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Pragmatism Regained

Christopher Kutz

Boalt Hall School of Law, University of California at Berkeley

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PRAGMATISM REGAINED

*Christopher Kutz**

THE PRACTICE OF PRINCIPLE. By *Jules Coleman*. New York: Oxford University Press. 2001. Pp. xx, 226. \$39.95.

I. FROM PRACTICE TO THEORY

Jules Coleman's *The Practice of Principle*¹ serves as a focal point for current, newly intensified debates in legal theory, and provides some of the deepest, most sustained reflections on methodology that legal theory has seen. Coleman is one of the leading legal philosophers in the Anglo-American world, and his writings on tort theory, contract theory, the normative foundations of law and economics, social choice theory, and analytical jurisprudence have been the point of departure for much of the most interesting activity in the field for the last three decades. Indeed, the origin of this book lies in Oxford University's invitation to Coleman to deliver the Clarendon Lectures in Law in 1998, one of the greatest honors for legal scholars. Moreover, unlike many law school "legal theorists," Coleman's high standing within the legal academy is fully matched in the professional philosophical world. *Practice* will surely be mined for years for its many and subtle discussions of the nature of law and legal argument. The book is a wonderful achievement, both for Coleman himself, and for the development of rigorous philosophical study of the law.

Coleman's first publication, "On the Moral Argument for the Fault System," appeared in the flagship *Journal of Philosophy* at a time when work on first-order problems of law — as opposed to second-order questions about the nature of law — was frequently disparaged by professional philosophers as mere "application."² Coleman's early writings helped significantly to change that, by showing that deep philosophical issues of responsibility and justice were raised by our le-

* Assistant Professor of Law, Jurisprudence and Social Policy Program, Boalt Hall School of Law, University of California at Berkeley. B.A. 1989, Yale; Ph.D. (Philosophy) 1996, University of California at Berkeley; J.D. 1997, Yale. — Ed. I am grateful to Jules Coleman and Mark Greenberg for their very helpful comments. Some of the material in this Review will also appear in the *Times Literary Supplement*.

1. Jules Coleman is Wesley Newcomb Hohfeld Professor of Jurisprudence and Professor of Philosophy, Yale University.

2. Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473 (1974).

gal practices and that our concepts of justice and fault could not be fully understood apart from those practices. What Coleman brought to the field of legal philosophy was both the conceptual rigor of his graduate training at Rockefeller University as well as an interest in and sensitivity to the way risk and responsibility are actually allocated through tort law. In his own work, and in fostering the work of others, Coleman has greatly expanded the range and interest of legal philosophy, moving beyond the mainstays of jurisprudence and constitutional law to the private law of tort and contract.

His 1992 book, *Risks and Wrongs*, set out his general view of those fields.³ Coleman argued that tort doctrine must be understood as the institutionalization of a distinctive moral view, "corrective justice," according to which wrongdoers bear duties to rectify the wrongful losses they inflict on their victims. Such a view is opposed, on the one hand, to the strict liability view put forward by Richard Epstein,⁴ according to which causing harm, faultlessly or not, suffices for liability; and on the other to the economic theory of tort, whose chief proponents are Richard Posner and Guido Calabresi,⁵ according to which liability properly rests with the party best able to reduce the costs of both accidents and accident prevention, independent of any causal or faulty responsibility for the accident. By contrast, Coleman's interpretation of contract law rejected seeing it as embodying a distinctive moral conception (as, for example, Charles Fried has influentially argued⁶). Rather, argues Coleman, contract law is best understood functionally, as a piece of a more general liberal political theory. With the economists, Coleman sees contract law's chief justification in its facilitation of economic markets. But where the economists see the chief value of markets as lying in their promotion of allocative efficiency, Coleman understands their virtues in richer, more political terms: markets permit social cooperation in the circumstances of liberal societies, that is, divisive pluralism and individual freedom.

Coleman's argument in that earlier work reflects a general claim, that abstract concepts must be understood in terms of the practices they structure. This claim is a hallmark of philosophical pragmatism and has been implicit in most of Coleman's writing. Now he has paused to make it explicit, and to show how other, related, theses of philosophical pragmatism help to illuminate and ground the substantive positions he has advanced over the years.

3. JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

4. Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

5. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); RICHARD POSNER & WILLIAM LANDES, *THE ECONOMIC THEORY OF TORT LAW* (1987).

6. CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

The Practice of Principle is, in effect, two books. The first returns to the subject of tort law. Here Coleman's concern is not setting out his substantive view of tort law, although this work does provide an opportunity for him to knit together his corrective justice view with some other recent work coauthored with Arthur Ripstein, setting out an account of the relation between corrective and distributive justice.⁷ Rather, Coleman's concern is methodological, with the question of what kind of account of a body of law should be deemed an adequate explanation. In this half of the book, Coleman's principal adversary is named "the economic approach to law," and represents not any particular figures, but rather a theoretical commitment to explaining and justifying legal institutions in terms of the economic value of efficiency. Coleman hopes to offer an exceedingly ambitious argument: not just that his corrective justice account of tort law is superior to the economists', but that *only* an account like his, one that takes the internal structure of tort law seriously, could ever be a contender.

The second "book" takes up questions of general, or "conceptual" jurisprudence: what is law, what authority does it have, and how is law possible? Again, the point of Coleman's discussion here is not to present new substantive answers to these questions, but rather to show how a position he originally put forward twenty years ago, in "Negative and Positive Positivism,"⁸ can draw upon a broader pragmatic approach to overcome powerful objections raised against his and similar accounts. Legal positivism, at the most general level, involves the claim that law is grounded ultimately and only in social facts, where "social facts" include conventions, practices, and beliefs. But positivists have disagreed whether moral criteria — tests of moral goodness — can be incorporated into the conventions defining a community's law, with Coleman (following H.L.A. Hart) arguing for a capacious view, while Joseph Raz and Scott Shapiro argue that moral tests can never partly constitute a community's law without undermining the basic function of law, guiding conduct.⁹ Coleman also takes the occasion to defend the general project of conceptual jurisprudence against two objections voiced by Ronald Dworkin and Brian Leiter, who criticize positivism for, on the one hand, an impossible pretence of value-neutrality; and on the other of poaching on the proper territory of social scientists in claiming to illuminate a form of social organization.

This Review will touch on the larger themes of Coleman's book, but it cannot do justice to all its contents, for *Practice* is dense and

7. Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995).

8. Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982), reprinted in JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 3 (1988).

9. See JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW* 37, 50-51 (1979); Scott Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469 (1998).

rich, with new arguments appearing on almost every page. It is also a difficult book, in great part because of the conceptual difficulties of the issues Coleman considers, and the great range of theoretical considerations he brings to bear on those issues. While the general subject matter should be of interest to anyone working in legal theory, broadly speaking, the detail and rigor of its arguments may leave non-specialists a little dazed.¹⁰ But for those with a serious interest in the field of legal philosophy, this is a must-read. Even those who reject Coleman's methods and substantive claims will benefit from the characteristic lucidity and incisiveness with which he sketches rival positions, alternatives, and problems for the field.

Just as important, a signal virtue of Coleman's book is the excitement it embodies about the state of the field. The book vibrates with critical engagement, with both arguments and authors. The reader has the impression of being invited to a particularly lively philosophy seminar, whose members are both familiar (e.g., Ronald Dworkin) and relatively new (e.g., Scott Shapiro). On every page Coleman is confronting, criticizing, and endorsing others' views, as well as explaining how his own views have shifted over time. The consequence of this strongly dialectical approach is that the book does not really purport to present definitive answers to the problems it treats; Coleman's views will likely shift again in the future. The book, then, offers a snapshot of Coleman's mind and the debates his work drives. In that sense, the book may seem less satisfying than the traditional philosophical treatise, in which the appearance of finality is scrupulously maintained by the rhetoric of the obviousness of the author's conclusions. Coleman's approach is, by contrast, refreshingly honest. The problems are *hard*, and a philosopher would be a fool to think his or her views the final words on the matter.

II. PRAGMATISM, PRINCIPLE AND TORT

According to Coleman, *The Practice of Principle* is supposed to both exemplify and explain philosophical pragmatism as applied to legal theory (p. xi). Because pragmatism is, to varying degrees, the unifying thread of this book, it is worth getting clear from the start what Coleman means — and does not mean — by it. For “pragmatism” is a word much in vogue in legal academia. A recent Westlaw search turns up nearly 200 law journal articles with “pragmatic” or “pragmatism” in the title,¹¹ on subjects ranging from administrative law,¹² to envi-

10. The book has one serious defect: a virtual absence of specific references to the current literature, including the works of authors Coleman discusses at length. This is particularly unfortunate because it excludes interested readers who might otherwise find this a helpful introduction to contemporary debates in this field.

11. Search on Westlaw (JLR database), conducted Feb. 10, 2002.

ronmental law,¹³ to voting rights law,¹⁴ not to mention at least two special symposia specifically noting the emergence of pragmatism.¹⁵ These articles range in theoretical depth, and it is fair to say in many that “pragmatic” functions as a five-dollar synonym for “practical.” Others invoke a more general methodological stance, one that abjures arguments from pure principle in the spirit of compromise — in David Luban’s characterization, this is pragmatism as “eclectic, result-oriented, historically minded antiformalism.”¹⁶

Even among the more reflective proponents of “legal pragmatism,” the term seems to denote a waiver of the requirements of producing systematic theory, in favor of a bricolage of independently plausible theoretical assumptions and principles, balanced against intuitively reasonable outcomes. Daniel Farber’s recent *Eco-Pragmatism* is typical: “Legal pragmatists are, in part, reacting against the increased obsession of some other legal scholars with grand theories such as economic reductionism We can have better hopes of building an interlocking web of arguments that will support a decision based on diverse, overlapping considerations.”¹⁷ There may indeed be good reasons to avoid difficult theoretical work in particular times and places: not all debates happen in seminar rooms, nor is the solitary cool of the study the appropriate forum for hammering out policy among parties with sharply conflicting interests and conceptions of the good.¹⁸ Moreover, because philosophical theories by their nature are general and tend to underdetermine particular policy conclusions, it is often possible at the policy-making level to reach consensus on particular decisions without needing to square all theoretical premises. However, such pragmatism, or better “legal pragmatism,” stands generally to philosophical pragmatism as “legal realism” stands to philosophical realism, which is to say that the resemblance largely stops at the orthography. For philosophical pragmatism represents a

12. Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rule-making*, 78 N.C. L. REV. 1013 (2000).

13. Lisa Heinzerling, *Pragmatists and Environmentalists*, 113 HARV. L. REV. 1421 (2000) (reviewing DANIEL A. FARBER, *ECO-PRAGMATISM* (1999)).

14. J. Morgan Kousser, *Beyond Gingles: Influenced Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551 (1993).

15. See Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996).

16. David Luban, *What’s Pragmatic about Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 44 (1996).

17. DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 9-10 (1999).

18. The case for practical agreement amid theoretical disagreement has been well made recently by CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

constellation of semantic, epistemological, and metaphysical claims, most of which derive directly or indirectly from arguments about the relations between theory and evidence,¹⁹ and from the priority of interpretation to metaphysics.²⁰ In its philosophical form, therefore, pragmatism represents a deeply-considered theoretical framework, a framework congenial to a wide-range of substantive ethical and legal positions.

Coleman's pragmatism is of the latter flavor, and the book may come as a shock to those seeking the usual pass from theory. According to Coleman, philosophical pragmatism is characterized by the following five claims or characteristics: (1) "semantic non-atomism": the idea that meanings reside not in individual concepts but holistically, in networks of concepts, so that for example the meaning of "fault" can only be explicated in terms of the related concepts of "harm," "agency," and "remedy," related inferentially to the term to be explained; (2) "practical inferential role semantics": the meaning of concepts is given by the inferences they support in the practices in which they occur; (3) "explanation by embodiment": normative principles are explained by showing the practices in which they occur; (4) "conceptual holism": what role a concept plays in one practice depends on its role in other, related practices; and (5) "radical revisability": all beliefs, both theoretical and empirical, are open to revision on both theoretical and empirical grounds (pp. 6-7).

Taken together, these claims add up to a distinctive view of human language, one that sees language not as a kind of transparently Platonic mapping of reality, but rather as a tool developed and used for a range of social and theoretical purposes, of discovery, explanation, and justification. While mapping reality is, of course, a central function, linguistic pragmatism emphasizes the social context of the mapping activity — the way in which our attempts to work out an understanding of our social and physical environments are done *from here*, that is from a temporally and spatially limited location, using conceptual materials drawn from other activities and projects.

An example will make this clearer. Take the claim "punishment is the merited response of intentionally inflicted suffering to wrongdoers," which might be thought definitional of punishment. According to the principle of semantic non-atomism, to understand this claim we need to understand as well the related but unmentioned concepts of "harm" and "responsibility." Second, a complete understanding of the

19. See PIERRE DUHEM, *TO SAVE THE PHENOMENA: AN ESSAY ON THE IDEA OF PHYSICAL THEORY FROM PLATO TO GALILEO* (Edmund Dolan & Chaninah Maschier trans., 1969) (1908); W.V.O. Quine, *Two Dogmas of Empiricism*, 60 *PHIL. REV.* 20 (1951).

20. See W.V.O. QUINE, *WORD AND OBJECT* (1960); Donald Davidson, *On the Very Idea of a Conceptual Scheme*, *PROC. & ADDRESSES AM. PHIL. ASS'N* 47 (1974), reprinted in DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* 183 (1984).

claim and its subsidiary concepts is going to require more than just a discursive account. Rather, grasping the concept of punishment means understanding the contexts in which punishment is deployed (or excused), and how punishing relates to practices of compensation or revenge. And third, we might want to revise our seemingly definitional claim about the connection of punishment to wrongdoing upon encountering societies with very different practices. For instance, imagine a culture in which norms of forgiveness in the wake of wrongdoing dominate, where people compete to absorb and forgive the greatest insults and harms. In such a culture, inflicting suffering on wrongdoers would not, “by definition,” be merited. What this example is meant to show is that what had seemed on its face a single semantic claim about the meaning of “punishment” now turns on the relation between punishment and a congeries of associated social practices — that is, turns on the relation between that individual semantic claim and a particular, contingent, form of life.

The pragmatic view of language defines a research program in philosophy that treats our concepts and ideals as, in Quine’s term, immanent not transcendent, and so only understandable through an exploration of their place in our social and physical world.²¹ In the case of law, immanent exploration means taking legal doctrine and its conceptual skeleton seriously, not just as independent data points which an explanatory curve must fit but as a systematic phenomenon whose parts interrelate both conceptually, in being mutually illuminating, and practically, in sustaining a form of social life whose complexity and value are recognizable to us as both inhabitants and explorers.

The antithesis of immanent exploration, by contrast, is reduction, especially as practiced by the legal economists who serve as Coleman’s foil in the first part of the book. Reductions of some phenomena are helpful — explanatory — when they transform the relatively mysterious into the familiar, or thereby relate an apparently singular phenomenon to a range of disparate phenomena, permitting unified theoretical treatment. Famously, the reduction of heat to molecular motion does both these things; equally famously, attempts to reduce mental states like beliefs and desires to neural firings has done neither, giving up a rich and explanatory theory of human agency for a “science” of the brain unable to explain the mind’s most salient feature, its intentionality.²²

For Coleman, economists’ reduction of tort law’s language of the “duty of care” to “efficiency” is like the reduction of the mental to the

21. W.V.O. Quine, *Replies to Davidson*, 19 *SYNTHESE* 303, 305 (1968). For a fuller discussion of the immanent method, see W.V.O. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* (1969).

22. For a polemic along these lines, see JOHN SEARLE, *THE REDISCOVERY OF THE MIND* (1992).

physical, impoverishing rather than enriching our understanding. This reduction is most explicit in economists' endorsement of the "Learned Hand test" for negligence, according to which a failure to take precautions against causing injury is negligent just if the cost of precaution is less than the cost of the possible injury, discounted by the probability of its occurrence.²³ (So, for instance, carmakers shouldn't be deemed negligent for failing to install \$10 bumpers if there were only a 0.1% chance of a driver causing at most \$9,999 in injuries.) The Learned Hand test may make good sense as social policy in deciding when it is reasonable to demand injurer compensation, since the incentives it creates for potential injurers have the effect of lowering the net social costs of accidents *plus* precautions — in other words, the true social costs for the potentially injurious activity. But the question of its general reasonableness as social policy and its fairness as between the two parties are two very separate things. Imagine, for example, that it is very costly for a shipping company to ensure that its drivers do not drink on the job, but that its drivers do sometimes drink, and when they do, they cause accidents. The car owner whose car is dented by a drunken driver will have a legitimate grievance against the company, a grievance expressed morally as "you need to clean up the messes your workers make," whose normative force persists even if, as a matter of overall policy, society is best off leaving the loss with the car owner.

The grievance persists because it expresses a fundamentally relational dimension of morality, the responsibility of the injurer for the injury to the victim; the Learned Hand test, by contrast, expresses a non-relational dimension of morality, the responsibility of each to bear costs when that maximizes social welfare. The two dimensions, traditionally catalogued as deontological vs. utilitarian, compete in the reasons they offer, and it is obvious that one is not fully reducible to the other. Utilitarianism, of which welfare economics is a special form, assesses acts by reference to whether they will produce more or less overall welfare in the relevant population; deontological theories, by contrast, assess acts by their conformity to principles of right — for example, whether an act expresses disrespect for a particular person, or whether the act honors a previous commitment.

Take the old chestnut of the deathbed promise: Franz asks his old friend Max to swear to burn Franz's book manuscripts upon his death, and Max so promises. But after Franz's death, Max reads them and realizes they are works of genius, sure to bring pleasure to the world. What should Max do? For a utilitarian, the matter is obvious: there is no welfare gain from keeping the promise in this instance, while publishing brings a clear gain. But to the deontological moralist, serious about the principle that promises ought to be kept, the case poses a

23. *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).

problem because the promise itself creates a powerful, if not decisive, reason to burn the manuscripts. A utilitarian might try to end up in the same place, by arguing for example that welfare is enhanced by our internalizing rules of thumb regarding promise-keeping, rules that should be put aside when welfare runs strongly the other way. But this argument would imply that any sense of dilemma Max feels is just a matter of irrational carryover, that if he saw things clearly, he would see he had no reason to honor the promise.²⁴ And this seems wrong: any adequate account of human morality — one aiming to be true to both the phenomenology and the practice of promise-making and moral deliberation — has to recognize the deep force of both sorts of reasons, utilitarian and deontological. For what is at stake, in Max's deliberations and in morality's place in our lives generally, is both Max's particular relation to Franz, to whom he has made a commitment, and his relation to humanity in general. Relations to friends, family, promises, neighbors, the world at large: these structure our lives, puzzle us, and divide our loyalties. Utilitarianism, in its re-description of our relations to particular others in terms of our relations to humanity in general, fails to take seriously the complexity of our normative relations to others.

Coleman's argument against the economic approach to tort law mirrors the debate between deontology and utilitarianism. Tort doctrine's "bilateral" structure, in Coleman's term, reflects the relational dimension of morality, in its confrontation of injurer and victim. In this sense, Coleman says, tort law deeply expresses the corrective justice principle that "individuals who are responsible for the wrongful losses of others have a duty to repair the losses" (p. 15). All the central issues of tort law — who may be liable, and under what conditions — presuppose this principle, for all involve a confrontation between an injured plaintiff and an ostensible injurer. This is in fact the heart of Coleman's argument against the economic approach to tort law. Tort law fundamentally concerns what to do about what has happened. Economics, by contrast, is fundamentally oriented around the future; its concern is how to structure incentives so that future costs will be minimized. Within economic analysis, an accident's importance is purely epistemic or informational: it can reveal where attractive pressure points lie, where incentives might better be tailored, so that the future will be unlike the past (pp. 15-17). Beyond this role, however,

24. A utilitarian will also argue that Max has a reason to keep his promise because breaking it might encourage others, in non-welfare-maximizing circumstances, to break theirs — or will cause worry to those trying to settle their estates. But this response seems basically ad hoc, turning as it does on empirical predictions about the effects of promise breaking. It is also unprincipled, for it fails to apply when the promise breaking would not be known to anyone — yet presumably Max would still regard himself as facing a dilemma in this case. For discussion, see Samuel Scheffler, *Introduction to CONSEQUENTIALISM AND ITS CRITICS 1* (Samuel Scheffler ed., 1988).

the fact that *A* hurt *B* is of no economic concern; it is merely a sunk cost.²⁵

More generally, as Coleman argues, economists have no principled way to limit their field of view to these two parties. Indeed, it is an open question whether liability might better lie with some independent third party who, for whatever reason, is in a better position yet to take precautions. To continue an example above, perhaps truckers' mothers are in the best position to check the sobriety of the drivers, and so ought to be liable for any future accidents in order to encourage them to check their children's drinking. If economic analyses stop short of casting the liability net so widely, there are only two possible reasons: either the contingent fact that the best cost-minimizers are, in fact, injurers or victims; or a failure by legal economists to realize how revisionary the instrumental conception of tort law really is to actual doctrine. Either way, economics fails to account for the deepest feature of tort law, its concern to repair a past harm, and thus it fails as an explanation of tort law in general.

Of course, the forward-looking perspective of economics is present in contemporary tort law, most notably in products liability,²⁶ as well, arguably, in older doctrines such as *respondeat superior*. But these incursions of instrumentalism occur at the margins, as exceptions to the bilateral logic of tort law. Coleman's claim, to be sure, is not that departures from the corrective justice model are unwarranted, or that a frankly revisionary conception of economic theory should not guide institutional reform. Even the plaintiffs' bar could not argue with a straight face that tort law, with all its costs, is the only just way for a society to deal with accidental harm. Coleman, indeed, recognizes the possibility that we might be better off scrapping the tort system for an alternative, for example New Zealand's general no fault insurance scheme (p. 59). The central point of his argument is simple: a theory of what tort law *is* must respect, not eliminate, its basic structure; and the economic approach to tort law fails to do this.

This flaw at the heart of the economic approach would seem to be fatal, but Coleman goes on to discuss some other ways an efficiency-centered account of law might be helpful even if it fails as a conceptual reduction. The first is if economics offered a "functional explanation" of the sort favored by evolutionary psychologists. A functional explanation of something — say, a structure such as the eye, or a practice such as altruism — tries to show how the fact that it furthers some goal

25. Judge Hand's deployment of the cost-benefit test for negligence is thus only partially compatible with law and economics, since it assumes that liability will lie, if at all, only with the injurer. Full-bore economic analysis, however, must consider the whole universe of potential cost-minimizers.

26. The *locus classicus* in American tort law is Justice Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944).

explains its presence. On an evolutionary account, the fact that (some) species have eyes is explained functionally, by the fact that eyes enhance survival. Creatures with eyes are likely to be more successful in reproducing, and so passing on the eye trait, than creatures without eyes. Thus, assuming a mechanism for generating the eye trait in some individuals (random mutation in evolutionary theory), and a filtering process by which the trait can spread through a population (reproductive competition and heritability), the presence of eyes is explained by their function of enhancing survival.

An economist trying to make a similar case for tort law would accept the complex, relational structure of tort doctrine, and then try to show how the presence of that structure, as a whole, is explained by its function of enhancing efficiency. But this is not easy, for it involves showing, first, that the structure of tort law does, in fact, enhance efficiency — at least relative to other systems of social organization that might have emerged — and, second, that there is some plausible filtering process through which the tort system, complex relational structure and all, has emerged because, in fact, it maximizes efficiency. But, as Coleman argues, no such explanations are on the horizon (p. 27). While economists have argued whether particular rules within tort law are, or are not, efficient, they have not taken up the task of arguing that tort law as a whole promotes efficiency. And even if that claim were accepted, no one has shown evidence for a filtering mechanism by which efficiency-promoting structures, rather than others, would come to dominate social practice. While there are today some economically-oriented judges on the bench, that is a very recent phenomenon and it can't help in explaining structures of tort doctrine dating from English common law. So the functional explanation is a nonstarter.

Coleman next considers whether an efficiency-centered account might work as what Ronald Dworkin has called a “constructive interpretation” of tort law. An account provides a constructive interpretation when it shows a practice or institution in its best light, making it the “best possible example of the form or genre to which it is taken to belong.”²⁷ To take Dworkin's example, a reading of *MacBeth* that interpreted the play as a murder mystery rather than as a tragedy would fail as an account of that play, not because the murder mystery account could not explain all the features of the play — there are lots of bodies lying around, after all — but because such an interpretation would make it a bad murder mystery rather than a powerful tragedy. For Dworkin, understanding what a thing is essentially a matter of seeing what it is for, what it does best. So, if economic analysis provided a constructive interpretation of tort law, it would have to show

27. RONALD DWORKIN, *LAW'S EMPIRE* 52 (1986).

why ordering tort law around efficiency reveals it as, in some sense, a more attractive institution than do other plausible accounts. But, as Coleman persuasively argues, interpreting tort doctrine in terms of efficiency does not seem to reveal its structure in an attractive light; rather, it seems to impose upon its structure an alien organizing principle, for the reasons discussed above (p. 31). Second, there's simply no reason to think that the value of efficiency does make tort law more attractive than does corrective justice. If efficiency is where we want to go, then tort law under any interpretation may not be the way to get there. (Similarly, someone looking to read an entertaining mystery would do better to pick up an Agatha Christie novel than to force such an interpretation on *MacBeth*.²⁸)

Finally, Coleman considers whether the economic account of tort law might nonetheless be more attractive than the corrective justice account because the economic account manifests the explanatory virtue of "consilience," or the ability to explain many different, related phenomena with a single concept. Coleman suggests that if we expand the scope of the economic account beyond efficiency, to the more general goal of risk-regulation, then we might get an account of tort law that lets us see how tort law fits together with contract law, property, and perhaps even criminal law (pp. 37-38). In fact, the success of economics within the legal academy is largely a product of its purported success in providing a unifying treatment of isolated doctrinal puzzles. Coleman's argument at this point is more generous to economic analysis. He grants that, to the extent economic analysis explains tort law at all, it does so in a way that permits tort's explanatory unification with the rest of private law, and then some. But, Coleman argues, in perhaps the most interesting chapter in this part of the book, the corrective justice account is also nicely consilient. For not only are the central concepts of corrective justice — agency, responsibility, duty, repair — found throughout our social practices, but the corrective justice account of responsibility for misfortune can help to illuminate what Coleman sees as the basic idea of distributive justice: who owns what costs? As Coleman and Ripstein argued in "Mischief and Misfortune,"²⁹ the question for tort law concerns the costs of accidents, and the question for distributive justice concerns the costs of congenital misfortune, such as being born poor, or disabled, or untalented. Examination of corrective justice reveals that there is no non-normative, purely naturalistic way of assigning costs to agents. Heroic attempts, notably by Richard Epstein, have been made to make causa-

28. This, indeed, is consistent with a general criticism of Dworkinian constructive interpretations: that making something the best it can be may, in fact, make it into something else.

29. Coleman & Ripstein, *supra* note 7.

tion the key to assigning liability for accidents;³⁰ and by Dworkin to make “brute” versus “option” luck the basis for assigning responsibility for congenital misfortune.³¹ But Coleman and Ripstein show — convincingly to my mind — that neither causation nor luck on their own can determine the content of a scheme of justice. Causation is too promiscuous a concept: any necessary condition of an event is a cause, the driver driving or the pedestrian walking. And what makes congenital bad luck so hard to bear, and thus a proper object for action by redistributive institutions, is a prior conviction that undeserved harms warrant compensation. In both cases, what does the work is a more basic conception of “the requirements of political fairness as reciprocity among free and equal persons” (p. 45). And thus the elements of the corrective justice account can illuminate two bodies of normative theory initially thought fully distinct. On grounds of consilience, then, corrective justice scores at least a tie.

Coleman’s argument for the superiority of the corrective justice account in illuminating tort law is highly persuasive. Indeed, Coleman’s refutation of the economic approach is so persuasive that the reader may well wonder whether anyone today seriously holds a belief for economics as a descriptive account of tort doctrine. This is a fair question, since Coleman provides no references to economists making the descriptive claim, and the principal work setting out the descriptive account, by Richard Posner and William Landes, is now twenty years old. It is true that the economic account does still play a significant role in legal pedagogy, where its descriptive and normative aspirations are rarely disambiguated; and it is prominent in descriptive accounts of transactional law, such as contracts. But it would appear that the economists have already abandoned the descriptive project in tort for the greener pastures of reform, or for the evaluation of the relative efficiency of particular rules rather than the system as a whole. Louis Kaplow and Steven Shavell, two of the most influential legal economists working today, describe their own work as wholly normative, a technically sophisticated utilitarianism.³² Their argument in tort law is that legal policies should promote social welfare, which is maximized by efficiency-centered approaches, not ill-defined notions of justice or fairness.³³ This approach takes on corrective justice as a normative, not a descriptive matter. Of course, it presumes that the structure of tort law is sufficiently compatible with the value of efficiency that reform, rather than scrapping the whole, is a live possibil-

30. Epstein, *supra* note 4.

31. RONALD DWORGIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000).

32. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

33. *Id.* at 1039-52.

ity. In that sense, economists like Shavell and Kaplow may fail to recognize the radical alternative to corrective justice that economics presents. But even if they are right about the possibility of insinuating a forward-looking value into the structure of a backward-looking doctrine, they need not be interpreted to claim that tort law is already oriented around efficiency. Coleman's criticisms largely pass by them, and most other legal economists working today.

In any case, the real interest of the economic account lies in its service as a foil for Coleman's own demonstration of the pragmatic method in normative theorizing. Much modern moral and political philosophy begins from within our experience, often in the form of "intuitions" whose epistemological status as deliverances of some external moral reality rather than conventional prejudice always seems suspect. On the other hand, forms of moral and political philosophy that begin with very general theoretical principles, such as that the good consists in aggregate happiness, and then argue back to the norms and practices constitutive of everyday life, seem basically alien to the particular and partial perspectives of human agency. The virtues of Coleman's pragmatic approach, by contrast, are the generosity of its scope and the modesty of its objectives. Starting from the rich material of our actual practice, the kind of coherent and holistic explanation pragmatism insists upon results in a theory of tort liability that shows its complex relation to human agency, social justice, and moral responsibility. At the same time, because Coleman does not claim that the corrective justice account is independently morally justified or self-justifying — he acknowledges the obvious point that there are surely better ways of allocating accident costs than private litigation — his account avoids the charge of conservatism that dogs intuitionist accounts. On the other hand, Coleman's account makes clear how thoroughgoing a revision the economists propose, not just to our legal landscape, but to the individualistic perspective on agency to which the corrective justice account is intimately bound.

III. PRAGMATISM AND THE NATURE OF LAW

The second half of the book is chiefly devoted to a distinct problem: how to make sense of law's claim to authority. The authority of morality's commands lies in their intrinsic goodness or rightness. Law, by contrast, seems to command us to do or refrain simply because we are commanded. Its authority is or purports to be independent of the goodness of its dictates. This claim might be, and has been, denied in two ways: by anarchists, who deny the authority of law; and by "natural lawyers," who see law's authority as stemming from its capacity to help us realize the good. But explicating the familiar thought that "because it's the law" seems to provide a *prima facie* reason for obedience is the challenge taken on by legal positivists. Modern legal positivism

descends from H.L.A. Hart's *The Concept of Law*, the most important work of legal philosophy of the last century.³⁴ According to Hart, law's authority depends only on the existence of a social convention among a group of people, who would agree in their collective practice that certain norms — don't steal, written promises are to be kept or damages paid — were to be recognized as obligatory and so obeyed or deviations therefrom criticized. The law's authority for those people is simply a matter of their accepting it as authoritative — a bootstrap argument of sorts. (A noteworthy feature of this account is that because law's authority extends only to those who accept it, legal positivism takes no position on the political philosophical question whether law has any authority over subjects who do not accept the convention as reason-giving but merely abide by it, for example out of fear.) The convention observed by this group, whose practice is generally obeyed by others, is called the "Rule of Recognition;" the "rule" is the set of criteria according to which certain norms are recognized as law, not just as bits of social morality.³⁵

Many criticisms have been raised against the conventionalist account, chief among them Ronald Dworkin's argument that conventionalism fails to capture the disputatiousness of legal practice: the ubiquity of argument about what the law is on some point despite the clear absence of any conventional answer.³⁶ A different criticism of Hart's account, and of its adumbration in Coleman's "Negative and Positive Positivism," has been made by Scott Shapiro.³⁷ According to the most widely-accepted theory of convention, that of David Lewis,³⁸ to say that a social practice is conventional is to say that the parties to that practice have preferences with a particular structure: each party to the practice prefers most to conform to whatever the general practice is, than to engage in any particular form of the practice. To adapt an example of Lewis', many people adopt a convention that when a cell phone call is dropped, the caller is the one who calls back.³⁹ This convention is maintained not because there's any inherent justice in the caller calling back, but because the most important thing is to have some settled convention so that each party doesn't meet a busy signal. Conventions are, in technical language, solutions to coordination

34. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

35. What characterizes a legal system, or "law" in a general sense, according to Hart, is the existence, manifest in social practice, of a rule of recognition, as well as primary conduct-guiding norms; secondary power-granting norms, for example governing how to make binding agreements; and other secondary norms governing legal change. *Id.* at 94-95.

36. DWORKIN, *supra* note 27, at 135-39.

37. Scott J. Shapiro, *Laws, Plans and Practical Reason*, 8 *LEGAL THEORY* (forthcoming 2002) (manuscript on file with author).

38. DAVID K. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969).

39. *Id.* at 5.

problems: problems individuals face when they need to act together to act successfully, but could act together in any number of ways.

As Shapiro points out, the social practice governing what counts in a community as law seems quite unlike a convention, for the parties to that practice have strong preferences concerning what criteria to use in determining the law; they don't prefer conformity of any kind. In the United States, for example, legal officials share a practice of referring to the Constitution to determine in part what counts as law; this practice is stable not just because the Constitution was selected as a coordination point and all prefer to coordinate around something. Rather, officials coordinate around the Constitution because each believes it sets out the proper criteria for what counts as law. More generally, it certainly doesn't seem to be a necessary feature of a community's rule of recognition that it be followed as a convention, in Lewis' sense, for it could be followed for all sorts of reasons. And this poses a problem for the traditional positivist account.

Coleman's subtle and valuable discussion of the social foundations of law provides an answer to Dworkin's criticism. Rather than seeing law's authority as residing in an unreflective convention among officials, Coleman suggests that is a product of their active, reflective — and disputatious — cooperation. (Think of how a boxing match is both cooperative, the fighters accepting a common set of rules and trying to put on a good show, and competitive, each struggling for his preferred outcome.) Coleman's use of the term "cooperation" is technical and draws on recent and influential work by the philosopher Michael Bratman, as well as work by Shapiro.⁴⁰ Roughly speaking, persons cooperate when their intentions to engage in some activity manifest a particular, interlocking structure: each person attempts to be responsive to the actions and intentions of the other participants; each is committed to the success of the activity, and moreover to its successful realization via cooperative activity; and each is committed to helping the other participants to achieve the shared goal (p. 96).

Agents who are cooperating are not necessarily in full agreement. You and I may be cooperating in planting our garden together, each committed to sharing expenses, digging the beds together, and working out together what to plant in them. But we may be deeply divided about what to plant, you preferring vegetables and me flowers. Our cooperative plan to build the garden does not determine this issue, but it does create a background for, and structure our, bargaining over the question of what to plant (p. 97). For if we weren't committed to gardening together, we would not be constrained at all by considerations of what the other is willing to accept, or by the budget we have jointly

40. See MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* (1999).

pooled and so forth. Cooperation thus accounts for both agreement and the nature of our disagreement.

In the case of law, Coleman suggests that judicial practice can be understood as cooperative in Bratman's sense: judges are mutually responsive, through doctrines of precedent; mutually committed to the existence of a stable, institutional practice of adjudication; and mutually helpful, through practices of appellate review (pp. 96-97). At the same time, the kind of disagreement that has captured Dworkin's imagination, Coleman argues, is well accounted for by the cooperative model. What is shared by legal officials in a community is not any particular set of legal criteria, as in Hart's account, but a commitment to a project — to working out, acrimoniously if need be, what the community's law should be. It is this shared commitment to a project that explains how a community comes to have law; and the particular trajectory this shared practice takes explains why it has the law it does. The invocation of pragmatism here is more implicit than explicit, but no less real: while positivism's virtue lies in situating the abstract concept of law in a particular set of social practices, its vice was not looking closely enough at the actual structure of those practices. The shift from convention to cooperation reflects a pragmatic commitment to finding law's structure in actual practice, and so provides an object lesson in the pragmatic approach.⁴¹

One question does remain: has Coleman, by eliminating the conventionalist basis of positivism, thereby relinquished his claim to a distinctively positivist theory?⁴² For even a natural law adherent could

41. I should say that while I favor the general approach advanced here by Coleman, I think the cooperative model still fails to take seriously enough the extent of disagreement at the foundation of law — principally because many participants in legal practice lack the motivation of mutual helpfulness. I prefer a weaker model of collective action to cooperative action. See Christopher Kutz, *The Judicial Community*, 11 PHIL. ISSUES 442 (2001).

42. This argument is pushed very hard by Dworkin in his review of Coleman. Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1660-63 (2002) (reviewing *The Practice of Principle*). As I understand it, Dworkin's central point seems to be that when positivists rely on social action defined in such abstract terms as, for example, "cooperatively attempting to determine the community's criteria of legality," they forgo the chief functional advantage claimed by traditional positivism: the idea that what defines a community's law is a strict function of its members' convergent behavior and critical attitudes. Thus, in principle an observer could determinately read off the law from an account of the commonalities in participants behavior and attitudes.

True, when the traditional positivist notion of a convention is weakened to Coleman's point, convergent behavior and attitudes no longer serve to identify the content of a community's law — for the simple reason that Coleman, recognizing the force of Dworkin's argument for pervasive controversy, no longer claims that participants' behavior must converge. But Coleman's claim for positivism is metaphysical, not epistemological, as I argued above: positivism's virtue is that it gives a true account of what makes a given proposition valid law in a community, namely its logical relation to the cooperative practices of legal officials in that community. Coleman's positivism may therefore be useless in the hands of an observer trying to divine a community's law from its practices, but it still makes a clear and controversial claim about law's nature, and thus stands as an alternative to legal theories, like Dworkin's, that make legal validity turn necessarily on moral merit.

claim that law's social foundation is cooperative in a relevant sense: under natural law theory, judges cooperatively seek to determine what are the morally best standards of law. The cooperation here, however is only of sociological interest, analogous to the observation that, say, experimental physics consists of scientists cooperatively trying to determine the constituents of the universe. What distinguishes natural law theories from positivist ones is the normative role played by the sociological observation. In positivist theories, the cooperative behavior of the judges makes it the case whether a given proposition counts as valid law; the judicial behavior *fixes* the truth of legal propositions.

To return to the physics example, positivism in law is thus equivalent to social constructionism in science, according to which scientific claims count as true just because they are so acknowledged by a community of inquiry; according to scientific realists, by contrast, the truth of those claims depends only on whether they reflect the way the world is. Since Coleman insists that the cooperation of social officials is itself what fixes the truth of legal propositions — or, more precisely, what fixes the criteria for what counts as law in that community — his abandonment of conventionalism does not entail abandoning positivism. Though I myself doubt that the cooperative picture of judicial behavior is fully adequate to the fractious nature of actual legal practice, Coleman is clearly moving in the right direction in order to save the positivist project from the meager foundations in unreflective convention that it set for itself.

There is a great deal more of jurisprudential interest in the second half, including a long discussion of the question whether legal positivism can accommodate the evident role of moral principles in particular legal systems — for example the principle in U.S. law that the legal process comport with “fundamental fairness.” This question is often referred to as the question whether “inclusive” or “exclusive” legal positivism is true, “inclusive positivism” being the view that moral criteria can count as part of a community's law whenever social practice by legal officials makes them relevant to legal decisionmaking. “Exclusive positivists” hold that whether or not legal officials sometimes deliberate using moral criteria, a community's “law” in the strict, definitional sense cannot include those terms. For instance, Raz, the leading exclusive positivist, has influentially argued that because law's function in a positivist understanding is basically to resolve conflict without resort to moral argument, if moral principles play a role in legal systems, it is not as “law” but rather as binding extra-legal decisional standards.⁴³ Shapiro has argued, relatedly, that if law functions to guide conduct, then the law must make a “practical difference” to

43. JOSEPH RAZ, *The Identity of Legal Systems*, in *THE AUTHORITY OF LAW*, *supra* note 9, at 78, 100.

an agent's deliberations about what to do, either by motivating the agent or identifying for her what she should do.⁴⁴ But if the law merely says, in effect, "do what morality says," then the law is not making a difference; morality is. For law to make a practical difference, it must do so by virtue of its mere legality, that is by virtue of its form and independent of its content. Moral norms, by contrast, guide conduct by virtue of their content, and so moral standards cannot be part of law, on pain of compromising its guidance function.

Against these arguments, Coleman defends the common sense view voiced by Hart⁴⁵ that if law is at root conventional, then some of those conventions could, in fact, incorporate moral principles-as elements of law. I cannot do justice to Coleman's full response to Raz and Shapiro, particularly to the care with which he explores their views. But the general nature of his response is to acknowledge the force of their claims in defining the general character of law as a social institution, an institution whose function clearly is to provide an authoritative and decisive guide to conduct. As Shapiro and Raz argue, this function may well be a virtually defining feature of law: a community whose "law" consisted of the rule "act morally" (or consisted of nothing but more specific rules, such as "contracts must be honored when it would be immoral to break a promise," and "tort damages must be paid whenever there is a moral duty of compensation,") would not really be a community in which law existed in any interesting sense. But, as Coleman points out, all this can be true of "law" in the sense of a "legal system," without holding true of every particular law. For surely some laws, at the margin, can fail to serve as uncontroversial or content-independent guides to conduct without undermining the general guidance function of law (p. 144). If some laws can include moral norms, then the rule of recognition for a legal community can include moral criteria, such that at least occasionally legal validity will turn on moral validity. Hence inclusive legal positivism is consistent with law's generally guiding conduct without reference to moral norms.

Coleman's pragmatism seems like an especially healthy intervention in this debate for a broader reason, which is the puzzling persistence in legal theory of claims about the "conceptual necessity" of legal systems having certain features.⁴⁶ Philosophers generally, in our post-Wittgensteinian and Quinean age, have tended instead to reject claims about conceptual necessity, particularly in the case of artifacts

44. Shapiro, *supra* note 9.

45. In the Postscript to *Concept of Law*, Hart said that he regards Coleman's position in *Negative and Positive Positivism* as a fair statement of his own. HART, *supra* note 34, at 250-51.

46. See Dworkin, *supra* note 42, at 1680, for a similar point, although mysteriously directed against Coleman.

and social practices. What, after all, is a conceptually necessary feature of a chair, or (famously) of a game? For any feature one can name, there will be some variant of the thing or activity with plausible claim to the title yet lacking the feature. Legal systems are obviously enormously complex, and complexly situated, institutions, which serve or claim to serve a great range of different functions among communities whose members take very different stances towards them and their authority. Compare a piece of showboat legislation, self-evidently never to be implemented or enforced, with a core element of the criminal law, such as the prohibition of murder. The way these different examples of law relate to citizens' self-understanding, institutional expectations, and broader questions of moral and political theory are so different that no single, rigid functional characterization of a legal system's aims can adequately encompass them both.⁴⁷

Pragmatism's appeal lies in its shrugging off of claims of conceptual necessity, in favor of a more supple analysis of the way and degree different features of legal systems satisfy different functional demands. Here the relevant question is: what degree of content-dependent guidance is consistent with the existence of a legal system? The answer to this question is partly empirical, partly conceptual. We can, and do, imagine a legal authority functioning as an authoritative system even if it delegates to agents some responsibility for reasoning morally about its requirements; yet at a certain point we cease being able to imagine such a system as law at all. Pragmatism tells us such a conclusion is what we should expect, for our concepts are children of our practices; they are made for our world, it is not made for them.

If one side of Coleman's pragmatism is his insistence that concepts get their content from their social contexts, its obverse is his view that concepts are not simply reducible to those contexts. This point, that concepts and conceptual structures can be the legitimate object of philosophical study, marks Coleman as a kind of moderate among fellow pragmatists. In the concluding portion of the book, Coleman defends conceptual jurisprudence against two, more radically pragmatic, alternatives: the "normative jurisprudence" advocated by Dworkin and the "naturalized jurisprudence" proposed by Brian Leiter.

According to Dworkin, jurisprudence is not a matter of giving a neutral description of law's nature, but a morally committed attempt to justify or criticize how applications of state power flow from a regime's particular history and body of principles; legal argument is perforce moral and political argument. Dworkin's insistence that claims about what law is only make sense as ways of achieving moral and po-

47. Exclusive positivism's semantic maneuver, counting deviant instances as legally binding but not law, seems to me a stubborn insistence on maintaining a thesis in the face of recalcitrant facts.

litical goals thus significantly extends the basic pragmatic orientation around practice. In Coleman's view, however, Dworkin mistakenly moves from the weak but plausible claim that an account of law should enable us, at the end of the day, to see the value of legal governance, to the implausibly strong claim that the only way to produce such an account is by starting from moral premises.

Leiter, by contrast, follows both Quine's repudiation of traditional epistemology and last century's "Legal Realists" in seeking to explain adjudication not in terms of law's logic, with its famous indeterminacies, but rather through the causal explanations offered by psychology and political science. Against Leiter, Coleman points out that the psychologists and political scientists would have no well defined problem space in which to work — no legal system to study — without the kind of internal account of law's nature that conceptual jurisprudence aims to provide.

Coleman's arguments here are probably unlikely to convince his opponents. Dworkin simply denies what Coleman asserts, namely the availability of an external, uncommitted perspective on a regime's law on the grounds that only the committed perspective reveals the non-conventional moral standards he thinks pervasive in actual adjudication. Leiter, meanwhile, could well accept the aprioristic stage-setting role of jurisprudence and still think it is time for philosophers to close up shop, leaving the difficult questions about law's operation to social science. (In a sense Dworkin and Leiter both represent more extreme versions of pragmatism than Coleman himself.)

IV. CONCLUSION

In his recent (and peculiarly sour) review of Coleman's book, Dworkin complains about the insularity of contemporary legal philosophy, whose practitioners "teach courses limited to 'legal philosophy' or analytic jurisprudence in which they distinguish and compare different contemporary versions of positivism . . . attend conferences dedicated to those subjects, and . . . comment on each other's orthodoxies and heresies in the most minute detail in their own dedicated journals."⁴⁸ Coming from a member of the academy, Dworkin's bleak description is bizarre in three ways: first, of course, because that description characterizes all of academic life, not just legal philosophy. Second because its bleakness seems a product of an alienated outsider, unable to perceive the excitement and interest of the debates to which his own writings have contributed so influentially. Indeed Dworkin's remark seems to reflect precisely the uncharitable interpretive stance

48. Dworkin, *supra* note 42, at 1678.

he deploras as a matter of jurisprudence; it seems committed to seeing opposing views in their worst, not their best, light.⁴⁹

Third, and most importantly, this book, in particular, ill deserves the charge of pedantry. Rather, *Practice of Principle* is exceptional for the fresh air it breathes into old debates, blowing aside the dust of tangential debates and leaving clean a work area in which beautiful philosophy proceeds.

49. For that matter, the extensive political philosophical debate on equality to which Dworkin has also notably contributed — whether inequalities are best measured in terms of Rawlsian “primary goods,” economic welfare levels, Sen-ic capacities, or Dworkinian resources — could be characterized in precisely the same terms by an outsider insisting on deploring it. Yet that debate, for all its occasionally claustrophobic tendencies, has clearly done a great deal in making clearer what is at stake in questions of justice and equal treatment.