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It's a Positivist, It's a Pragmatist, It's a Codifier! Reflections on Nietzsche and Stendhal

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IT'S A POSITIVIST, IT'S A PRAGMATIST, IT'S A *CODIFIER*! REFLECTIONS ON NIETZSCHE AND STENDHAL

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Argument.

The modern movement called "Pragmatism" either is trivially associated with an absurdly wide range of adherents (including the Legal Panel's principal speakers) or is dangerous in its implications for original, unmediated, and creative thinking. Lawyers instead would benefit from the approach of the *codifier*, who seeks to link a private creative vision to a public political program. The models for the *codifier* come from philosophy and literature and help to challenge Richard Rorty's view that the public and private realms are inevitably disjoined.

Richard Rorty writes that "[n]owadays, Allan Bloom and Michael Moore seem to be the only people who still think pragmatism is dangerous to the moral health of our society."[1] Given the source, I would not contest the generalization. Nor would I seek to correct the adjective about pragmatism used more than once by Professors Rorty and Grey: "banal."[2] Indeed, the popularity of pragmatism may reflect its banality. Its amorphous nature has produced strange alliances. For example, the same Stanley Fish who once declared Richard Posner's humanistic forays to be "execrable" now joins Posner's pragmatic program almost without qualification.[3] If Pragmatism's tent is big enough to cover such disparate personalities, its grounding is unlikely to be distinctive or even

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1 Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, *in* PRAGMATISM IN LAW AND SOCIETY 89, 90-91 (Michael Brint & William Weaver eds., 1991).

2 *Id.* at 89, 90; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 814 (1989).

3 Fish finds little to disagree with in Posner's approach to legal reasoning, which he calls "Almost Pragmatism." Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty and Ronald Dworkin*, *in* PRAGMATISM IN LAW AND SOCIETY, *supra* note 1, at 47, 55. Fish's harsh assessment of Posner's earlier attempts in the humanities related to Richard Posner's *Law and Literature: A Misunderstood Relation*. For Fish's critique, see Karen J. Winkler, *Controversial Judge and Legal Theorist Jumps Into the Debate on Law and Literature*, CHRON. HIGHER EDUC., Dec. 7, 1988, at A10.

identifiable. On the other hand, when we consider that pretenders to pragmatist status have included Holmes, Cardozo, Brandeis, Pound, Llewellyn, Fuller, Frankfurter, Douglas, Brennan, and Powell, we must ask who was or would be rash enough, imprudent enough, to wish to be excluded?

There is no conceivable way that a skeptic of pragmatism like myself could better summarize the pragmatist program for law than do the papers of Professor Grey or Judge Posner. Judge Posner has characteristically raised the adjectival stakes[4] by calling pragmatism "vague"[5] (which is in some ways worse than banal), and calling the very issue he has explored today "spongy."[6] But I *can* add my name to the tiny list of dissenters. I think that pragmatism is, on the terms offered by its proponents, harmful to contemporary legal thought and practice.

The sources for my brief anti-pragmatist argument are a pair of nineteenth-century writers, one of whom has never been described as a pragmatist, and the other of whom would roll over in his grave in hearing himself so labelled. The latter is Friedrich Nietzsche, and the former a novelist whose non-pragmatic art Nietzsche admired greatly: Stendhal.[7] These writers may help us today to distinguish a kind of legal and judicial temperament that is fundamentally different from that of the pragmatist's and, in my view, far more appropriate to the challenges we face as a culture of law in the late twentieth century.

To situate my sense of pragmatism's untimeliness, I shall note that Professor Grey has elsewhere cited William James to the effect that "in this matter of belief we are all extreme conservatives,"[8] so that—now in Grey's own words—"[o]nly when habit and practice

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4 "Perverse," "hectoring," and "peripheral" are some non-pragmatic adjectives Judge Posner has used in writing about my treatment of a topic to which he returns late in his paper for today—judgment under totalitarian regimes. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 171, 174-75 (1988) [hereinafter POSNER, LAW AND LITERATURE]. There are those who feel he later came to accept my primary position on adjudication in these regimes—and he surely used my primary evidence!—in a later piece. *See* Richard A. Posner, *Courting Evil*, NEW REPUBLIC, June 17, 1991, at 36 (reviewing Ingo Müller's book *Hitler's Justice: The Courts of the Third Reich*).

5 Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 1 (1996).

6 *Id.*

7 On Nietzsche's admiration for Stendhal, in the context of his admiration for one of our modern codifiers, Napoleon, see FRIEDRICH NIETZCHE, BEYOND GOOD AND EVIL aphorism 254 (Helen Zimmern trans., 1989); *see also* FRIEDRICH NIETZCHE, THE TWILIGHT OF THE IDOLS § 45 (R.J. Hollingdale trans., Penguin Books 1968) (1889).

8 Grey, *supra* note 2, at 799 (citing WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 224-25 (1907)).

become problematic is there occasion for inquiry."[9] Such a pragmatic method has appeal and looks like the way most people who think or do law and justice proceed. For me, though, such a method has *itself* become intensely "problematic," for, as I shall discuss briefly towards the end of this response, the events of our century have called into radical question the appropriateness of conservative belief structures, or of only incrementalist growth, for law.

To situate my argument further, I will concede the distinction made in Judge Posner's paper today between pragmatism and positivism; Professor Grey has elsewhere cogently separated pragmatism from formalism and other rationalistic systems (including traditional positivism).[10] If pragmatism and any formalism were indeed similar, few antiformalist contemporary legal thinkers would have become its fellow travellers. Instead, as I mentioned earlier, most of them are card carrying members. But I will also return (and also briefly) to the question of positivism.

The pragmatist/formalist opposition conceded, I want instead to articulate a dichotomy between the pragmatist and another jurisprudential type, the one I argue we need today. Since no school has been built—at least recently—around this type of lawyer, I shall give her[11] a name today: I call her *the codifier*. The distinction between the pragmatist and the codifier has the merit of being tangible rather than spongy, and it may also bring with it the possibility of setting apart this panel's two principal speakers. So, whereas there is no reason to question Grey's sincerity in couching his allegiance to pragmatism in the oxymoronic terms of a "conversion" or at least a "partial conversion" to that banal condition, I argue that Posner is an apostate to pragmatism. He is, rather, a *codifier*.

A codifier is that actor who deliberately seeks to embody into law a revolutionary program already situated pre-legislatively on the brink of social acceptance by the actor's—or group of actors'—political, military, and/or verbal achievements. The actor is sometimes utterly, but always mostly, disinterested in the pragmatic likelihood of her program's implementation or acceptability.

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9 *Id.* at 800.

10 *Id.* at 789-91. Grey allows that the "instrumental aspects" of pragmatism are harder to distinguish from some means-ends qualities of the positivist program. *Id.* at 852-54.

11 In his response to my remarks at the conference, Judge Posner noted that my pronominal choice de-gendered him even as I was paying him the compliment (?) of calling him a "codifier." But the real pronominal choice relating to his work on legal economics is in my *title*, which is partly meant to convey the abysmal and depersonalizing effect upon the law of Posner's brand of economic reasoning.

There is instead a kind of "prophetic" commitment to the program, in the spirit and often in the manner of unpopular idealists whose ambitions went against the grain of the already imbedded popular agenda. Examples of codifiers are Moses, Jeremiah, Socrates, the Icelandic saga writers, the French and American Revolutionary generations, Napoleon, and Nietzsche. All paid a price for their beliefs, but all succeeded in part because pragmatic "incrementalism" played no part in their enterprise or belief system.

The codifier, from the perspective of pragmatist theory, does not exist. She could not, because the positing of any abstract ideal towards which one works independently of the infinite flexibility of a pragmatic collectivity is, of course, anathema to the pragmatist. Since the codifier creates through act and word the ideal that she then wishes to transform into text—*and especially because the codifier is a solo player, inclined to lead and not to follow the masses*—she cannot and would never wish to be a pragmatist.

But she is alluded to as an *absence* by pragmatists, or perhaps as a shadow in the space recently discovered and emphasized by Richard Rorty in his extraordinary book *Contingency, Irony, and Solidarity*.[12] There Rorty identifies what he sees as an unbridgeable gap between the private person striving for individuality and the public person engaged in social improvement. For Rorty, Nietzsche exemplifies—with Baudelaire and Proust—the quest for the self-created life, a life striving for "private perfection."[13] On the other hand, thinkers like Marx, Dewey, Habermas, and Rawls contribute to a "shared, social effort—the effort to make our institutions and practices more just and less cruel."[14] In the space between them, Rorty situates the pragmatic "liberal ironist," a figure resigned to the unalterable difference between the two types, a difference Rorty couches in the strongest terms:

> We shall only think of these two kinds of writers as *opposed* if we think that a more comprehensive philosophical outlook would let us hold self-creation and justice, private perfection and human solidarity, in a single vision.
>
> There is no way in which philosophy, or any other theoretical discipline, will ever let us do that.[15]

The *codifier* disproves of this uncharacteristically universal statement. And she does so as a construct of the two realms used

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12 RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989).

13 *Id.* at xiv.

14 *Id.*

15 *Id.*

by Rorty to *absent* her: philosophy and literature. Now first it must be noticed that Rorty's move to stories may well be the beginning of his own trajectory towards the codifier. Rorty's book directs us to literary sources as guidelines to the sensitivity of the liberal ironist. (Both Posner and Grey have analogously asked the not always receptive world of lawyers to think about poets, novelists, and other storytellers, although a strain in the legal world that might be classified as "pragmatist" tends to resist this literary suggestion—and Posner here conspicuously cites history and philosophy but *not* literature as appropriate reading for appellate judges.) Rorty's move to stories may join with our burgeoning Law and Literature movement to enhance the lawyer's professional options.

Yet, on his own present terms, Rorty disjoins definitively the act of the creative self-fulfilling individual from the act of the communally-minded person. For Rorty, and for most pragmatists, the private and public realms will not be merged. Our pragmatic social actor might be kinder and gentler because he is well read, or he may develop a keen sense of irony that leaves him free to do what he will—but the ironist is never the codifier.[16]

Suppose, as I deeply believe, that the gap between the self-created life and the public world of law *can be breached*! Suppose that a set of readings, which like that proposed by Rorty focuses on Nietzsche, shows us how the most creative private program leads to a socially useful text?

Stendhal and Nietzsche provide us with our anti-pragmatic program. Nietzsche admired Stendhal, as he admired few other nineteenth-century novelists, precisely because of Stendhal's unpragmatic heroes. These characters, like their creator, refused to be constrained by an insipid notion of collective and conformist behavior. But neither does the thrust of their actions derive purely from an unmediated personal vision. Instead, Stendhal is everywhere concerned in his stories with the notion of *devoir*, or duty. His characters' drive to act well is not, on this model of *devoir*, purely *self*-generated. Often contrasted with mere pragmatism or prudence, *devoir* imposes on the protagonist an externally-inspired set of affirmative and negative constraints. Heroic action, both in the private and public spheres, is defined in Stendhal's world as

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[16] Note that the well-read Newt Gingrich has been loudly proclaimed a pragmatist in a *New York Times* headline. Jerry Gray, *Gingrich, Long Seen as a Purist, Shows His Worth as a Pragmatist*, N.Y. TIMES, Oct. 27, 1995, at A1. Gingrich is proving to be a Rortian ironist more than he is a successful codifier, as attest the Republican Party's recent deletion of references to its "contract for America and its more recent flirtation with terminating his role as Speaker."

both self-willed and socially constructed by external models, particularly by the model of Napoleon as at once conqueror and codifier.

Julien Sorel, the youthful hero of *Le Rouge et le Noir*, conceives of himself this way.[17] He imposes on himself a series of outlets for his ambition, but (as René Girard stresses[18]) these outlets reflect a model of heroism derived from an outside source, in Julien's case, Napoleon. Thus, Julien associates heroism on a smaller scale with each act of duty—each *devoir*—that he imposes on himself in the domains of romance, politics, and thought.[19] Although Stendhal treats his protagonists with irony on occasion, there can be little doubt that he, like his Julien, found the *source* of heroic duty in Napoleon. A man of action in his early life, Stendhal proceeded to imitate the Napoleonic model—a striking merger of action and writing. Napoleon's conquests gave birth to his majestic codes of law, sections of which Stendhal used to read nightly to guide him in creating his own masterpieces.[20] Julien's image of Napoleon equally marries heroic action to legislative text. The narrative associates Napoleon with Julien's self-willed accomplishments more than twenty times; equally to my point today, Julien does Napoleon the seemingly unheroic compliment of memorizing the Napoleonic Codes. When Julien is arrested for the attempt on Mme. de Renal's life, which he at first believes to have succeeded, he announces to the examining magistrate, "I caused death with premeditation . . . I bought the pistols from _____ the gunsmith, and had him load them. Article 1342 of the Penal Code is explicit; I deserve death, and I am ready for it."[21] Julien is probably the only

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17 STENDHAL, LE ROUGE ET LE NOIR (Paris, Librairie Générale Francaise 1983) (1830). For an English translation, see STENDHAL, THE RED AND THE BLACK (Catherine Slater trans., Oxford Univ. Press 1991) (1830).

18 *See* RENÉ GIRARD, MENSONGE ROMANTIQUE *et* VÉRITÉ ROMANESQUE (1961) (translated as *Deceit, Desire and the Novel*). To simplify for today's purposes: Girard approaches the characters in Stendhal, and other writers, in terms of "triangular desire": the structuring of the character's self-imposed goals through *another*, through a model whom the character emulates. For Julien, the goal of seducing Mme. de Renal or of achieving certain political ends is a triangulated reflection of Napoleon's own achievements.

19 The word *devoir* ("duty") is employed narratively to characterize Julien's various self-imposed public and private challenges. *See, e.g.*, THE RED AND THE BLACK, *supra* note 17, at 57, 86; *id.* at 59 (the *duty* to embrace Mme. de Renal, especially: "*He had done his duty, his heroic duty*"); *id.* at 343 (the *devoir* of growing personally through self-criticism); *id.* at ch. 21 *passim*; *id.* at 411 (the *duty* to fulfill M. de la Mole's restorationist scheme); *id.* at 444 (the *devoir* of cooling Mathilde de la Mole's passion for him).

20 *See, e.g.*, Letter from Stendhal to Balzac (Oct. 28-29, 1840), *in* III STENDHAL CORRESPONDENCE 1835-1842, at 393, 403 (Henri Maritneau ed., 1968) (in which he reveals that he needed a nightly dose of at least three pages of the Code Civil while writing *La Chartreuse de Parme* in order to attain the proper tone in his own novels).

21 THE RED AND THE BLACK, *supra* note 17, at 470.

transgressing hero in literature who knows in advance of his crime (and by heart) the code section under which he will be tried. His continuing reverence for the code and its codifier is obvious in that he seeks immediate punishment under its terms.

Creator and character join in an admiration for Napoleon as both heroic actor and legislator. In a theme picked up more subtly by Melville in the descriptions of Admiral Nelson from *Billy Budd, Sailor*,[22] Stendhal moves us towards the bridging of the gap that only irony seems to bring about in the late twentieth century. For, in an age of *great codifiers*, individuals are able to think unironically about external standards for their actions, not as a limiting factor only (the law says I can't do this or that) but as a positive inducement to action (the law sets standards that encourage me to act a certain way, say as the codifier might have acted).

The creative individual striving for Rorty's "private perfection" is not, on this view, inevitably disjoined from the public world, even the seemingly banal public world of legislation. But to understand the codifier, we will need to see this process described genealogically, at its origin in the acts and in the thoughts of the codifier herself. We will need Nietzsche.

Nietzsche takes the admiration for Napoleon that he shared with Stendhal one step further.[23] Instead of disjoining a public program from the personal, creative will to power (Rorty's reading),[24] Nietzsche consistently binds the public to the private. Rorty in fact allows, correctly, that Nietzsche is a pluralist (or perspectivalist) only in a fraction of what he writes, thus privileging Nietzsche's more typically hierarchical scheme of moral valuation.[25] But Rorty then errs by seeing the will to power as a merely *private* actor.[26] In fact, the Nietzschean will to power becomes publicly expressed *through law*, that very *locus* denied by Rorty's basic claim that these two worlds can never meet.

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22 *See* RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION chs. 8, 9 (1984).

23 *See, e.g.*, FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 490 (Walter Kaufmann trans., 1967).

> Like a last signpost to the *other* path, Napoleon appeared, the most isolated and late-born man there has even been, and in him the problem of the *noble ideal as such* made flesh — one might well ponder *what* kind of problem it is: Napoleon, this synthesis of the *inhuman* and *superhuman*.

Id.

24 RORTY, *supra* note 12, at 106.

25 *See generally* WEISBERG, *supra* note 22, at 13-23.

26 *See supra* note 12 and accompanying text.

The great legislator is himself (or herself) conceived of as one whose act of social codification begins with a private program of creative self-fulfillment. Nietzsche goes so far as to *describe* the process by which the creative personal striving at its most positive becomes socialized through a legislative text. Let us listen to this central text from *On the Genealogy of Morals*. In the eleventh aphorism of the second essay, Nietzsche first disposes of the link between justice and knee-jerk revenge or *ressentiment*, and then offers us this account of justice on earth:

> To what sphere is the basic management of law, indeed the entire drive towards law, most connected? In the sphere of reactive people? Absolutely not. Much more so in the realm of the active, strong, spontaneous, aggressive. Historically understood, the place of justice on earth is situated as a battle *against* the reactive emotions, a war waged by means of that active and aggressive power that here uses a part of its strength to quiet the ceaseless rumblings of *ressentiment* and to enforce a settlement. The most decisive move, however, made by the higher power against the predomination of grudge and spite, is the establishment of *the law*, the imperial elucidation of what counts in [the codifier's] eyes as permitted, as just, and what counts as forbidden and unjust. . . . From then on, the eye will seek an increasingly *impersonal* evaluation of the deed, even the eye of the victim itself, although this will be the last to do so.[27]

This is a remarkable passage because it at first seems so different from what post-modernists have made of Nietzsche. He is linking to social justice the most controversial and value laden aspect of his personal moral agenda: the ranking of nobility above *ressen-*

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27 FRIEDRICH NIETZSCHE, *Zur Genealogie der Moral*, *in* 6 SÄMTLICHE WERKE 306-07 (1964) (my translation). The original language reads as follows:

> [I]n welcher Sphäre ist denn bisher überhaupt die ganze Handhabung des Rechts, auch das eigentliche Bedürfnis nach Recht auf Erden heimisch gewesen? Etwa in der Sphäre der reaktiven Menschen? Ganz und gar nicht: vielmehr in der Aktiven, Starken, Spontanen, Aggressiven. Historisch betrachtet, stellt das Recht auf Erden . . . den Kampf gerade *wider* die reaktiven Gefühle vor, den Krieg mit denselben seitens aktiver und aggressiver Mächte, welche ihre Stärke zum Teil dazu verwendeten, der Ausschweifung des reaktiven Pathos Halt und Maß zu gebieten und einen Vergleich zu erzwingen. . . . Das Entscheidendste aber, was die oberste Gewalt gegen die Übermacht der Gegen- und Nachgefühle tut und durchsetzt—sie tut es immer, sobald sie irgendwie stark genug dazu ist—,ist die Aufrichtung des *Gesetzes*, die imperativische Erklärung darüber, was überhaupt unter ihren Augen als erlaubt, als recht, was als verboten, als unrecht zu gelten habe . . . von nun an wird das Auge für eine immer *unpersönlichere* Abschätzung der Tat eingeübt, sogar das Auge des Geschädigten selbst (obschon dies am allerletzten . . . .).

Id.

timent, of action above reaction, of the heroic Old Testament code above the rococo, privatized spiritualization of the Gospels.[28] The will to power emerges from the realm of self-perfection into the world of socialized humanity. The individual striver—think of Moses, the Revolutionary generation, or some recent feminists—*devotes some of her time to codewriting!* And, from the time of codification on, as the rest of this aphorism tells us, people's actions are gauged cooly and impersonally along the lines of their *duty*, as prescribed by the codifier.

Happy is the generation whose best private actors are regulated by such a code, and whose mass of people share the same reverence for its codifier! But, as Stendhal shows us through Julien's scorn of the prudent French generation around him, people are quickly overcome by *ressentiment*.[29] They lose sight of the greatness of the code, or they live in times where there simply is no great code. Or, worse still, they live in totalitarian times, where the values of *ressentiment*, of limitless violence, have been codified and are followed by millions of people.

I believe that the lesson of the awful codes of twentieth-century Germany and other European states has largely brought on Professor Rorty's liberal ironist, with her programmatic disjunction of the private and the public realms. She reflects the absence of reverence in our times for the constraints of a code. Put more literally, who among us would emulate Stendhal and voluntarily crack the spine of any legal code written under western skies, much less delve into it for creative guidance? The modern rift between letters and law[30] seems most striking in the difference, say, between the Internal Revenue Code and our favorite novel.

But this does not eliminate the *normative* possibility of the arrival of a new codifier. And for those like Judge Posner and myself, who are sensitive to the shadow of European history, ours is a period that might demand, rather than ironize, the linkage of private and public that the codifier forges. Certain periods mandate codification over pragmatics. Ours is such a generation. As Judge Posner observes in this symposium, evoking a debate he had with me about legal rhetoric during the period of Vichy France,[31] ours is a period in which the example of law in Nazi Europe coerces com-

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28 *See, e.g.*, NIETZSCHE, *supra* note 7, aphorisms 52, 251.

29 See the phenomenological later work of Nietzsche's student, MAX SCHELER, RESSENTIMENT (W.W. Holdheim trans., 1961).

30 *See, e.g.*, ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984).

31 *Compare* POSNER, LAW AND LITERATURE, *supra* note 4, at 171-75 *with* WEISBERG, *supra* note 22, at 1-9, 181-82 (introduction and appendix on French lawyer, Joseph Haen-

parisons at every moment to some of our own techniques and practices.[32] As I have suggested, particularly when a system so similar to ours in its basic story—the system under which French lawyers were trained—behaves in the pragmatic manner typical of Vichy law—accommodating incrementally to an evil inversion of the traditional egalitarian story—we must reassess the premises of analogous movements seeking prominence in our jurisprudence. If positivism were the villain, the stakes would still be high; but note that Posner here dissociates Nazi judges from positivism—and I believe he is surely correct, if the referent is also Vichy France—and places them implicitly within the dilemma for pragmatism. Recall that Posner the pragmatist earlier defines the pragmatic judge—and in part his own approach—as follows: "[A] pragmatist judge always tries to do the best he can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past."[33]

Well, if this be pragmatism, and if the pragmatic judge in fact has no Sorel- (or Dworkin-) like *devoir* to any worthy codifier, what keeps us from replicating the model of European law during World War II? What prevents us from going with the flow of the latest accepted and fashionable movement, however grotesquely out of line with our country's previously long held traditions? Neither Posner's answer here nor in his earlier writings is reassuring; today, he advises that Nazi judges might have resisted more if they had been "backward looking" instead of advancing a radical Third Reich program foreign to their traditions. But this suggestion, which is in the service of Posner's "council of wise elders" approach, only helps if the wise elders have unpragmatically assimilated the egalitarian code as a certain guideline for decision-making. This, however, did not happen in Vichy and Posner's earlier consistently pragmatic suggestions about what lawyers should have done in that situation involve such lower-level questions as how does one get published during times of oppression if one does not at least partially accommodate;[34] how does one manage both to write and to hide one's true feelings;[35] how does one "step forward" to resist directly when "heroes are rare."[36]

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nig) *and* RICHARD WEISBERG, POETHICS, AND OTHER STRATEGIES OF LAW AND LITERATURE 127-213 (1992).

32 Posner, *Pragmatic Adjudication*, *supra* note 5, at 15.

33 *Id.* at 3–4.

34 POSNER, LAW AND LITERATURE, *supra* note 4, at 173.

35 *Id.*

36 *Id.* at 174.

It is probably not entirely fair to conclude from what I have read so far about pragmatism that it does not help us (at least no more so than other contemporary patterns of legal thought) with the issue that I have identified and Judge Posner has reflected upon. But Posner's definition of what it means to be a judge seems to me so far from the common understanding of pragmatism that it offers a step in the direction of an answer. For it seems to me that Posner, here and perhaps in his practice as a judge, is more the codifier than the pragmatist. He believes that judges, wise or foolish, old or young, should act on a body of "organized knowledge" or a "disciplined, rigorous, and articulate inquiry," rather than an "unstructured intuition"—surely not on the basis of anterior constraint.[37]

Unanchored from precedent, the codifying judge may seek occasion to instantiate his own sense of social utility. A microeconomic generalization, first impressed upon lawyers by Posner's extra-judicial writings,[38] is now raised to the level of appellate rule.[39]

One need not be a judge to be a codifier. One can also be a law professor or a consultant to municipal governments; here I believe that the example of Catherine MacKinnon is helpful. Like Posner, she has moved from a base of powerful theoretical writing[40] to articulate her private academic beliefs into a socially viable code, in her case *literally* a code.[41]

Unlike pragmatism and some other more recent jurisprudential approaches, the move toward codification has the merit of baring the values of the otherwise private thinker or actor to full social scrutiny. Whatever drove Napoleon to conquer Europe, his lasting contribution in the domain of the written code elucidates the social component of his private ambitions. Perceiving Posner or MacKinnon as codifiers, more than as pragmatic or feminist theorizers, engages our social-policy instincts on their most forceful plane. It is in this legislative domain that Napolean himself fell prey to

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37 Posner, *Pragmatic Adjudication*, *supra* note 5, at __.

38 *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

39 See, for example, the decision in *Edwards v. Honeywell, Inc.*, 50 F.3d 484 (7th Cir. 1995), on proximate cause, limiting corporate liability even where the plaintiff is foreseeable at the time of the negligent act.

40 *See, e.g.*, Catherine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

41 I am referring to her and Andrea Dworkin's Indianapolis anti-pornography statute. *But see* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). Some Canadian jurisdictions have adopted her code.

Holmes's antipathy. After all, Napoleon was not to Holmes's liking[42]—maybe that is why Holmes might be happy to be called a pragmatist rather than a codifier, much evidence about his legal method to the contrary notwithstanding.[43]

But it will be up to us, under the codifier model, not merely to criticize or to rationalize the codes of others that we may not like. The challenge for us is to develop and perfect our own private beliefs and, if they are good enough, to make them public. From then on, we will be treated by *skeptical* others as wrongheaded and ephemeral but at least as "entitled to our beliefs" or as "off the wall" but still within the operations of "the system."[44] *Admiring* others will have a chance to say we are correct and inspired. If we attract a sufficiently large group of admirers, we may ironically produce a form of positivism that Nietzsche of all people seems to endorse in the unlikely scenario of the re-appearance of a codifier worthy of the name.

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42 A scan of the many mentions of Napoleon by Holmes in his correspondence reveals his distaste for the French hero/codifier. *See, e.g.*, Letter from Justice Holmes to Harold S. Laski (Apr. 30, 1921), *in* I HOLMES-LASKI LETTERS 260-61 (Mark De Wolfe Howe ed., Atheneum 1963) (1953) (wherein he does express an interest in Melville); Letter from Justice Holmes to Harold S. Laski (Sept. 26, 1921), *in id.* at 287-88; Letter from Justice Holmes to Harold J. Laski (Oct. 9, 1921), *in id.* at 291-93 ("Kant after more than a century counted for more than Napoleon").

43 It was his admirer Cardozo who, in *Pokora v. Wabash Railroad Co.*, 292 U.S. 98 (1934), reluctantly had to correct the bald, unpragmatic assertiveness of Holmes's "stop and get out of his vehicle" railway crossing absolute rule in *Baltimore & Ohio Railroad Co. v. Goodman*, 275 U.S. 66 (1927). For that matter, on the level of style, Cardozo certainly painted Holmes in the terms of the codifier, with his epigrammatic, monarchical "type magisterial." *See* BENJAMIN N. CARDOZO, *Law and Literature*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339, 347-48 (Margaret E. Hall ed., 1947). For Cardozo, Holmes might have been a kind of Nietzschean "last signpost" to the times of judges who—on their sole authority—could write boldly and without further justification in pragmatics or (even) experience. On this view, Holmes, while not in the Napoleonic mode, was more a codifier than a pragmatist.

44 STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 357 (1980).