaimed Holmes, and it owes its efficacy to "the fact that the public force will be brought to bear upon those who do things said to contravene it."⁸⁵ When the right in question is enforced intermittently, its objective status comes into question, and when a specific liberty is no longer backed by administrative force, it matters not if society continues to pay lip service to it – such a liberty is but a legal fiction. Looked at from this angle, the meaning of a legal principle no longer pivots out on itself. Rather, it grows with the circumstances and absorbs the changing historical climate, its objectivity treated as a variable reflecting specific context and not as a property inherent in the principle.

"Contract" is another legal precept which does not owe its efficacy to some major premise enshrined in constitutional tracts and guiding inquiry to an inevitable conclusion. Contract ultimately refers to the practical consequences likely to befall those who enter a legal agreement. An unscrupulous businessman – a "bad man" as Holmes called him famously, "does not care two straws for the axioms or deductions, but . . . he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁸⁶ To determine what restraints the government can impose on the freedom of contract, it is not enough to perform a logical syllo-

⁸³ See BENJAMIN N. CARDOZO, *GROWTH OF THE LAW* 46 (1924), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 205 & n. 21 (Margaret E. Hall ed., 1947); BENJAMIN N. CARDOZO, *PARADOXES OF LEGAL SCIENCE* *passim* (1947), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO*, *supra*, *passim*.

⁸⁴ HOLMES, *supra* note 82, at 237.

⁸⁵ Oliver Wendell Holmes, Jr., *Natural Law*, 32 *HARV. L. REV.* 40, 42 (1918), reprinted in *HOLMES*, *supra* note 82, at 182.

⁸⁶ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 460-61 (1897), reprinted in *HOLMES*, *supra* note 82, at 163.

gism, to construe a statute in light of its plain language, to let a constitutional principle speak for itself – one also has to take into account changing community standards and the statute's impact on the parties involved.

The voluminous batch of legal opinions bearing his name attest to Holmes's pragmatic convictions that "[g]eneral propositions do not decide concrete cases," that courts had rightfully been "cutting down the liberty to contract by way of combination," and that a statute limiting working hours under hazardous conditions was not an infringement on the employers' constitutional rights to contract freely but a "proper measure on the score of health."⁸⁷ In a dissenting opinion Holmes entered in *Adkins v. Children's Hospital*, he appeals to the "industrial peace" as the ground for rejecting the constitutional reasons the majority invoked to strike down a law "forbid[ding] employment at rates below those fixed as the minimum requirement of health and right living."⁸⁸ The same activist reasoning informs his numerous judgments, many held in dissent, that endeared Holmes to progressive politicians of his time and infuriated laissez-faire enthusiasts. A rare occasion on the U.S. Supreme Court, dissent would become increasingly common after Holmes, who used it to articulate the nascent community values inviting a fresh look at the Constitution. Rationales behind his specific decisions varied, but the willingness to go beyond the precedent, to give a novel reading to time-honored principles in light of changing community standards, remains the hallmark of Holmes's method throughout his tenure on the U.S. Supreme Court.

Following his illustrious predecessors on the Supreme Court, Cardozo linked his judicial perspective to the common law tradition with its benign view of judicial discretion and sensitivity to evolving policy concerns. More than Holmes, Cardozo was willing to theorize the principles underlying his jurisprudence, to trace their intellectual roots and credit his philosophical comrades in arm: "[T]he juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition."⁸⁹ His is a theory of the legal process that focuses on law-in-use or law-in-the-making – law as it manifests itself in a judgment rendered upon a particular situation with a specific set of circumstances to contend with. Cardozo captured the emergent determinism germane to the legal system in this trenchant formula: "Law never *is*, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires. There are no such things as rules or principles: there are only isolated dooms."⁹⁰ Law, in other words, becomes pragmatically meaningful when applied to the full range of cases whose adjudication determines the proper scope and meaning of the law. Before a legal judgment is passed, the situation remains open to multiple determinations just as the law invites disparate, conflicting interpretations. The judge terminates indeterminacy by select-

⁸⁷ *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting), reprinted in HOLMES, *supra* note 82, at 306.

⁸⁸ *Adkins v. Children's Hosp. of the District of Columbia*, 261 U.S. 525, 570-71 (1923) (Holmes, J., dissenting), reprinted in HOLMES, *supra* note 82, at 308-09.

⁸⁹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 102-03 (1921), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO*, *supra* note 83, at 149.

⁹⁰ *Id.* at 126.

ing a terminological frame from the current stock of laws, principles, and precedents, achieving in the process what Dewey calls in his theory of inquiry the “transformation of an indeterminate unsettled situation into a determinate unified existential situation.”⁹¹ To “terminate” means two opposite things here: “to define, to delimit the sense” as well as “to extinguish, to bring to an end.” By choosing particular terminological means of discursive production, we do justice to the situation at the cost of doing violence to its alternative determinations, some of which, preserved for posterity in dissenting opinions, might ground future determinations. Laws and legal canons we use to terminate the indeterminacy may be thoroughly codified, but for all their formal rigor legal principles routinely get in each other’s way, leaving professionals ample room to argue which one takes precedent in the case at bar. Indeed, the function the legal lore plays in juridical practice is not altogether dissimilar to the folklore where proverbs strategically contradict each other, and where this very multivocality serves a practical purpose by allowing the user to invoke a maxim most suitable for the situation and amenable to the interpreter’s agenda. By rendering the situation officially meaningful, legal judgment bears the double burden of doing justice to the unique fact pattern and sustaining law as a semi-coherent system – the two objectives that often work at cross-purpose.

With this turn of argument, the locus of the judicial process shifts to legal judgment which instantiates a universal law in the case at bar just as it universalizes the case particulars into court certified facts. The law in question may seem to leave little or no room for disagreement, but the determinacy the legal judgment confers on the situation is always something socio-historically emergent rather than a priori – ahistorically – true. This certainty is a product of the ongoing interpretation process that stretches back for generations. Once the community sense of right and wrong has changed, the interpretive process ceases to be routine, novel fact patterns are discerned, and old principles are given new ostensible definitions. Legislators play their part in codifying the most enduring social changes, but the logistics of statutory law enactment is too slow and unwieldy to keep pace with the continually evolving reality. And so, it often falls on the courts to lead the way in articulating the changing community values and establishing in situ the emergent meaning of a particular law and of the Constitution as a whole. Justice John Marshall is one example Cardozo cited to illustrate how a judge at once expresses emerging national needs and helps channel them along: “He 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.”⁹² Judges are more than neutral transmitters for immutable principles; they apply the rules in situ, remaining faithful to the constitutional ethos while adjusting the settled principles to the community mores continuously evolving with the passage of time. Thus, it is imperative for judges to ask, “Does liberty mean the same thing for successive generations? May restraints that were arbitrary yesterday be useful and rational and therefore lawful today? May restraints that are arbitrary today become useful

⁹¹ JOHN DEWEY, *LOGIC: THE THEORY OF INQUIRY* 296 (1938).

⁹² See CARDOZO, *supra* note 89, at 169-70, reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO*, *supra* note 83, at 179.

and rational and therefore lawful tomorrow? I have no doubt,” Cardozo concludes, “that the answer to these questions must be yes.”⁹³

This pragmatic jurisprudence was marked by an increasing reliance on social science research used by judges to justify their ruling. Economic, sociological, and epidemiological data was in particular demand, as legal scholars angled for a construction promising to breathe new life into the old laws:

Courts know today that statutes are to be viewed, not in isolation or *in vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad.⁹⁴

Legal inquiry extends beyond the study of relevant statutes and precedents – it encompasses the legislative history, the present day social conditions, and the latest empirical data bearing on the pending judgment.

An increased attention to speech conditions advancing the democratic process is another prominent feature of pragmatist jurisprudence. When government or corporate interests work to suppress critical opinions, judges should err on the side of allowing even extreme views (like those of the socialist leader Eugene Debs) to reach the public ear. This is what Justice Holmes urged when he wrote in his famous dissent in *Abrams v. United States* that “the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.”⁹⁵

One more aspect of the pragmatist current in legal thought needs to be singled out. I am talking about the oft admired rhetorical power of the written corpus Holmes and Cardozo left to posterity. Posner believes that Holmes is read today not so much because he spawned innovative legal opinions but because of the superb style in which his judgments are clothed, even when his specific legal opinions are flawed.⁹⁶ I see this dimension of early legal pragmatism as reflecting its proponents’ commitment to embodied reasonableness. However intellectually grounded, a constitutional principle or a statutory enactment cannot be effective unless it affects our minds as well as emotions. This is where rhetoric is called upon to play a part, for its office is to shake our convictions, move us toward a new way of seeing, and stir one into actions that change the shape of things. Good rhetoric is something you cannot readily ignore. It plants in your soma the nagging seeds of doubt and tender hooks of hope which pull you by your guts, compelling you to confront your prejudices and realign your action with you beliefs. Cardozo urged jurists to pay close attention to the noncognitive springs of other people’s – and their own – conduct: “Deep below consciousness are other forces, the likes and the dislikes,

⁹³ *Id.* at 76-77.

⁹⁴ *Id.* at 139.

⁹⁵ *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting), reprinted in HOLMES, *supra* note 82, at 320.

⁹⁶ Richard A. Posner, *Introduction* to HOLMES, *supra* note 82, at xvi-xvii. Elsewhere, Posner asserts that the nations’ most esteemed and rhetorically gifted Justices – Holmes, Cardozo, Jackson, Hand, and Brandeis – were pragmatist in their legal practice if not in their philosophy. See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 84 (2003) [hereinafter POSNER, LAW].

the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”⁹⁷ Mastering rhetorical tools is one way legal professionals can achieve their ultimate goal of furthering justice, order, and peace in society.

As for their political agenda, we should not take the legal pragmatists’ openness to change as a sign of their personal political preferences. Holmes’s dicta often sounds progressive, as for instance, when he opines “that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the de facto supreme power in the community and . . . spread . . . an educated sympathy [to] reduce the sacrifice of minorities to a minimum.”⁹⁸ But if you read closely the rationales he proffers for desired policy objectives, you discover how firmly his sentiments were rooted in nineteenth century Social Darwinism.⁹⁹ Holmes was a true believer in the struggle for survival that demands the sacrifice of the weakest. The law should interfere in this evolutionary struggle only to the extent necessary to give all groups a fair chance to compete. Society is within its rights to enlist law to expedite the extinction of a group no longer able to fight for itself or contribute to societal welfare. This is why Holmes voted to uphold a Virginia law permitting involuntary sterilization in *Buck v. Bell*, with this rationalization to buttress his case: “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices.”¹⁰⁰

As a member of the religious minority who saw discrimination firsthand, Cardozo showed no traces of nativism found in the upper crust American progressivism of this era. He was not given to doubt about the wisdom of reform afflicting his distinguished predecessor on the Supreme Court. To the end he remained convinced that “[t]he final cause of law is the welfare of society.”¹⁰¹ He supported wholeheartedly the New Deal laws, often finding himself in the minority on the Court, yet pressing his case with dignity and flare, occasionally convincing the majority to reverse itself and endorse his views. There is warmth to his prose, an apparent absence of malice disguised as humility that sometimes mars Holmes’s judgment. You sense this in his demeanor as well as his rhetoric; you want to believe that Cardozo embodied in personal conduct the pragmatist virtues he professed in theory. This alignment between pragmatist discourse and practical action would not become an issue until legal pragmatists were ready to move beyond the traditional legal venues into town

⁹⁷ CARDOZO, *supra* note 89, at 167, reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra* note 83, at 178.

⁹⁸ HOLMES, *supra* note 82, at 122.

⁹⁹ “Why should the greatest numbers be preferred?,” asks Holmes. “Why not the greatest good of the most intelligent and most highly developed? The greatest good of a minority of our generation may be the greatest good of the greatest number in the long run.” Oliver Wendell Holmes, Jr., *The Gas-Stokers’ Strike*, 7 AM. L. REV. 582, 584 (1873), reprinted in HOLMES, *supra* note 82, at 122.

¹⁰⁰ *Buck v. Bell*, 274 U.S. 200, 207 (1927), quoted in LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 66 (2001).

¹⁰¹ See CARDOZO, *supra* note 89, at 66, reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra* note 83, at 133.

halls and mediation forums where they could rejoin other citizens in shaping America's democratic process.

V. THE RESURGENCE OF LEGAL PRAGMATISM

Legal pragmatism is much in the news these days, in both the popular and scholarly press. It raises unsettling questions, fights an established dogma, yet offers few clear-cut solutions to the problems afflicting today's jurisprudence. And these problems are legion, according to Richard Posner. The U.S. legal system is "much too solemn and self-important," "too marmoreal, hieratic, and censorious," "too theocratic," while its practitioners are apt to show "too much confidence," "too little curiosity," "too much emphasis on authority, certitude, rhetoric, and tradition," and "too little on consequences and on social-scientific techniques."¹⁰² In sharp contrast to this moribund picture is a paradigm Posner offers to his colleagues as a philosophical alternative which invites a sober look at "the limitations of human reason," accepts "the unattainability of 'truth'," takes "problems concretely, experimentally, without illusions," acknowledges the inexorable "'localness' of human knowledge," and urges that "social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves."¹⁰³ The name of this paradigm is pragmatism. Alas, if you are a lawyer or a judge, there is not much you can do with it. It is more of an attitude than a creed, more a mood than a practical guide to action; its most trenchant advice to professionals curious about a "method of pragmatic jurisprudence" is to practice "kicking . . . sacred cows"¹⁰⁴ and keep "muddling through."¹⁰⁵

Kicking sacred cows is indeed a favorite pastime of many legal pragmatists, so much so that you begin to wonder if such cruelty to animals is really conducive to reasoned discourse. Fortunately, there is more to pragmatist jurisprudence than name calling and the avowal of faith. We get a better sense of what legal pragmatists are up to when we move beyond their programmatic statements and examine their specific legal judgments. A good place to start is the robust pragmatist defense Stanley Fish offers to laws supporting affirmative action.¹⁰⁶

In a piece titled *When Principles Stand in the Way*, Fish takes to task both the proponents and opponents of affirmative action for their misguided efforts to ground their policy objectives in a priori principles. One example of the futile search for such a neutral standard is Wechsler's article about the decision in *Brown v. Board of Education*, where the author, troubled by the Supreme Court's failure to procure a major theoretical premise for its pragmatic decision to allow school integration, offers a "general principle whose application would yield that result independently."¹⁰⁷ The principle general enough to allow the right deduction, Wechsler proposed, is "the right of freedom of association."

¹⁰² POSNER, *supra* note 7, at 465.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 466.

¹⁰⁵ Posner, *supra* note 73, at 43.

¹⁰⁶ Stanley Fish, *When Principles Stand in the Way*, N.Y. TIMES, Dec. 26, 1996, at A27.

¹⁰⁷ *Id.*

However, the application of the principle yielded paradoxical results: If segregation denies excluded minorities the right to free association, then forced integration coerces into an association those who wish to avoid it. Either way, the facts on the ground would not square off with the Constitutional principle, which sounds unimpeachable in its formal sense but proves to be divisive when applied to real life situations. The solution Fish offers is pragmatic: Don't let a good principle stand in the way of a sound policy. "A principle scorns actual historical circumstances and moves quickly to a level of generalization and abstraction so high that the facts of history can no longer be seen."¹⁰⁸ The policy in question is a sound one – to remedy the insidious consequences of institutional racism that marred social relations in America for generations. You get nowhere when you have "substituted philosophical urgencies for social urgencies" in such cases. Worse than that, you give ammunition to and stir up bitter opposition from the opponents of social integration who are only too happy to cover their bigoted motives by taking refuge in hallowed principles. Fish quotes Justice Stevens's plain words that set the matter straight in the controversies surrounding affirmative action: "There is no moral or Constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."¹⁰⁹ By reverting to neutral principles like "fairness," "equality," "merit," or "color-blindness," Fish contends, you are really "playing on your opponent's field and thus buying into his position."¹¹⁰ The brief for pragmatist jurisprudence concludes with this plea:

Let's be done with code words and concentrate on the problems we face and on possible ways of solving them. Those who support affirmative action should give up searching for theoretical consistency – a goal at once impossible and unworthy – and instead seek strategies with the hope of relieving the pain of people who live in the world and not in the never-never land of theory.¹¹¹

Less hostile to legal principles and theoretical considerations is the position articulated by Orlando Patterson. His article titled *Affirmative Action: The Sequel*, defends affirmative action on the pragmatic ground of policy objectives and cost effectiveness. Several decades after the courts threw their support behind affirmative action, we can see the progress made: fewer ethnic riots, racial integration at major universities, more heterogeneous professional elites, gains in the African-American middle class, and the emergence of a global popular culture where minorities play a key role. This progress has had its cost born in part by the whites, but this cost was modest. As befitting a pragmatically driven legal argument, Patterson cites research data to back up his claim: "[N]o more than 7 percent of Americans of European heritage claim to have been adversely affected by affirmative action programs."¹¹² While Patterson acknowledges that "affirmative action violates fundamental principles that have guided this country" and that it is "difficult to reconcile affirmative action with the nation's manifest ideals of individualism and merit-based competition," he

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Orlando Patterson, *Affirmative Action: The Sequel*, N.Y. TIMES, June 22, 2003, at 11.

¹¹² *Id.* at 4-11.

does not shrink from the challenge, rightly pointing out that “America’s history is replete with just such pragmatic fudging of these ideals.”¹¹³ Congress has not hesitated in passing legislative acts that support special interests – multinational corporations, millionaire farmers, oil-well drillers, mortgage owners, and war veterans have benefited from these statutory enactments with dubious Constitutional provenance. But there are red flags for the African-American leaders who search for an overarching principle like “diversity” in which to ground programs favoring minorities, for “many whites who were otherwise prepared to turn a pragmatic blind eye to their principled concerns about affirmative action” will not stand for ever-expanding entitlements benefiting minorities who stake no claim to have been wronged in the past.¹¹⁴ The affirmative action legislation is unique, its purpose is “to redress the past wrongs,” not to indulge in “the celebration of separate identities.” Henceforth, one should stay clear of “affirmative action as an entitlement, requiring little or no efforts on the part of minorities.”¹¹⁵ Patterson concludes with an appeal to our pragmatic wisdom, which does not require throwing away principles and bravely embraces the inevitable clash between the cherished ideals enshrined in our Constitution:

Americans have always recognized that high ideals, however desirable, inevitably clash with reality, and that good public policy requires compromise. But only through the struggle of affirmative action are they coming to realize that such compromises, wisely pursued, can actually serve a higher principle: the supreme virtue of being fair to those who have been most unfairly treated.¹¹⁶

Posner’s latest book, *Law, Pragmatism, and Democracy*, offers more examples of the pragmatic approach to litigation on highly divisive issues facing our nation. On *Bush v. Gore*, Posner offers “a pragmatic defense of the Supreme Court’s controversial decision.”¹¹⁷ He agrees with the critics that the Court’s rationale for its majority decision was flawed. This decision shows how perilous the judgment often is when reached in haste under the conditions of national emergency. “[T]he Justices’ choice of the ground of decision, and other strategic choices that various Justices made in the course of the litigation, turned *Bush v. Gore* into a pragmatic donnybrook.”¹¹⁸ Spurious though the foundation on which the holding rests, it led to the right outcome. “The result was defensible – and that matters a great deal to a pragmatist! It was not the outrage to democracy and the rule of law that the critics of the decision have claimed it was, unless the Justices’ motives were as malign as some of their critics have charged.”¹¹⁹ The due attention to the consequences is what makes the ultimate decision, if not the Court’s reasoning, correct, for “the danger that there would be a Presidential succession crisis if the Court failed to intervene was one of the pragmatic considerations that should have weighed (and perhaps did weigh) with the Supreme Court”¹²⁰

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ POSNER, LAW, *supra* note 96, at 22.

¹¹⁸ *Id.* at 22-23.

¹¹⁹ *Id.* at 22.

¹²⁰ *Id.*

The opposite is true of the outcome in *Clinton v. Jones* where the Court failed to weigh the likely consequences of its decision to force the sitting president to testify in a private law suit. It is fine to invoke principles like “no one is above the law,” but when the Supreme Court denied President Clinton the narrowly crafted temporary immunity he sought from testifying in Paula Jones’s sexual harassment suit, it plunged the nation into the paralyzing spectacle which lead to Clinton’s impeachment.¹²¹

Posner also brings up kindred pragmatic arguments in cases involving the First Amendment issues. He rejects the notion that “First Amendment freedoms are ‘absolute’,” urging attention to “the relationship between pragmatic adjudication and the use by judges of cost-benefit analysis in ‘noneconomic’ cases.”¹²² On national security legislation like the Patriot Act, Posner defends government actions, citing “the urgent need for taking a pragmatic approach to cases that arise out of national emergencies – cases involving war, terrorism, economic depression.”¹²³ He asks judges to weigh carefully the consequences that the constraints imposed on individual rights will have on the quality of life and advocates measured, revisable compromises that reflect the nation’s security needs while preserving our liberties.

Pragmatic jurisprudence has secured a foothold in the nation’s highest judicial body. “The Supreme Court that upheld the new campaign finance law on Wednesday,” announces a typical newspaper article, “was a pragmatic court, concerned less with the fine points of constitutional doctrine than with the real world context and consequences of the intensely awaited decision.”¹²⁴ Popular press credits several Justices with pragmatist virtues. David Souter receives accolades from liberal commentators for his “brand of moderate pragmatism and his willingness to engage Justice Scalia in direct intellectual combat,”¹²⁵ and so does Justice Sandra O’Connor – “the court’s leading pragmatist [who] cast only five dissenting votes in the entire term, far fewer than anyone else, and was in the majority in 13 of the 18 most closely decided cases.”¹²⁶ But it is Justice Breyer who is rightly considered the premier theoretician of legal pragmatism on the nation’s highest court. His recent exchange with Justice Scalia – the Court’s chief opponent of pragmatic jurisprudence – brings into sharp focus the constitutional issues involved.

Scalia is a formidable opponent. His powerful – or sinister, as critics allege – attacks on legal realism and its pragmatist heirs show the real stakes we all have in this debate. In a speech Scalia gave at the University of Chicago Divinity School, the Justice dramatized the constitutional issue involved:

As it is, however, the Constitution that I interpret and apply is not living but dead – or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted. For me,

¹²¹ *Id.*

¹²² *Id.* at 23.

¹²³ *Id.* at 386.

¹²⁴ Linda Greenhouse, *A Court Infused with Pragmatism*, N.Y. TIMES, Dec. 12, 2003, at A38.

¹²⁵ See David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 64 (quoting Linda Greenhouse).

¹²⁶ Linda Greenhouse, *The Year Rehnquist May Have Lost the Court*, N.Y. TIMES, July 5, 2004, at A12.

therefore, the constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted¹²⁷

As this statement attests, Scalia is a proponent of “originalism” – an influential constitutional doctrine that appeals to the framers’ original understanding embodied in the text of the Constitution and steadfastly resisting efforts to tailor its meaning to the changing community mores.¹²⁸ Scalia forswears attempts “to impose our ‘maturing’ society’s ‘evolving standards of decency’” on our Constitution. “That moral obligation may weigh heavily upon the voter, and upon the legislator who enacts the laws,” he states:

[b]ut a judge, I think, bears no moral guilt for the laws society has failed to enact. Thus, my difficulty with *Roe v. Wade* is a legal rather than a moral one: I do not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would – and could in good conscience – vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.¹²⁹

In the widely read *Tanner Lecture on Human Values* he delivered at Princeton University, Scalia articulated his “philosophy of statutory construction in general (known loosely as textualism) and of constitutional construction in particular (known loosely as originalism).”¹³⁰ He did not spare sarcasm about the brand of jurisprudence championed by Holmes and Cardozo and now taught to first year law students who are plowed with stories about a wise judge “running through earlier cases that leaves him free to impose that rule – distinguishing one prior case on his left, straight-arming another one on his right, high-stepping away from another precedent about to tackle him from the rear until (bravo!) he reaches his goal: good law.”¹³¹

Scalia takes pains to distinguish his “textualism” from “strict constructionism,” the latter obstinately holding onto a literal sense of the law, the former allowing that statutes “should be construed reasonably, to contain all that it fairly means”¹³² in line with the established “rules of interpretation called the canons of construction.”¹³³ The point he strains to make is that we should beware of adapting the Constitution to the political moods of the country, for:

It surely cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot take them away.

. . . .

¹²⁷ Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS, May 2002, at 17-18, <http://www.firstthings.com/ftissues/ft0205/articles/scalia.html> (last visited Feb. 15, 2005).

¹²⁸ See David Hoy, *Is Legal Originalism Compatible with Philosophical Pragmatism?*, in PRAGMATISM IN LAW AND SOCIETY, *supra* note 8, at 343 (describing the doctrine of originalism).

¹²⁹ Scalia, *supra* note 127, at 18.

¹³⁰ Antonin Scalia, *Common-Law Curs in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, Tanner Lecture at Princeton University (Mar. 8-9, 1995), in 18 THE TANNER LECTURE ON HUMAN VALUES 79 (1997).

¹³¹ *Id.* at 85.

¹³² *Id.* at 98.

¹³³ *Id.* at 100.

If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority.¹³⁴

Stephen Breyer responded to Scalia's spirited defense of originalism and textualism in the James Madison Lecture he gave at the New York University Law School, where he spelled out the interpretation cannons guiding jurisprudence steeped in the pragmatist ethos.¹³⁵ This particular brand of jurisprudence espouses "an approach to constitutional interpretation that places considerable weight upon consequences – consequences valued in terms of basic constitutional purposes," a perspective that "disavows a contrary constitutional approach, a more 'legalistic' approach that places too much weight upon language, history, tradition, and precedent alone while understating the importance of consequences."¹³⁶ Central to Breyer's argument is the contention that the U.S. Constitution embodies several complementary principles which sometime work at cross-purpose. He lists five such objectives: "(1) democratic self-government, (2) dispersion of power (avoiding concentration of too much power in too few hands), (3) individual dignity (through protection of individual liberties), (4) equality before the law (through equal protection of the law), and (5) the rule of law itself."¹³⁷ According to Breyer, the problem with legal formalists is that they fail to appreciate the importance of giving all these objectives fair play. They focus on the dispersion of power and the rule of law yet overlook other values encysted in the Constitution, particularly the need to foster democratic self-government. Nevertheless, formalists cannot escape the very fallacies of which they accuse their opponents, since their "'literalism' tends to produce the legal doctrines (related to the First Amendment, to federalism, to statutory interpretation, to equal protection) that . . . lead to consequences at least as harmful, from a constitutional perspective, as any increased risk of subjectivity."¹³⁸ Appealing to the plain meaning supposedly inherent in the constitutional and statutory documents, the originalists conveniently gloss over the inconsistencies and ambiguities abounding in such texts. Breyer notes:

The more literal judges may hope to find in language, history, tradition, and precedent objective interpretive standards; they may seek to avoid an interpretive subjectivity that could confuse a judge's personal idea of what is good for that which the Constitution demands; and they may believe that these more "original" sources will more readily yield rules that can guide other institutions, including lower courts. These objectives are desirable, but I do not think the literal approach will achieve them, and, in any event, the constitutional price is too high.¹³⁹

With his interpretive weapons drawn, Breyer proceeds to analyze several key legislative acts that have come before the Supreme Court – campaign finance reform, the disposal of toxic substances, federal minimum standards,

¹³⁴ *Id.* at 114, 120.

¹³⁵ Stephen Breyer, *Our Democratic Constitution*, The Fall 2001 James Madison Lecture at New York University Law School (Oct. 22, 2001), at http://www.supremecourtus.gov/publicinfo/speeches/sp_10-22-01.html (last visited Nov. 23, 2004).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

equal protection and voting rights, and laws infringing on privacy rights – showing in each case how the decisions he recommended, some reflecting the minority opinion, navigate between the equally sound yet conflicting objectives propounded by the framers. Breyer’s overriding concern in all these decisions was to promote “the Constitution’s general democratic participatory objectives [which] can help courts deal more effectively with a range of specific constitutional issues.”¹⁴⁰

There is the story of a British official entrusted to hold court in India who asks his more experienced colleague for advice. “Use your common sense,” the esteemed judge tells him, “and you will almost always be right, but never give reasons for your rulings, for they will almost always be wrong.” That is, pretty much, what radical pragmatists at law advise us to do. It is easier to see what they oppose – originalism, textualism, formalism – than to grasp any alternatives they put forward. Legal pragmatists reject originalism on the ground that we could not possibly fathom the primordial constitutional understanding, not with fifty-five framers struggling to reach a compromise over the Constitution and some 1500 delegates bitterly contesting its meaning at the state ratifying conventions. Nor can we rely on the plain language of the final document to yield its timeless meanings to honest textualists willing to set aside their prejudices and let the Constitution speak for itself. Pragmatists are skeptical about any doctrine that casts the judge as a faithful agent carrying out the legislative will by applying formal rules while ignoring the ambiguities inherent in legislative acts and conflicting special interests embodied in their provisions. Pragmatist jurists see the judicial process as part of a national conversation in which they take part as legal professionals entrusted to guard the tradition and as citizens sensitive to evolving community standards. They are eclectic in the choice of tools,¹⁴¹ ready to reach for whatever helps advance the democratic process in a manner consistent with the framers’ ideals. An ethos more than a theory, pragmatism invites judges to cultivate an inquiring mind, consult empirical research, and accept all conclusions as provisional in the face of the semi-chaotic world we inhabit. Sometimes that means drawing on “the ragtag bag of metaphors, analogies, rules of thumb, inspirational phrases, incantations, and jerry-built ‘reasons’ that keep the conversation going and bring it to temporary, and always revisable, conclusions.”¹⁴²

One senses this pragmatic attitude in Justice Breyer’s contention that laws change “in the context of a national conversation involving, among others, scientists, engineers, businessmen and women, the media, along with legislators, judges, and many ordinary citizens;”¹⁴³ in his willingness to enlist rhetorical devices like “metaphor [which helps] avoid the more rigid interpretations to

¹⁴⁰ *Id.*

¹⁴¹ Special mention in this regard deserves Sunsteins’s attempt to articulate “incompletely theorized agreements,” which can be seen as an alternative to the kind of extreme positions we find in Stanley Fish (who favors “completely untheorized” decisions) and Justice Scalia (who insists on “completely theorized” judgments). See Cass R. Sunstein, *Agreement Without Theory*, in *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* 123, 128 (Stephen Macedo ed., 1999).

¹⁴² See Fish, *supra* note 9, at 67.

¹⁴³ See Breyer, *supra* note 135.

which greater reliance upon canons alone would lead;" and in his determination to "harmonize a court's daily work of interpreting statutes with the Constitution's democratic, and liberty-protecting, objectives."¹⁴⁴ As Breyer's analysis suggests, there is more to the pragmatist method than blowing with the political winds. Legal pragmatists need not dispense with principles or ditch theory altogether, as Stanley Fish would have it. Principles have their rightful place in the pragmatist analysis, provided we understand that they do not coalesce into an immaculate logical system and often appear at loggerheads. Theory comes in handy too, especially if it is open to nonclassical insights into the objective indeterminacy of the situation. Dewey urged judges to adopt "a logic *relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than one of deduction of certainties," but he also maintained that "in judicial decisions the only alternative to arbitrary dicta, accepted by the parties to a controversy only because of the authority or prestige of the judge, is a rational statement which formulates grounds and exposes connecting or logical links."¹⁴⁵ The search for pragmatically understood principles and a logic of inquiry consistent with emergent determinism remains on the legal pragmatists' research agenda.

VI. THE PLACE OF PRINCIPLES IN PRAGMATIC JURISPRUDENCE

Rightly or wrongly, weighing consequences is perceived as the chief method of pragmatist adjudication that lets a cost-benefit analysis tip the scales toward a particular holding. But do we not endorse the facts-speak-for-themselves positivism when we claim "[t]here are bad pragmatic decisions as well as good ones"¹⁴⁶ without spelling out the accounting principles to guide the evaluation? Zeroing in on legal outcomes and their long-term impact on society poses serious challenges.

For one thing, the consequences a legal ruling is likely to engender are often hard to fathom, and when they loom large, it is difficult to calculate their true cost. Just try to balance the risk of plunging the country into a Presidential succession crisis against the damage to the rule of law the Court's decision in *Bush v. Gore* could have precipitated. Biases affecting decision calculus are another difficult-to-gauge factor in high-wire balancing acts, like the one the Supreme Court had to perform in *Roe v. Wade*.¹⁴⁷ According to Posner, the Justices failed to reach a pragmatically viable decision in this crucial case. When they overturned the Texas statute prohibiting abortion (except where a woman's life is endangered), the Justices underestimated the moral outrage their decision was likely to provoke in certain religious circles. Nor did the Court weigh the positive impact on sexual habits that letting the Texas statute stand could have had, such as "to make girls and women somewhat more careful about sexual activity than if they still had access to abortion on demand as a

¹⁴⁴ *Id.*

¹⁴⁵ 15 JOHN DEWEY, *THE MIDDLE WORKS, 1899-1924*, at 72-73, 75 (Jo Ann Boydston ed., 1983).

¹⁴⁶ See POSNER, *LAW*, *supra* note 96, at 125.

¹⁴⁷ 410 U.S. 113 (1973).

backup to contraception”¹⁴⁸ Above all, Posner contends, the Justices failed to consider the “stifling effect on democratic experimentation of establishing a constitutional right to abortion.”¹⁴⁹ It was wrong, in other words, to stop a state from pursuing its own policy and finding out whether it works in practice.

Posner does not dwell on the negative consequences that upholding the Texas antiabortion statute could have produced – outrage among the pro-choice activists, grim prospects of back alley abortions, the difficulty of monitoring compliance with the Texas statute. Yet, the cost of such consequences was hardly negligible, and weighing it against the cost of the decision the Court handed down in *Roe v. Wade* would have been a contentious exercise without a principle to anchor the holding. Whether it is an unconscious bias or an explicitly stated rationale, some sort of perspective is bound to guide the evaluation process. Even Stanley Fish cannot avoid recourse to general principles when he talks about “longstanding injustices” as a reason for pressing on with affirmative action,¹⁵⁰ to say nothing of Orlando Patterson’s appeal to “the supreme virtue of being fair.”¹⁵¹ And if we add up all the pragmatic consequences Posner cites in his opposition to *Roe v. Wade*, it would not seem outlandish to infer that their combined effect dovetails with conservative principles.

Matching legal decisions with their consequences is indeed a hazardous enterprise. Based on the “If X-then-Y” logic, such an exercise tends to run afoul of the *ceteris paribus* clause, the assumption that other things are being equal. Other factors are rarely equal in the real world, however, where events cannot be readily broken down into logical antecedents and outcomes. Rather, we are forced to deal with causal networks that produce wide-ranging, often unanticipated consequences which leave ample room for partisan squabbling about which outcome can be credited to what decision. It took time for economists to realize that unregulated markets produce monopolies inimical to free trade and for social scientists to figure out that releasing the mentally ill from hospitals turns prisons into mental wards. Reckoning with this perennial uncertainty, pragmatists learned to mistrust broad theoretical claims, stick close to particulars, and keep tracking the unanticipated consequences our informed decisions routinely produce. Still, pragmatists are not ready to give up on principles altogether.

Posner is well aware that pragmatic jurisprudence cannot confine itself to weighing consequences, which is why he rejects crude consequentialism and embraces a qualified consequentialism he credits to a genuinely pragmatic approach, which is not above borrowing wisdom from any creed. In this spirit, Posner adopts a not-that-I-am-against rhetorical strategy designed to prove legal pragmatism’s moderate bona fide. “It would not be unpragmatic to prefer the rule to the standard,” he writes. “Nor would it be unpragmatic to refuse to

¹⁴⁸ See POSNER, *LAW*, *supra* note 96, at 125.

¹⁴⁹ *Id.* Another pragmatist alternative available in this case, Posner suggests, was to invalidate the Texas law but uphold a less stringent Georgia statute which allowed abortions in cases involving rape and incest. *Id.* at 126.

¹⁵⁰ See Fish, *supra* note 106, at A27.

¹⁵¹ See Patterson, *supra* note 111, at 11.

recognize any but the most excruciatingly narrow exception to the rule.”¹⁵² “Nor is it unpragmatic to worry . . . about constitutional doctrines that are so loose that they give judges *carte blanche* to decide cases any way they want”¹⁵³ Moreover, “legal pragmatism is not always and everywhere the best approach to law . . . in some circumstances formalism is the best pragmatic strategy.”¹⁵⁴ There is no analytical arrow, it seems, which would not fit into the pragmatist quiver. With the conceptual net spread so widely, legal pragmatists make their claims sound more realistic, but such an ecumenist strategy has its cost: it blurs the pragmatic jurist’s identity, turns legal pragmatism into a hodge-podge of ad hoc practices, and unwittingly refocuses attention on the moral underpinnings of law. Posner shows little interest in juridical moralism, resolutely rejecting Kant’s “moralistic conception of law far removed from pragmatic considerations.”¹⁵⁵ But scholars sympathetic to pragmatism’s progressive agenda are willing to give the Kantian perspective on human autonomy another chance.

The natural law tradition from which Kant derived his inspiration had furnished a theoretical groundwork for modern republicanism. The inalienable rights verbiage helped safeguard human autonomy against absolutism, and as such, it aided the movement toward civil society which gave citizens the liberties necessary to advance their private goals with minimum state interference. Natural law shored up capitalist markets, providing the bourgeoisie with the enforceable legal constructs to support their entrepreneurial ventures. Unfettered commerce, industrial buildup protected from state interference, labor free to sell itself in the marketplace, freedom to enter contractual relations anywhere in the nation – such *laissez-faire* principles inscribed into law did their magic with little public outcry well into the nineteenth century, when the harsh realities of unbridled capitalism began to ignite a serious opposition. As capitalism went through its natural cycles of multiplying goods and profits, it also left in its wake a trail of human misery which the custodians of law were no more eager to acknowledge than the captains of industry. The U.S. Supreme Court steadfastly invoked the freedom of contract to rebuff legislative efforts to soften the impact of round-the-clock manufacturing on children and women while citing the same natural law to keep women from entering the legal profession as inimical to “the nature of things” and the “functions of womanhood” which mercifully consigned women to “the domestic sphere.”¹⁵⁶ Meanwhile, free competition bred fierce battles for the markets, and free markets begot cartels and trusts, whose monopolistic proclivities encouraged price fixing and pushed upward the cost of living, most ominously for labor, whose deteriorating working conditions stirred serious unrest at the century’s end. The cause of human dignity that liberalism took for its guiding star was hard to reconcile with children working overtime on the factory floor and in shops throughout

¹⁵² See POSNER, *LAW*, *supra* note 96, at 339.

¹⁵³ *Id.* at 374.

¹⁵⁴ *Id.* at 94.

¹⁵⁵ *Id.* at 251.

¹⁵⁶ *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring); see also Daniel R. Ortiz, *Deadlock in Constitutional Theory*, in *PRAGMATISM IN LAW AND SOCIETY*, *supra* note 8, at 314.

the country. Such was the fate of the “18th century doctrine of natural rights,” Dewey charged, “which began as a liberal doctrine and is now the dogma of reactionaries.”¹⁵⁷ Child labor legislation, the federal workmen’s compensation program, the Adamson Act reducing working hours on interstate railroads, Sherman antitrust regulations, food and drug laws – every statute passed during the Progressive era was at some point challenged in court as inimical to constitutional principles or stalled by legislators eager to please special interests. It was up to Holmes, Cardozo, and other juridical mavericks to nudge the Constitutions in a new direction to meet public concerns. At first decried as *lapsus iudicii*, their unconventional opinions would in time become mainstream.

Not that the rights natural law bestowed upon humans ceased to be valued. What happened was that the routine interpretation and enforcement of these rights produced consequences the American public came to judge injurious to its other rights. And that, I believe, is the point legal pragmatists like Holmes and Cardozo (and more recently Breyer) were trying to make in their defense of the consequence-oriented yet constitutionally grounded legal reasoning. The need for such jurisprudence becomes clear at major historical junctions. That is when new principles are invoked to offset old ones and fresh metaphors deployed to fire up moral imagination and spur legal creativity. It is at such a turning point in our legal history that pragmatic jurisprudence first came into its own.

This momentous historical transformation exemplifies the pragmatist notion of emergent determinism which, we may recall, suggests that our principles do not merely describe the world out there but also help usher it in, lend it determinacy. “Indeterminacy” does not mean the paucity of terms as much as their overabundance, with antithetical terminologies vying for attention and forcing themselves on the public mind. While the social world appears to its producers as a thing itself, it owes its being to terminological practices – and law is a paradigmatic example of a formal terminological practice – through which historical agents continuously frame themselves and their situations as meaningful objects. Applied and enforced, a principle brings in tow an objective reality which appears to stand on its own, blinding its producers to the constitutive role their sense-bestowing interpretation and law-abiding action play in generating the world as a sheer fact. What humans discover at major historical junctions is that this facticity is a historical accomplishment, that as sense-making creatures we all take part in the production of social reality as objective and meaningful. We do so by applying the taken-for-granted values, principles, laws – the terminological means of production that generate the world as a readily recognizable, affectively saturated, behaviorally fleshed out historical construct. Such terminological props do not form a coherent system, although contradictions enciphered in the text remain hidden for the time being. Meanwhile, these contradictions do their subterranean work, as principles bump up against each other, with some forced into plain view, others pushed down, and new ones working their way into public discourse.

A good example of constitutional principles working at cross purpose is the slogans the French Revolution proudly placed on its masthead – *liberté*,

¹⁵⁷ DEWEY, *supra* note 145, at 234.

égalité, fraternité. Far from being mutually reinforcing, these principles subtly undermined each other. Civil liberties that allowed citizens to pursue their private interests without state interference did little to mitigate inequality. The material inequalities, in turn, handicapped the ability of the poor to redeem their constitutional rights and, in the absence of a meaningful safety net, dimmed prospects for social peace. Taking a clue from Isaiah Berlin we can say that by maximizing one value we are likely to undermine some other value, by doing justice to one right we may have to abridge another. The relationship between the antithetically paired principles is that of uncertainty – the two cannot be maximized simultaneously with an arbitrary precision. Clean environment, we all agree, is a good thing, but so is chip oil and energy self-sufficiency, and it is not until the issue of oil drilling in Alaska comes up that we are forced to judge which value must in the end trump the other. By the same token, we all value liberty and equality, yet pushing one principle to its limit will inevitably set it on a collision course with the other. And when principles we act upon bring forth conflicting realities, we cannot readily appeal to “facts” to resolve the tension between valued objectives, for these facts are propped up by the very principles we espouse. To deal with social strain, we must engage in a moral discourse about the first principles, their relative weight, and the kind of society they engender.

Herein lies the significance of the Kantian distinction between adjudication and justification, between positive law that treats reality as a fact determined in itself and moral law that lends to things themselves their humane significance. Both types of law rely on force to achieve their goals. In one case this is the administrative force that secures compliance through violence; in the other – the force of reason which appeals to nothing but our moral imagination or compassion with fellow human beings. Eclipsed by the utilitarian and pragmatic philosophies, this Kantian perspective has made a comeback. It shines through in contemporary thinkers like Ronald Dworkin who calls for “the moral reading of the Constitution;”¹⁵⁸ it is evident in John Rawls’s commitment to “Kant’s [and] Rousseau’s idea that liberty is acting in accordance with a law that we give to ourselves;”¹⁵⁹ and it is most palpable in Jürgen Habermas who “demands a *remoralization* of politics”¹⁶⁰ and grounds his theory in the “principle, that – expressed in the Kantian manner – only reason should have force.”¹⁶¹ These authors seek to restore the debate about principles to its rightful place in jurisprudence, as well as widen public discourse on the meaning of justice. Each one uses a different strategy for reintegrating moral deliberation into the legal process.

¹⁵⁸ See RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 72-76 (1996) (describing the idea of a natural reading of the Constitution).

¹⁵⁹ JOHN RAWLS, *THEORY OF JUSTICE* 225 (1999).

¹⁶⁰ JÜRGEN HABERMAS, *AUTONOMY AND SOLIDARITY: INTERVIEWS WITH JÜRGEN HABERMAS* 71 (Peter Dews ed., 1986).

¹⁶¹ JÜRGEN HABERMAS, *TOWARD A RATIONAL SOCIETY; STUDENT PROTEST, SCIENCE, AND POLITICS* 7 (Jeremy J. Shapiro trans., 1970).

VII. JURIDICAL MORALISM RECONSIDERED

In his influential monograph, *Law's Empire*, Dworkin outlines three competing perspectives on law – legal positivism, legal pragmatism, and what he calls “law as integrity.”¹⁶² Legal positivism has several strains, all converging on the premise that in any historical community there is one correct statement as to what the law is or what it requires, and it is up to jurists to discover and apply this correct reading to the case at bar. Legal positivists do not agonize about the law’s ambiguities or the need to reconcile statutes with nascent mores. They simply follow the “plain-fact view of law” and enforce statutes in line with established conventions, relevant precedent, and the brute facts of the case.¹⁶³ Legal pragmatism, by comparison, is “a skeptical conception of law” premised on the notion that judges “should make whatever decisions seem to them best for the community’s future, not counting any form of consistency with the past as valuable for its own sake.”¹⁶⁴ The principle of right does not play a prominent role in this legal approach. Its proponents treat civil liberties as legal fictions filled with specific meaning by the judges who “sometimes act *as if* people had legal rights” but who are generally free to invoke or ignore any principle as the situation warrants, consistent with the overall objective of furthering social change.¹⁶⁵ This perspective, according to Dworkin, ignores the systemic properties of law, the paramount objective of reconstructing the legal corpus as a coherent system aimed to (a) produce predictable outcomes; (b) clarify the overall constitutional architecture; and (c) regenerate the nation’s liberal culture. Such is the burden of the third legal perspective Dworkin calls “law as integrity which accepts law and legal rights wholeheartedly,”¹⁶⁶ “demands consistency with decisions already made by other judges and legislature,”¹⁶⁷ and claims that “law’s constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.”¹⁶⁸

In his subsequent works, Dworkin grounds law as integrity in liberal values and principles he finds central to the U.S. Constitution. Chief among these is the “general principle that the government should not act out of prejudice against any group of citizens.”¹⁶⁹ Doing so would violate human dignity and moral autonomy – values consistent with “the ideal of ethical individualism”¹⁷⁰ that Dworkin finds at the core of the U.S. Constitution interpreted in moral terms. With this move, Dworkin hopes to avoid the pitfalls of originalism, notably its proponents’ reluctance to extend the reach of a constitutional principle beyond the matters it was meant to address by those who framed the princi-

¹⁶² DWORKIN, *supra* note 10, at 94.

¹⁶³ *Id.* at 33; *see also id.* at 37-43.

¹⁶⁴ *Id.* at 95.

¹⁶⁵ *Id.* at 152.

¹⁶⁶ *Id.* at 95.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 95-96.

¹⁶⁹ *See* DWORKIN, *supra* note 158, at 271.

¹⁷⁰ *Id.* at 250.

ple. The fact that the Fourteenth Amendment aimed to remedy racial injustice and said nothing about gender discrimination should not handicap future generations from mobilizing the moral force built into this principle for a fight against the prejudicial, unequal treatment of women. The very abstract nature of moral principles codified in the Constitution serves as an interpretive resource, for “once we have defined the principle we attribute to the framers in the more abstract way, we must treat their views about women as misunderstandings of the force of their own principle, which time has given us the vision to correct, just as we treat their views about racially segregated education.”¹⁷¹ The adjudication process, then, focuses on the structure of constitutional principles, with the expectation that judges will justify every decision by explicitly anchoring it in a suitable moral principle and applying the same moral standard consistently to the full range of relevant cases.¹⁷²

John Rawls takes a different route toward restoring the moral dimension of law. He enlists Kant’s categorical imperative, the principle that bids us to contemplate the maxim guiding our conduct as if it were a universal law and measure our own conduct by what we are willing to tolerate in others. Applying this principle to law in his monumental treatise *Theory of Justice*, Rawls develops “a justice as fairness” thesis that invites adjudicators to place themselves in “the original position” or a purely deliberative state where one can “set up a fair procedure so that any principles agreed to will be just.”¹⁷³ The justification discourse succeeds when “the parties are situated behind the veil of ignorance,” i.e., when they “do not know how the various alternatives will affect their own particular case [and] are obliged to evaluate principles solely on the basis of general considerations.”¹⁷⁴ Under such idealized conditions of unconstrained discourse propelled by arguments alone, participants are expected to establish a hierarchy of universal rights reasonable enough to secure consent from the parties involved and to insure distributive justice. Legal practice will be guided here not just by positive laws but by the adjudicators’ sense of justice, the fair standards articulated in the ongoing national discourse about moral goods and the way these goods ought to be distributed among community members.

The strategy Rawls favors in implementing the justification process is different from the one advocated by Dworkin. The latter recognizes that discourse on justice is part of a broader democratic process, but he addresses his model primarily to legal professionals whom he expects to shoulder the main burden of upholding fairness in the community: “[I]ndividual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.”¹⁷⁵ Rawls, on the other hand, wants to draw into justification discourse a far broader constituency. Lawyers are not accorded a privileged role in his schema, nor are philosophers, who may

¹⁷¹ DWORKIN, *supra* note 158, at 270.

¹⁷² *See id.* at 271.

¹⁷³ RAWLS, *supra* note 159, at 118.

¹⁷⁴ *Id.*

¹⁷⁵ *See* DWORKIN, *supra* note 158, at 344.

initiate the discussion but who otherwise play no special part in this process which includes legislators, executives, judges, party leaders, and citizens engaged in a discourse about public good and rational principles: "In justice as fairness there are no philosophical experts. Heaven forbid! But citizens must, after all, have some ideas of right and justice in their thought and some basis for their reasoning. And students of philosophy take part in formulating these ideas but always as citizens among others."¹⁷⁶

Habermas is even more adamant about the importance of engaging the entire body politic in justification discourse. Combining Kant's commitment to a disinterested moral deliberation where everybody has a vote with Peirce's vision of a research community ceaselessly advancing toward truth, Habermas calls for a public discourse in an ideal speech situation found "under the *pragmatic* conditions of rational discourses in which the only thing that counts is the compelling force of the better argument based on the relevant information."¹⁷⁷ "In this speech situation, persons for and against a problematic validity claim thematize the claim, and, relieved of the pressures of action and experience, adopt a hypothetical attitude in order to test with reasons, and reasons alone, whether the proponent's claim stands up."¹⁷⁸ Habermas does not offer a comprehensive account of the conditions under which the justification discourse achieves its goals, but drawing on his various works we can say that ideal speech conditions exist in a situation where: (1) every interested party has a say; (2) no force is admitted except the force of reason; (3) all statements are sorted out into factual, normative, and expressive validity claims; (4) propositions are methodically redeemed through rational arguments; (5) the discussion continues until a collective consensus is reached; and (6) conclusions are revised in light of experience and further deliberation.¹⁷⁹

The ideal speech situation can be approximated only in a thoroughly modern society which has replaced "the weight of tradition with the weight of arguments" ¹⁸⁰ A society that clears this threshold no longer accepts positive law in its unexamined facticity, as a natural state enforced by administrative power, but demands judgment about the law's legitimacy based on rational considerations. That is when the perennial "tension between facticity and validity built into law itself, between the positivity of law and the legitimacy claimed by it"¹⁸¹ comes to the fore. For centuries this tension has been building in the Occidental world, which saw European states undergo the juridification process. Following Max Weber and Otto Kirchheimer, Habermas

¹⁷⁶ JOHN RAWLS, *POLITICAL LIBERALISM* 427 (1995).

¹⁷⁷ HABERMAS, *supra* note 13, at 103.

¹⁷⁸ *Id.* at 228.

¹⁷⁹ See JÜRGEN HABERMAS, *AUTONOMY AND SOLIDARITY: INTERVIEWS WITH JÜRGEN HABERMAS* 90 (Peter Dews ed., 1986); see also 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 72-74 (Thomas McCarthy trans., 1987) [hereinafter HABERMAS, *THEORY*]; Dmitri N. Shalin, *Critical Theory and the Pragmatist Challenge*, 98 *AM. J. SOC.* 237 (1992) (discussing Habermas's theory of communicative action and the ideal speech situation); Habermas, *Pragmatism, and Critical Theory*, in 15 *Symbolic Interaction* 1 (Dmitri N. Shalin ed., 1992).

¹⁸⁰ JÜRGEN HABERMAS, *COMMUNICATION AND EVOLUTION OF SOCIETY* 113 (Thomas McCarthy trans., 1979).

¹⁸¹ See HABERMAS, *supra* note 13, at 95.

identifies this process with “the tendency toward an increase in formal (or positive, written) law that can be observed in modern society.”¹⁸² The juridification has unfolded in stages, beginning with the creation of a centralized state under Absolutism, followed by a constitutional monarchy, in turn supplanted by a democratic constitutional state, which evolved into a contemporary democratic welfare state.

The juridification process has produced mixed results. On one hand, it codified civil rights (protecting individuals from arbitrary state interference), political rights (securing citizens’ ability to participate in the political process), and social rights (spreading the safety net underneath the most vulnerable social strata). On the other hand, by extending law into life domains previously immune to legal rational authority, the juridification process has weakened the bond between the lifeworld and the normative system, between personal values and impersonal regulations, between individual identities and bureaucratic rationalized classifications. To offset the insidious consequences of juridification and bureaucratization, one has to find ways to reengage alienated citizenry in justification discourse about the laws’ rationality. According to Habermas, “the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected.”¹⁸³ To be sure, communicative practices are unlikely to render positive law and administrative force completely obsolete – in modern society with its staggering complexity, “the increasing need for integration must hopelessly overtax the integrating capacity of communicative action.”¹⁸⁴ But the justification discourse conducted under the conditions approximating ideal speech empowers the subjects of law, particularly those dependent on the largesse distributed by the welfare administration, and thus promises to lend legitimacy to the thoroughly bureaucratized, impervious-to-scrutiny legal system. In a democratic state, “the *legitimacy* of statutes is measured against the discursive redeemability of their normative validity claims – in the final analysis, according to whether they have come about through a rational legislative process, or at least could have been justified from pragmatic, ethical, and moral points of view.”¹⁸⁵

Contemporary juridical moralism deplors the situation where “the court serves as nothing more than an ad hoc arbiter of issues it finds too difficult to decide in a principled way.”¹⁸⁶ At the same time, legal moralism moves beyond Kant’s moral apriorism. It shows how moral principles can undergo historical reinterpretation without losing their universal appeal. It suggests standards by which one can assess the practical consequences of various legal decisions. It integrates the legal process into a community-wide justification

¹⁸² See HABERMAS, *THEORY*, *supra* note 179, at 357.

¹⁸³ HABERMAS, *supra* note 13, at 104.

¹⁸⁴ *Id.* at 26.

¹⁸⁵ *Id.* at 30.

¹⁸⁶ Charles Fried, *Courting Confusion*, N.Y. TIMES, Oct. 21, 2004, at A29. Fried takes to task the present-day Supreme court for “defending principles in theory but abandoning them in fact, [which] points to a court that has lost its will to protect and explain the nuanced doctrinal constructions that have threaded their way past opposing extremes.” *Id.*

discourse where citizens as well as institutional agents take part. And it captures certain features of justification discourse in our legal and political community. As far back as the 1858 Lincoln-Douglas debates, the discussion about the most urgent legal issues confronting the nation featured a clash of moral principles. Judge Stephen Douglas articulated one such principle when he appealed to “popular sovereignty”¹⁸⁷ as a constitutional warrant allowing citizens of each state to decide whether they wish to retain the institution of slavery.¹⁸⁸ Abraham Lincoln offered an alternative moral vision, one based on the hermeneutical strategy highlighting “the abstract moral question”¹⁸⁹ that the Declaration of Independence raised and that required new answers from successive generations:

I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say that all men were equal in color, size, intellect, moral development, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal – equal in certain inalienable rights, among which are life, liberty, and the pursuit of happiness. This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society which should be familiar to all and revered by all – constantly looked to, constantly labored for, and even, though never perfectly attained, constantly approximated; and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people, of all colors, everywhere.¹⁹⁰

This is as good an approximation of the law-as-integrity model as you can find in U.S. political history. But as the above example suggests, juridical moralism runs into problems of its own. After all, it was not the force of reason that allowed Lincoln to impose his moral vision on this reluctant nation. It was the Civil War which required the suspension of habeas corpus, interdiction of enemy food supplies, burning of Atlanta to the ground, and the sacrifice of more than half a million lives. The fight for moral principles can be costly.

The moral reading of the Constitution raises the question how to balance moral precepts vying for supremacy at any given historical junction. Dworkin is fully aware that ethical principles enciphered in our Constitution routinely clash, that they send mixed signals to interpreters facing specific legal problems. Where one adjudicator favors human autonomy, another may stress equal opportunity, and still others opt for security, safety, or social justice as a moral guide. The ethics of conviction and the morality of ultimate ends breed

¹⁸⁷ *Fifth Joint Debate, at Galesburgh, Illinois*, (Oct. 7, 1858), in 1 ABRAHAM LINCOLN, THE COMPLETE WORKS OF ABRAHAM LINCOLN 427-28 (John G. Nicolay & John Hay eds., The Century Co. 1894). Countering Lincoln, Douglas plausibly claimed that “this government was made by our fathers on the white basis. It was made by white men for the benefit of white men and their posterity forever, and was intended to be administered by white men in all time to come.” *Id.* at 434.

¹⁸⁸ *Id.* at 435.

¹⁸⁹ *Id.* at 438.

¹⁹⁰ *Speech in Springfield, Illinois* (June 26, 1857), in LINCOLN, *supra* note 187, at 226, 232.

bitter disagreements, especially when we deal with hot-button issues like reproductive rights, gay marriage, and sexually explicit materials. Sometimes these moral disagreements evolve into full-blown uncivil wars. The bitter polemics between Dworkin and MacKinnon, one taking liberty as a paramount value and another placing social justice above individual autonomy, is the case in point.¹⁹¹ It would be hard to avoid self-righteousness and acrimony in ethics-centered judicial discourse without a meta-discourse justifying a hierarchy of moral principles and settling conflicts between competing value claims. Or else, we need to make ample room for the honest difference of opinion in situations where consensus about moral priorities proves elusive.

Another objection to current efforts to remoralize legal practice concerns the division of powers in our political system which explicitly empowers legislators to deliberate on the moral questions. According to the tripartite system of government, the judges' responsibility is to make sure that the legislative will, provided it comports with basic constitutional requirements, is correctly interpreted and properly executed. That is what Justice Scalia advocates in his textualist approach to adjudication. Once the legislature passes the law, judges must squelch their personal preferences and exercise judicial restraint, applying unswervingly the moral guidelines spelled out by the Congress. But as Scalia's critics are quick to point out,¹⁹² he did not live up to his commitment when he joined the majority decision in *Bush v Gore* that contradicted the Court's and Scalia's longstanding deference to states' rights in matters within their jurisdiction, which state election procedures clearly exemplified. For all their dedication to the rule of law, originalists cannot evade their biases in situations marked by indeterminacy. Indeed, textualists never cease to be community members, and their legal judgments are bound to reflect, albeit in a well disguised form, their sense of what is fair and just for their own time and place.

One can also object to the moral reasoning in law on the ground that its proponents privilege consensus over dissent. Habermas cites Günther Frankenberg to the effect that justice as fairness underestimates the fact that "law is not a rule system but chaos" marred by "the radical indeterminacy" which precludes a rational consensus about "equal treatment and justice."¹⁹³ But this criticism applies to Habermas even more so than to Dworkin, who has to contend with the problem of consensus building among a handful of appellate judges (or just one "judge-Hercules"), whereas Habermas anticipates a community-wide agreement as the ultimate test for the rationality of a particular legal opinion or policy decision. Habermas does not sound very pragmatic when he contends that "majority decisions are held to be only a substitute for the uncompelled consensus that would finally result if discussion did not always

¹⁹¹ See generally DWORKIN *supra* note 158, at 195-243.

¹⁹² Alan Dershowitz points out that Scalia's vote in *Bush v Gore* contradicts his own pronouncement that "[o]nly by announcing rules do we hedge ourselves in" and that whenever "my political or policy preferences regarding the outcomes are quite opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989), quoted in ALAN DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 123-24 (2001).

¹⁹³ Gunther Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360, 392-93 (1988), quoted in HABERMAS, *supra* note 13, at 216.

have to be broken off owing to the need for a decision.”¹⁹⁴ And he is theoretically vulnerable when he holds rational consensus rather than reasonable dissent to be the touchstone of democratic politics. Certain locutions which crop up in his texts – “the costs of dissensions are quite high,” “the risk of dissension is growing,” “[one has to] counter the risk of dissension and therewith the risk of instability built into the communicative mode of social reproduction in general”¹⁹⁵ – makes one wonder if dissent has any conceptual footing in his theory as a vital element in the judicial and democratic process.

Finally, the contemporary juridical moralists like Habermas and Rawls remain faithful to the Kantian program that bypasses emotions and frames every dispute as a “*lawsuit*.”¹⁹⁶ Fashioned on the anvil of rationalism, the ideal speech situation appears to be thoroughly emptied of its affective content. Emotion shows up in the theory of communicative action in a truncated form as the “sincerity of the expressions”¹⁹⁷ and in the justice-as-fairness paradigm as the “principle-dependent and conception-dependent desires.”¹⁹⁸ But theories that “attribute to reasons the force to ‘move’ participants, in a nonpsychological sense”¹⁹⁹ run the risk of reducing moral agents engaged in the justification process to talking heads – disembodied creatures listening only to the voice of reason and ordering themselves into action by the sheer power of their will. References to “motivation through ‘good reasons’”²⁰⁰ beg the question as to where theory-driven desires come from and how they mesh with more mundane motives and partisan interests. Perhaps realizing this, Habermas amends his wording in the postscript to his treatise on law, which contains several tantalizing references to the habits of freedom and a population schooled in liberty:

[C]onstitutional democracy depends on the motivations of a population *accustomed* to liberty, motivations that cannot be generated by administrative measures²⁰¹

[F]or only a population *accustomed* to freedom can keep the institutions of freedom alive²⁰² [C]onstitutionally protected institutions of freedom are worth only what a population *accustomed* to political freedom and settled in the “we” perspective of active self-determination makes of them.²⁰³

Italicized in the original, the word “accustomed” tacitly grounds communicative action in the nondiscursive properties deliberating agents are expected to bring to justification discourse. Communicative practices embedded in democratic deliberation are to be carried out by the agents whose embodied habits have already met the demands of the democratic process. This circular, unauthorized premise exposes the Achilles heel of the deontological tradition in moral

¹⁹⁴ JÜRGEN HABERMAS, *TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE, AND POLITICS* 7 (Jeremy J. Shapiro trans., 1970).

¹⁹⁵ See HABERMAS, *supra* note 13, at 21, 26, 36.

¹⁹⁶ KANT, *supra* note 17, at 486.

¹⁹⁷ 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 41 (Thomas McCarthy trans., 1984).

¹⁹⁸ RAWLS, *supra* note 176, at 85.

¹⁹⁹ HABERMAS, *supra* note 13, at 227.

²⁰⁰ HABERMAS, *supra* note 180, at 200.

²⁰¹ *Id.* at 461.

²⁰² *Id.* at 513.

²⁰³ *Id.* at 499.

philosophy and the theory of democratic justice that takes its cue from ethical formalism.

VIII. THE FULLY EMBODIED DEMOCRATIC PROCESS

The deontological tradition in ethics stipulates that duty trumps inclination whenever the two are in conflict.²⁰⁴ Kant, the radical exponent of this view, would have us believe that only by suppressing passions and cultivating “*moral apathy*” or complete “freedom from agitation”²⁰⁵ can we have confidence in the verdict rendered by “the court of justice of morality.”²⁰⁶ The moral philosophy privileging reason over emotions has its counterpart in ethical emotivism whose proponents mistrust reason’s propensity to rationalize and seek to check its intellectual proclivities by “moral sense,” “moral sentiments,” “the sentiment of the heart,” and kindred forms of affective reasonableness “upon which each particular virtue is found.”²⁰⁷ David Hume, with whom Kant carries a tacit polemic, captured the antirationalist pathos of this approach: “‘Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.”²⁰⁸ Pushing ethical emotivism to its logical extreme, Hume stands the deontological maxim on its head: “Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.”²⁰⁹ The point is that our sentiments, desires, and passions must be of the kind that make for social peace and justice – reason alone will not suffice.

Thus, deontological ethics and ethical emotivism are set on a collision course. Whereas Kant etherealizes human agency into pure reason to achieve a worthy moral aim, Hume and Adam Smith call on natural sentiments to resist imperious reason’s self-aggrandizing claim to pursue nothing but the public good. Hume’s polemical stance downplays the emotional littering that befools discourse, but then he readily admits passion’s destructive potential when he deals with anger or envy. Neither can Kant escape the recalcitrant reality of strong affect, which worms itself back into his ethical rigorism disguised as moral agent’s passion for justice. And yet the two perspectives owe each other more than their proponents are willing to admit. Incompatible at first blush, both ethical systems are dialectically bound to each other. This dialectic comes to the fore in the pragmatist view of reason as an embodied, historically emergent, biosocial structure that channels emotions along intelligent pathways and simultaneously taps affect’s sensitivity to the indeterminacy of the situation.

That passions can disrupt human intercourse is obvious, and Kant makes a sensible point when he appeals to judicious temperament. However, it is his unwillingness to accommodate strong emotions that raises the red flags. As Dewey warned us:

²⁰⁴ See Robert D. Olson, *Deontological Ethics*, in 2 *ENCYCLOPEDIA OF PHILOSOPHY* 343 (1967).

²⁰⁵ See KANT, *supra* note 26, at 70.

²⁰⁶ See KANT, *supra* note 40, at 213.

²⁰⁷ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 508, 511, 518 (Arlington House 1969) (1853).

²⁰⁸ DAVID HUME, *A TREATISE OF HUMAN NATURE* 416 (Prometheus Books 1992).

²⁰⁹ *Id.* at 415.

[T]he conclusion is not that the emotional, passionate phase of action can be or should be eliminated in behalf of a bloodless reason. More 'passions,' not fewer, is the answer. . . . Rationality, once more, is not a force to evoke against impulse and habit. It is the attainment of a working harmony among diverse desires.²¹⁰

There is more to reason than intellect and analytical skills which help us simplify reality, impose a rational schema on the world, and gloss over its untamed and chaotic properties. The human mind also thrives on "emotional intelligence"²¹¹ – an enlightened affect that readily transgresses borderlines imposed by reason, reclaims the world's unfathomable complexity, and treats uncertainty not as an indicator of our limited knowledge but as a birthmark of the world-in-the-making, the world in which embodied human agents act as participant observers. Extreme rationalism, in this reckoning, is a mark of self-deception. A desire to suppress the somatic-affective dimension of human existence is the sign of a troubled mind. Behind "the craving for rationality" hides what James calls "the sentiment of rationality," a passionate desire to make "the concrete chaos rational" and "banish puzzle from the universe" which serves as a kind of analgesic promising to alleviate "a very intense feeling of distress" and bring about the "peace of rationality."²¹² The life of the man who took the categorical imperative for his North Star offers an instructive illustration to this pragmatist insight.

The moral heights Kant sought to scale were lofty indeed. He demanded that we treat human beings as ends in themselves, cultivate a judicial temper in interpersonal communications, and squelch malignant passions defiling our moral agency. According to his contemporaries, Kant did not always follow his own counsel. Curled under the thick layer of rationalism was a man "passionate and impulsive – both in the way in which he lived his life and the way in which he philosophized."²¹³ The theoretician of categorical imperative called upon his fellow citizens to foreswear treating others as means, yet he leaned heavily on his reluctant ex-students to confront his critics and write "apologia" for his controversial theories.²¹⁴ An eager conversationalist, Kant liked talking better than listening, acted in an increasingly overbearing fashion as his fame spread, and on occasion behaved "almost rudely and uncivilly" toward those who disagreed with him.²¹⁵ We will never know for sure whether Kant managed to free himself from the pernicious habits which "give our imagination free play in sensual pleasures," breed "vices . . . contrary to nature," and precipitate "most serious offenses against the duties we owe to ourselves,"²¹⁶ but it wouldn't be unreasonable to conjecture that he hadn't an easy time riding himself from carnal images through the superior power of his rational will. Once again, we are reminded of Dewey's pragmatist warning:

²¹⁰ DEWEY, *supra* note 62, at 195-96.

²¹¹ See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995); HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993); ROB BOCCHINO, *EMOTIONAL LITERACY: TO BE A DIFFERENT KIND OF SMART* (1999).

²¹² See WILLIAM JAMES, *THE WILL TO BELIEVE: AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 63-75 (1956).

²¹³ MANFRED KUEHN, *KANT: A BIOGRAPHY* 319 (2001).

²¹⁴ See *id.* at 320-22.

²¹⁵ See *id.* at 319.

²¹⁶ See KANT, *supra* note 40, at 142.

Men who devote themselves to thinking are likely to be unusually unthinking in some respects, as for example in immediate personal relationships. A man to whom exact scholarship is an absorbing pursuit may be more than ordinarily vague in ordinary matters. Humility and impartiality may be shown in a specialized field, and pettiness and arrogance in dealing with other persons.²¹⁷

Prudence requires that we exercise an abundance of caution sorting through the testimonies left by Kant's contemporaries. A balanced biocritical account has to include conflicting testimonies and avoid rash generalizations. Bear in mind, also, that what is at issue here is not the truth of Kant's theory prescribing a moral attitude but the extent to which the author of categorical imperative integrated his theoretic stance with his pragmatic existence. We need to undertake this inquiry to find out how much fiber there is in Kant's morality. Looking from this angle at the discourse theory of law and the ideal of a morally grounded democracy, one can see what it sorely misses – embodied reasonableness. There is more to democracy than redeeming discursive claims by rational arguments. Democracy is also a demeanor, a system of government sustained by citizens who sign themselves in the flesh as well as in well-formed propositions. The same applies to law as an embodied practice that thrives on the corporeal habits not always abounding in its most successful practitioners. The moral approach to adjudication must extend beyond theoretical integrity to encompass an emotional stance that embodies the ethical principles the adjudicator bids us to accept.

Dworkin is right to protest MacKinnon's attacks on his moral commitments and intellectual integrity,²¹⁸ yet he needs to be careful to treat his opponents with the dignity he expects for himself. Suspect are the motives of those who commit themselves to a truth and then take "dissent from that truth [a]s treason," but those who bristle at dissenting views as an evidence of opponent's stupidity and urge that disagreeable arguments be "discredited by the disgust, outrage, and ridicule"²¹⁹ risk falling into the same trap. Considering how Dworkin sometimes puts down his opponents, one is compelled to ask if he has not crossed the line separating principled exchange from name calling. According to the student of law as integrity, Posner is "relentlessly superficial."²²⁰ Rorty's followers pretend to be "busy while actually doing nothing."²²¹ MacKinnon deploys "bad arguments," engages in "plain non sequitur," and reveals a "single-minded concentration on lurid sex."²²² Bork is a "crude moral skeptic" given to "empty" rhetoric, advancing "meager" and "shabby" ideas of "unsurpassed ugliness" and entertaining bogus arguments the way "alchemists once used phlogiston."²²³ Again, I am not concerned with the substance of Dworkin's judgment, which has merit, only with the emotional attitude his polemical stance embodies. It would be unfortunate if "vicious conservatism," if there is such thing, springs a counterpart on the liberal side.

²¹⁷ DEWEY, *supra* note 70, at 198.

²¹⁸ See DWORKIN, *supra* note 158, 227-243.

²¹⁹ *Id.* at 238, 252.

²²⁰ See Dworkin, *supra* note 11, at 377 n. 17.

²²¹ *Id.* at 359.

²²² DWORKIN, *supra* note 158, at 233, 243.

²²³ *Id.* at 273-75.

Just think about First Amendment lawyers eloquently defending free speech while repeatedly cutting off their opponents arguing the limits of free expression. Performative contradictions of this kind abound among legal professionals who may extol judicious temperament in theory while abusing power vested in the judge, who fight for civil liberties around the world while ignoring the rights of their own employees, who pass professional ethics exams with flying colors only to engage in grossly unethical legal practices. Chief Justice Warren Burger had some of these embodied virtues in mind when he urged that “civility is to the courtroom and adversary process what antiseptics is to a hospital and operating room. The best medical brains cannot outwit soiled linen or dirty scalpels – and the best legal skills cannot either justify or offset bad manners.”²²⁴ The larger pragmatist point here is that we ought to move beyond the purely discursive mode in which democratic deliberation is locked in discourse-centered accounts and open the affective-behavioral channels through which we communicate our attitudes in all their complexity and contradiction. The research focus thereby shifts from discourse ethics to the “ethics of embodied interaction,” from verbal communication to “the word-body-action nexus,” from textual interpretation to “pragmatist hermeneutics,” and from the discursive regime of democratic governance to “emotionally intelligent democracy.”²²⁵ This is the direction in which democratic theory has been moving in recent years.

The discourse theoretic turn has influenced several legal practitioners in this country who agree with Habermas and Rawls that “citizens owe one another justifications for the laws they collectively enact”²²⁶ but seek to expand the deliberative process to make room for affect and emotions alongside principles and reasoned arguments.²²⁷ According to pragmatism-conscious thinkers, “democratic discourse theory needs to learn from dispute resolution theory, that positions and parties may be multiple, that processes of deliberation may range from principled argument to interest-based bargaining and coalition behavior, to appeals based on emotions, faith and belief, as well as fact.”²²⁸ American scholars working in this tradition call on participants in democratic discourse “to renew their dedication to honesty, self-criticism, civility, good faith, and

²²⁴ Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 215 (1971).

²²⁵ See Dmitri N. Shalin, *Liberalism, Affect Control, and Emotionally Intelligent Democracy*, 4 J. HUM. RTS. 420-25 (2004); see also Shalin, *supra* note 177, at 254-75; see also Dmitri Shalin, *Discourse, Emotion, and Body Language of Democracy*, paper presented at the SSSI Stone Symposium (1999); Dmitri Shalin, *Signing in the Flesh: Notes on Pragmatist Hermeneutics*, a revised version of the paper presented at the annual meeting of the Society for the Advancement of American Philosophy (2001). The impact that the emotional heritage of the past has on building democracy in Russia is discussed in Dmitri N. Shalin, *Intellectual Culture*, in *RUSSIAN CULTURE AT THE CROSSROADS: PARADOXES OF POSTCOMMUNIST CONSCIOUSNESS* 41 (Dmitri N. Shalin ed., 1996).

²²⁶ Amy Gutmann & Dennis Thompson, *Democratic Disagreement*, in *DELIBERATIVE POLITICS*, *supra* note 141, at 243-44.

²²⁷ For a general overview, see two representative collections, *DELIBERATIVE POLITICS*, *supra* note 141, and *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1988). An early example of an attempt to move beyond Habermas can be found in AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996). See also Menkel-Meadow, *supra* note 15 (reviewing the pragmatism-influenced dispute resolution theory).

²²⁸ See Menkel-Meadow, *supra* note 15, at 359.

respect for their opponents”²²⁹ In keeping with this agenda, they search for:

a distinctively democratic kind of character – the character of individuals who are morally committed, self-reflective about their commitments, discerning of the difference between respectable and merely tolerable differences of opinion, and open to the possibility of changing their minds or modifying their positions at some time in the future if they confront unanswerable objections to their present point of view.²³⁰

Unlike their continental counterparts, however, scholars influenced by American pragmatism recognize that legal professionals have to act as “mood scientists,”²³¹ that “sometimes [it is] necessary not only to ‘promote mutual respect . . .’ but also to achieve authenticity, to reveal (as in ‘testimony’) the pain and anger . . . that someone actually feels, when expression or knowledge of those feelings furthers the understanding that is the goal of deliberation.”²³²

Legal pragmatists follow John Dewey and George Herbert Mead, the two preeminent pragmatist theorists of the fully embodied democratic process, who advocated the “passing of functions which are supposed to inhere in government into activities that belong to the community” and called for “the readjustments of personal interests that have come into conflict and which take place outside of court . . . [and] is not dependent upon an act of legislature.”²³³ Hence, the preference to work outside traditional legal venues where citizens can assemble to resolve their disputes over proposed dump sites and highway roads, parking garages and half-way houses, health issues and waste disposal, inter-group and neighborhood conflicts, city-wide ordinances and national legislations.²³⁴ Alongside citizens gathered in these venues toil legal professionals who, according to Menkel-Meadow, have a role to play in local justification discourses, for “lawyers may be particularly well suited to the design, management and facilitation of consensus building processes, especially those which implicate law, such as environmental, regulatory, governance, land-use, and other ‘legal’ problems.”²³⁵ Lawyers are expected to do more than provide legal expertise in the deliberation process. They have to model democracy in the flesh, find a way to embody the virtues of reciprocity, mutual understanding, and respectful disagreement where consensus turns out to be unachievable. The process in such a deliberative practice is every bit as crucial as its outcome, and often more so, for the consensus is bound to break down when we move to

²²⁹ Robert P. George, *Democracy, and Moral Disagreement: Reciprocity, Slavery, and Abortion*, in DELIBERATIVE POLITICS, *supra* note 141, at 184, 194.

²³⁰ Amy Guttman & Dennis Thompson, *Moral Conflict and Political Consensus*, in WHY DELIBERATIVE DEMOCRACY 64, 76 (1990).

²³¹ See Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientist: What We Know and Don’t Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1 (2002); see also Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?*, 19 OHIO ST. J. ON DISP. RESOL. 283 (2004).

²³² James Mansbridge, *Everyday Talk in the Deliberative System*, in DELIBERATIVE POLITICS, *supra* note 223, at 211, 223.

²³³ George Herbert Mead, *Natural Rights and the Theory of the Political Institution*, in SELECTED WRITINGS: GEORGE HERBERT MEAD 150, 166-67 (Andrew J. Reck ed., Phoenix ed., Univ. Chicago Press 1981) (1964). See also Dmitri N. Shalin, *G. H. Mead, Socialism, and the Progressive Agenda*, 92 AM. J. SOC. 913-951 (1988)

²³⁴ See Menkel-Meadow, *supra* note 15, at 363.

²³⁵ *Id.* at 367.

implement the mediated agreement, but the goodwill the well-planned deliberations engender may last beyond the fragile understanding reached on any given occasion.

The mediation and settlement movement that takes its cue from pragmatism has many critics, including some legal pragmatists,²³⁶ who point out that “[d]eliberation is not an activity for the demos;”²³⁷ that “the best thinking of the best thinkers, deliberating under the best conditions, reflects nothing more than the interests of the powers-that-be;”²³⁸ and that public deliberations “confront the problems of demagoguery, of sound-bite democracy, of the persistent inability of facts and evidence to transcend background normative belief, and of the extent to which the inequalities of society in general are reflected and replicated in its deliberative environments.”²³⁹ There is merit to this critique, and pragmatists should to take it seriously. They will also have to contend with the old query that John Dewey addressed to legal professionals: “How are we to explain the fact that to such a large extent the lawyers who have had a professional and supposedly a competent professional education seem to be the advocates of the most reactionary political and social issues of the community at any given time?”²⁴⁰ But then, half a century has passed since Dewey raised the issue, and it is now fairly obvious that lawyers are not beholden to any given political cause. Still, the challenges legal pragmatists face when they opt to facilitate the fully embodied democratic process are great.

“In our own time,” Justice William Brennan warned at the end of his illustrious career, “attention to experience may signal that the greatest threat to due process principles is formal reason severed from the insights of passion.”²⁴¹ To reconnect reason with the rest of the body, to realize the ideal of embodied reasonableness, legal professionals need to check their discursive stance against the messages they are signing in the flesh, and when the gap grows wide, work to realign mixed signals. Whether they toil at the bar, on the bench, or inside mediation forums, jurists must hone their people skills and act as “strange attractors” willing to remedy the laws’ intractable contradictions with emotions that are intelligent and intellect that is emotionally sane. Research on the place of emotions in the legal process continues to emerge, and there is much that legal scholars and social scientists can learn from each other in this area.

Architects of deliberative democracy are likely to be frustrated as long as they continue to measure their success by the actually achieved consensus. Nine Supreme Court Justices routinely fail to reach an agreement, delivering an increasing number of split-decisions in recent years. Do we really think the rest of us can do better? The law often appeals to reasonable persons’ judgment, yet one thing that stands out about reasonable people is that they agree to disa-

²³⁶ See POSNER, *LAW*, *supra* note 96, at 130-57.

²³⁷ Michael Walzer, *Deliberation, and What Else?*, in *DELIBERATIVE POLITICS*, *supra* note 141, at 58, 68.

²³⁸ *Id.* at 67.

²³⁹ Frederick Schauer, *Talking as a Decision Procedure*, in *DELIBERATIVE POLITICS*, *supra* note 141, at 17, 23.

²⁴⁰ DEWEY, *supra* note 45, at 54.

²⁴¹ William J. Brennan, *An Eloquent Liberal Voice on Equal Rights and Privacy*, N.Y. TIMES, July 25, 1997, at B7.

gree. It is heartening to see that deliberative democracy theorists shift their emphasis away from rational consensus and move beyond “*mere toleration*” toward “mutual respect (which is a more demanding form of agreeing to disagree).”²⁴²

Integrating emotions and reasons into a coherent conceptual schema also presents a problem. Menkel-Meadow divides modes of deliberation into principle-based, bargain-oriented, and emotion-driven.²⁴³ However, this classification creates an impression that principled discourses and interest-driven negotiations are devoid of emotions while emotional conflicts or faith-based disputes are devoid of principles. A robust yet flexible theoretical schema that can accommodate logical, affective, and behavioral dimensions of deliberative process may take time to articulate.

The biggest challenge facing legal pragmatists determined to insert themselves into the embodied democratic process is modeling its values in their conduct. They have every right to do so. They need to remember Judge Learned Hand’s advice, however, “[I]liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”²⁴⁴ Democracy is not held together by just laws, nor does it spring from wise constitutions. The genius of the framers has less to do with the clever foundational documents they cobbled together than with their embodied virtues, painfully limited though these proved on occasion (why else would countries that copy our constitution have such hard time bodying forth to its democratic ethos?). The framers’ chief strength was in their readiness to compromise, to accommodate each other, and to go on searching for elusive answers in the face of the bitter disagreements over principles. Therein lies the lesson for pragmatists, discourse theorists, social justice champions – all democracy boosters of our time.

No one holds a monopoly on democratic virtue. We should not assume that pragmatists are more ethically gifted or deliberatively savvy than the proponents of other philosophical brands.²⁴⁵ Pragmatist hermeneutics will have to tell us how to study the relationship between our discursive, affective, and behavioral performances while dodging the dangers of *ad hominem* reasoning. As the case of Immanuel Kant suggests, the misalignment between a theoretical corpus, affective attitude, and behavioral performance is part of the human condition. But the challenge is worth taking, and I hope that all those who understand democracy as the fully embodied democratic process will not shrink from it.

²⁴² Gutmann & Thompson, *supra* note 226, at 251.

²⁴³ See Menkel-Meadow, *supra* note 15, at 365-66.

²⁴⁴ LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 190 (3d ptg. 1974).

²⁴⁵ An interesting example is the debate about Justice Cardozo’s legal practice that according to some feminist critics shows a gap between his publicly espoused principles and certain legal decisions he rendered. See generally RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 17 (1990) (quoting Catherine Weiss & Louis Melling, *The Legal Education of Twenty Women*, 40 *STAN. L. REV.* 1299, 1350, 1350 n.128 (1988) (debating Justice Cardozo’s legal practice in light of his holding that allegedly shows a gap between his publicly espoused principles and certain legal decisions he rendered)); but see POSNER, *supra*, at 47-48 (1990) (giving an alternative look at this controversy).

IX. CONCLUSION

Over two millennia ago Aristotle observed that “all things are not determined by law, . . . that about some things it is impossible to lay down a law,” and that we must undertake “a correction of law where it is defective owing to its universality.”²⁴⁶ Pragmatists have been expounding on this premise for just over a century, providing legal scholars with ammunition in their polemics against legal formalism. Although there is no consensus about legal pragmatism’s tenets, jurists identifying with this movement tend to be skeptical about immutable principles, mindful of their historical meaning, sympathetic to judicial discretion, attentive to legal outcomes’ likely consequences, and open to social science findings that promise to illuminate the relationship between law and society.

As I tried to make clear in this essay, legal pragmatists cannot dispense with principles altogether. The theoretical nihilism Stanley Fish urges us to follow as a shortcut to justice is no more viable than the principled textualism Justice Scalia proposes as a solution to the reigning judicial chaos. Legal consequences do not come to us with price tags attached, ready to be sorted out as pragmatically sound or pragmatically spurious ones. Someone has to judge the consequences, figure out their cost, and such an evaluation requires a contestable standard. By the same token, pragmatist jurisprudence rejects the notion that laws are to be interpreted by some immutable principles lodged in a timeless legal canon. The rule of law does not dispense with women and men who lend it its time-bound agentic substance. Laws do not interpret themselves; they are applied by fallible human beings who need room for honest differences of opinion. As Justice Breyer pointed out, we should strive to do justice to the competing constitutional principles as well as to the historical consequences of specific legal holdings.

I have also tried to articulate another strain in legal pragmatism, the one that casts our political system as an embodied phenomenon. Democracy is more than a discourse. It is also a civic culture “which encourages trust, tolerance, prudence, compassion, humor, and withers away when overexposed to suspicion, hatred, vanity, cruelty, and sarcasm.”²⁴⁷ This pragmatist perspective on democracy bids us to look for its somatic-affective, behavioral-performative, as well as ethical-discursive equivalents. One can only get that far redeeming reasons with reasons, words with more words. “[T]he life according to virtue lived without impediment,”²⁴⁸ which the author of the *Nicomachean Ethics* took for the highest ideal, requires that we redeem our discursive claims with emotionally intelligent attitudes, affective offerings with bold behavioral commitments, and behavioral performances with principled arguments, as we travel the full hermeneutical circle where embodied meaning acquires its concrete historical shape. To achieve its pragmatic end, an ideal speech situation

²⁴⁶ Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 935, 1020 (Richard McKeon ed., 28th prt. 1941).

²⁴⁷ Mission Statement of The UNLV Center for Democratic Culture, at <http://www.unlv.edu/centers/cdclv/mission/index.html> (last visited Jan. 21, 2005).

²⁴⁸ Aristotle, *Politica*, in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 246, at 1127, 1220.

must include logos, pathos, and ethos, leaving ample room not only for intellectual prowess but also for emotional creativity and moral imagination.

Once again, we find a precursor for this line of reasoning in Aristotle. This proto-pragmatist taught us that “each government has a peculiar character which originally formed and which continue to preserve it. The character of democracy creates democracy, and the character of oligarchy creates oligarchy; and always the better the character the better the government.”²⁴⁹ We might want to reexamine the legal process in line with this premise, and that means recasting democratic justice as both a discursive and nondiscursive practice in the course of which legal professionals shape – or misshape – the social order they are sworn to protect. Jurists are engaged in a continuous production of social reality as objective and meaningful. They play a special role in this process as guardians of cherished terminologies waiting to be applied to contested situations whose indeterminacy jurists terminate not only discursively but also somatically, affectively, and behaviorally. The promise of legal pragmatism will not be fulfilled until its proponents grasp democratic justice as an embodied process.

²⁴⁹ *Id.* at 1305.