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## BALANCED JUDICIAL REALISM IN THE SERVICE OF JUSTICE: JUDGE RICHARD D. CUDAHY

*Elizabeth Mertz\* & Cynthia Grant Bowman\*\**

There is a quiet irony to be found in scholarly writings about the judiciary, which often center around high-profile jurists selected as the “great” judges. But there are great judges who do not receive or even want such widespread recognition, and who do not discuss their philosophy of judging—they simply focus on the job in front of them. Judges who operate with humility can often be very quiet about their legacies—brushing the issue off, as if uncomfortable with the attention. Anyone who knew Judge Richard D. Cudahy of the United States Court of Appeals for the Seventh Circuit will recognize this description. In some ways, that kind of reticence makes writing about his jurisprudence more than a little challenging. But in other ways, it invites us to examine what this “judges’ judge” exemplified as he worked at his craft. In reflecting on this, perhaps we can understand that craft more deeply.

The scholarly fields of jurisprudence and empirical socio-legal studies<sup>1</sup> have long histories of research that speak to the question of what judges actually do compared to what they *should* do. It remains

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1. By socio-legal studies we mean to indicate the long stream of empirical research done under the aegis of the law-and-society movement, bridging quantitative, qualitative, and experimental approaches as well as the full range of social science fields. This also includes empirical research on law done within the distinct social science disciplines, as in legal anthropology, sociology of law, political science studies of courts and other legal phenomena, economic research on law, psychology of law, and interdisciplinary or area studies fields. Because these fields are rooted in social science, they tend to produce work that describes and analyzes rather than generating normative recommendations—as one would expect to find the latter in the jurisprudential literature. But certainly empirical research, whether qualitative or quantitative, can reveal ways that judges’ work may stray far from stated ideals, or conform to those ideals with unexpected results. This can provide important information for normative analyses.

largely the case that these traditions of research normally do not communicate with each other. Yet we found that both traditions informed our thinking about the work of Judge Cudahy—indeed, they worked together with surprising ease. Maybe that is a gift of having both insider perspectives as his former clerks, and outsider perspectives as scholars assessing his public legacy and his work.

In this Article, we draw on both jurisprudence and socio-legal scholarship to shed light on Judge Cudahy's approach to the craft of judging, arguing that his decisions emanate from a moderate form of pragmatism in combination with a serious respect for the rule of law—all in pursuit of the higher aim of achieving justice. To distinguish this approach from other forms of judicial pragmatism, we are provisionally labelling Judge Cudahy's judicial style "balanced realism."<sup>2</sup> We interpret this kind of realism<sup>3</sup> to have a lot in common with judicial pragmatism, albeit with a few noteworthy differences. In Part I, we briefly discuss the realist tradition and its connection with pragmatism. Part II contains a further discussion of judicial pragmatism, including its sources in pragmatist philosophy, a description of that approach, and an introduction to some of the judges and their debates associated with pragmatism. In Part III, we consider the intersection of pragmatist and realist traditions in law, concluding that a form of balanced realism provides a productive meeting point for both empirical and aspirational accounts of judging. Part IV applies the insights of legal pragmatism and balanced realism to the adjudicative style of Judge Cudahy, using material from our own experiences as his judicial clerks as well as from the opinions he authored during those time periods.

## I. REALISM, PRAGMATISM, AND THE JUDGE'S ROLE

Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities. Social theories and other changes in society will be relevant when the ambiguity has to

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2. Here we follow Brian Tamanaha's insightful call for a balanced account of judicial style. See BRIAN Z. TAMANAHA, *BEYOND THE REALIST-FORMALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 6–7 (2010). Another plausible suggestion we have received is to call Judge Cudahy an "idealist pragmatist"—idealist both in the sense of incorporating deference to rules, and in the sense of holding idealistic aspirations for our system of justice.

3. Tamanaha lists a number of ideas as central to defining realism: a "shared sceptical take on the role of law in judging," use of law "as a means to serve social ends," "the pursuit of social scientific approaches to law," efforts to reform legal education so as to "improve legal practice and judging," and a progressive political agenda. *Id.* at 70. As Tamanaha also notes, any definition continues to be disputed because this was a loosely-bound collection of scholars that routinely denied its identity as a group. *Id.*

be resolved for a particular case. . . . The words change to receive the content which the community gives to them. The effort to find complete agreement before the institution goes to work is meaningless. It is to forget the very purpose for which the institution of legal reasoning has been fashioned. This should be remembered as a world community suffers in the absence of law.<sup>4</sup>

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Studies consistently demonstrate that the act of judging is influenced by judges' personal perspectives and experiences. . . . [F]rom the inception of civil rights legislation, judges in the United States have demonstrated an unease with affecting social change, based on the mostly unstated notion with no legal basis that courts should not change the social status quo absent extraordinary reasons for doing so. . . . The irony, of course, is that the activist insecurity leads judges to avoid the full implications of enforcing civil rights statutes in a way that demonstrates . . . a "troubling lack of allegiance" to formalistic applications of law.<sup>5</sup>

In the first quotation above, Edward Levi—arguably a legal realist—pointed out the judiciary's crucial role in drawing upon societal changes to give meaning to the words of legal statutes and precedent. This is the genius of legal reasoning at its best: it balances the weight of past legal decisions and aspirations for justice against the hurly-burly changes constantly occurring in society. In the second quotation above, Tanya Kateri Hernández reminds us that judges are themselves situated as particular members of society with their own prejudices and taken-for-granted truths. These judges are indeed balancing norms and social changes, but they do so from positions that may limit their vision. Hernández begins by pointing to the reluctance of judges occupying relatively privileged positions to change the status quo—no matter how unjust that status quo might be. Arguably, if judges were less insulated from the social injustices on which they must rule, they might be able to see how far the status quo has departed from larger principles of justice.

Hernández also draws on a realist tradition, one whose roots reach back to the realism familiar to Levi, but which has grown quite a bit since his time. Decades of empirical studies on courts and on law now generally provide far more sophisticated material than was available to Levi. That research can be found across the social science disci-

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4. Edward Hirsch Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 573–74 (1948).

5. Tanya Kateri Hernández, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*, 63 LA. L. REV. 875, 875–76 (2003) (footnote omitted). In this article, Hernández builds on the work of John Valery White. See John Valery White, *The Activist Insecurity and the Demise of Civil Rights*, 63 LA. L. REV. 785 (2003). Both White and Hernández pay careful attention to available empirical research in building their cases.

plines, including anthropology, sociology, political science, psychology, and economics. Many of the empirical legal researchers who took their inspiration from the realists have joined forces under the banner of the Law & Society Association, which also includes law professors and other scholars in a truly interdisciplinary mix.<sup>6</sup> Others have formed associations focused on law and economics, or law and quantitative empirical research.<sup>7</sup>

Another development in empirical research on law has been a more concerted effort than was found among the original realists to draw on social science theory as well as social science methods. Indeed, social science methods make little sense without careful attention to the kind of theorizing that gives them meaning.<sup>8</sup> In one sense, the Critical Legal Studies and its allied movements that arose during the 1970s could be seen as an offshoot of legal realism that took social theory seriously. In recent years, empirical Critical Race Theory (eCRT) in law, legal feminists drawing on sociology, and others have begun combining insights derived from critical theory with empirical research in new and exciting ways.<sup>9</sup> Hernández's work is an example of this promising trend. Scholars working at the intersection of empirical research and social theory—especially on issues of race—are shedding light on the mistakes that can follow from a limited view of law that omits perspectives from across a full range of experiences. For example, judges and legislators may attempt to develop legal remedies to address racial injustice without an adequate understanding of the reality they seek to address. It may now be possible to prevent such mistakes using empirical research designed with a sophisticated sense of

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6. The law-and-society movement spans a number of different parts of the world, and includes associations in multiple countries in addition to the United States.

7. The latter commonly calls itself “empirical legal studies”—a somewhat misleading name given that it omits a great deal of empirical research of the non-quantitative variety. See generally Mark Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555 (2010). Suchman and Mertz also discuss the New Legal Realist (NLR) movement, but we here subsume that under the law-and-society movement, with which NLR explicitly claims an alliance.

8. 8 In most social sciences, methods are developed in conversation with, and in response to, theory.

9. See generally Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149 (2014) (thoughtfully reviewing this emerging field). See also Laura Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004); Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2013).

all possibilities. This is where drawing on critical theory as well as rich interdisciplinary perspectives can be of help.<sup>10</sup>

In recent years, scholars calling for a “New Legal Realism” (NLR) have advocated for the use of theory-guided research from across the social sciences to address legal problems.<sup>11</sup> Keenly aware of the difficulties of moving between the “is” of social science to the “ought” of law and policy, NLR scholars are pursuing work that actively “translates” between these two very different approaches.<sup>12</sup> They urge lawyers and social scientists alike to be aware of the different goals and norms guiding their respective enterprises. Lawyers quite reasonably have to work with the best available information, even with known flaws, while social scientists prefer to continue their research projects until they can be certain of both what they know and what they do not know about a topic. Lawyers may become irritated by the ongoing nitpicking and declarations of uncertainty that characterize the best empirical research, while social scientists may find the crude use of their nuanced conclusions by lawyers offensive. Yet it is an abdication of responsibility to simply throw up our hands. How can judges make the best use of the available knowledge from social science?

Hanoch Dagan, writing on this question, has boiled down the tensions between law and social science into three main axes: power versus reason, science versus craft, and tradition versus progress.<sup>13</sup> His compelling version of the legal realist project urges a form of translation between law and social science that takes seriously law’s need to balance: (1) the external stresses of social power against the internal integrity of legal reasoning; (2) the external vision of social conflicts provided by social science against the internal craft of lawyering; and (3) the external push of social change against the internal roots pro-

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10. It is also where qualitative research can make one of its strongest contributions. Qualitative work, including ethnographic research, is sometimes characterized by quantitative scholars as “exploratory” or “hypothesis-generating” work—but its import can go far beyond those roles, depending on the disciplinary frame that is being invoked.

11. See generally Howard Erlanger et al., *Forward: Is It Time for a New Legal Realism?* 2005 WIS. L. REV. 335 (2005); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009). See also THE NEW LEGAL REALISM, VOLUME I: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE (Elizabeth Mertz et. al. eds., 2016); Stewart Macaulay & Elizabeth Mertz, *New Legal Realism and the Empirical Turn in Law*, in INTRODUCTION TO LAW & SOCIAL THEORY 195 (Reza Banakar & Max Travers eds., 2013); Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TULANE L. REV. 1161 (2006).

12. See HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY (2013); TRANSLATING THE SOCIAL WORLD FOR LAW (Elizabeth Mertz et. al. eds., 2016); Stewart Macaulay, *New Legal Realism: Unpacking a Proposed Definition*, 6 U.C. IRVINE L. REV. 149 (2016).

13. DAGAN, *supra* note 12, at 15.

vided by legal precedent, rule, and tradition. Stewart Macaulay similarly stresses the importance of including a legal perspective as well as wisdom from the social sciences when attempting any marriage of law and social science:

Legal scholars may well bring something from their culture to the social science approach to legal topics. Holding a Ph.D. does not free a scholar from the risk of reading, say, a statute literally without an appreciation of the context and traditions that give its terms meaning. . . . And lawyers often combine a confusing mixture of being ready to fight for a principle and a real skill in finding an acceptable compromise that they can sell to opposing parties. They may offer language that is more suited to calm angry partisans than to convey unpleasant truths. . . . Finally, legal questions usually involve normative issues based in the culture in question, and law frequently reflects the conflicting norms within a society. Just getting the facts straight will not necessarily solve every problem.<sup>14</sup>

Dagan and Macaulay, along with many of the new legal realists, take legal doctrines and processes seriously even if they do not accurately reflect what actually happens when laws “hit the ground.”

This approach found powerful expression in Patricia Williams’s classic defense of formal rights against attacks by critical legal studies theorists. These theorists, like many social scientists, tended to focus on the abuses of power and not the potential for justice behind the legal doctrines that enshrine such rights:

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality faces as the cement of conceptual determinism hardens round—but its opposite. . . . It is true that the constitutional foreground of rights was shaped by whites, parcelled out to blacks in pieces, ordained from on high in small favors, random insulting gratuities. Perhaps the predominance of that imbalance obscures the fact that the recursive insistence of those rights is also defined by black desire for them. . . . “Rights” feels new in the mouths of most black people. It is still deliciously empowering to say. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power. The concept of rights, both positive and negative, is the marker of our citizenship, our relation to others.<sup>15</sup>

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14. Macaulay, *supra* note 12, at 152. Frank Cross makes a similar point from a somewhat different angle. Frank Cross, *The New Legal Realism and Statutory Interpretation*, 1 *THEORY & PRAC. LEGIS.* 129 (2013).

15. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 163–64 (1992).

This passage speaks directly and powerfully to a core jurisprudential dilemma. However, disappointingly, Williams's work and other relevant writings by scholars of color do not get incorporated into the legal theoretical discussions that aim to define rights and solve the formalist-realist tension. Hopefully the new legal realism and other contemporary movements will propel "traditional" legal theorists at last to consider and incorporate the wisdom found in critical scholarship that by any measure should be considered "legal theory."<sup>16</sup>

Narrower definitions of a new legal realist enterprise can also be found in the literature. Legal scholars Cass Sunstein and Tom Miles, for example, confine their realist work to quantitative studies of behavior, including judicial behavior.<sup>17</sup> Closely allied work on "behavioral law-and-economics" draws on cognitive psychology and behavioral economics in an effort to correct for the more negative view of human beings promulgated by the classical law-and-economics "rational actor" model that frequently overestimated both the selfishness and the self-control of the average person.<sup>18</sup> Instead, the newer and more psychologically-accurate approach advocated by behavioral law-and-economics scholars considers the irrational, altruistic, and emotionally-based aspects of human behavior.

However, Daniel Farber comments that "[l]ike rational choice theory, the behavioralist approach also tends to slight the rich institutional settings of most legal problems."<sup>19</sup> Farber urges today's legal

16. By this we mean the critical legal scholarship that draws on generations of writings by those "outsiders" who have experienced law in different ways than have the more privileged sectors of society. Another source of broader, alternative hypotheses and perspectives lies in the work of social scientists. At their best, the social sciences provide a check on the imposition of socially-skewed perspectives by requiring that scholars go out into the world and test their ideas against empirical reality—particularly through the use of observational methods that allow what is actually happening on the ground to generate ideas and hypotheses for further study, rather than developing and testing (or merely theorizing about) concepts that do not connect meaningfully with many of laws' subjects' actual lives. See also Jonathan Yovel & Elizabeth Mertz, *The Role of Social Science in Legal Decisions*, in *THE HANDBOOK OF LAW AND SOCIETY* 410, 410–11 (Austin Sarat ed., 2004) (outlining institutional tensions that complicate translation of social science for law, including role of expertise in democracy, metascientific tensions, scientific institutional tensions, and problems resulting from infiltration of legal doctrine by a particular social scientific approach).

17. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 *U. CHI. L. REV.* 831 (2008). See also Frank Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 *Nw. U. L. REV.* 251 (1997).

18. See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 *U. PA. L. REV.* 1211 (2003); Christine Jolls, *Behavioral Law and Economics*, in *BEHAVIORAL ECONOMICS AND ITS APPLICATIONS* 115 (Peter Diamond & Hannu Vartiainen eds., 2007); see also Christine Jolls, Cass Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STANFORD L. REV.* 1471 (1998).

19. Daniel Farber, *Toward a New Legal Realism*, 68 *U. CHI. L. REV.* 279, 281 (2001) (reviewing *CASS R. SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS* (2000)).



scholars to follow the lead of the original realists, who “incorporated the social sciences of sociology, anthropology, psychology, and political science,” as well as economics, into their efforts to improve our understanding of law.<sup>20</sup> In keeping with “big tent” new legal realists of today, Farber notes that “[i]t may be more fruitful in the long run . . . to define the project [of a new legal realism] broadly as deepening the understanding of legal problems through using the models and methods of the [full range of] social sciences.”<sup>21</sup> Along with Laura Kalman, John Henry Schlegel, and Brian Tamanaha, Farber documents a clear legacy of concern with interdisciplinary perspectives on law that dates back to the original realists.<sup>22</sup>

In our analysis of the jurisprudence of Judge Cudahy, we follow the broader approach to an interdisciplinary new legal realism advocated by scholars who share a big tent view of the enterprise.<sup>23</sup> This broader approach permits us to incorporate the perspectives of Hernández, Williams, and other critical theorists along with the findings of the empirically oriented socio-legal tradition. We also follow these “big tent” scholars in their turn to pragmatism as a philosophical and epistemological foundation for work that integrates social science and law.

## II. JUDICIAL PRAGMATISM

Pragmatism arose as a reaction to positivism and its search for abstract, universal truths. Americans credited with developing this new

20. *Id.* at 302, n.67.

21. *Id.* at 303. By “big tent,” Farber refers to the NLR approach of including a wide range of social sciences and empirical methods rather than focusing on one or two.

22. Daniel A. Farber, *Back to the Future? Legal Scholarship in the Progressive Era and Today*, 100 MINN. L. REV. 1, 19, 21 (legal realists’ belief that law professors “would need interdisciplinary knowledge” and a keen understanding of that knowledge to achieve an adequate basis of social and industrial relations needed to create and administer law for new eras intelligently). See also LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); TAMANAHA, *supra* note 2, at 88 (all documenting the view of the vast majority of scholars—and especially those trained as historians, using in-depth examination of the historical record—that a central legal realist concern was to harness the social sciences in order to improve law). In another article, Farber critiques Richard Posner’s claim to be a pragmatist because Posner relies on abstract economic theories while “seem[ing] relatively uninterested in rigorously testing economic theory against reality,” as an actual pragmatist would want to do. Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic Case of the Coase Theorem*, 83 VA. L. REV. 397, 427 (1997). Farber also points out that, contra the standard law-and-economics vision, both Coase and the pragmatists, along with feminist and other critical theorists, understand humans as fundamentally social beings rather than as extreme individualists. While our analysis of Judge Cudahy’s decisions points to pragmatist elements in his jurisprudence, we distinguish his approach from Judge Posner’s in our identification of Judge Cudahy’s larger project as a balanced realist (in the terms laid out within this Article).

23. See *supra* notes 11–12 and accompanying text (referencing scholars).

approach, such as Charles Sanders Peirce and William James, interacted with Oliver Wendell Holmes Jr. at meetings of the Metaphysical Club in 1872.<sup>24</sup> Peirce, a scientist and philosopher, is credited with having developed a notion of human inquiry as a mode of activity adaptively produced through biological and cultural evolution.<sup>25</sup> That is, thought is an adaptive function of the human organism, a kind of evolved problem-solving mechanism embodied in inherited practices and then modified to meet the needs of humans at a particular time and in a particular context. Thus, intellectual inquiry for the pragmatists is a social activity which is contextual, situated, instrumental, and embedded in the conditions of real life.<sup>26</sup> In this view, the collective work of scientists gets incrementally better over time, approaching, if not perfectly capturing, reality. Peirce and William James, a philosopher and psychologist, challenged the idea that any sort of absolute truth was possible; at the same time, they rejected radical skepticism, which denies the possibility of any form of truth at all.<sup>27</sup> Rather, truth for the pragmatists was always tentative, a belief formed as a result of the best sort of scientific inquiry available at that time.<sup>28</sup> In Peirce's philosophy, external reality exists apart from human attempts to grasp it, and we approximate truth through the ever-improving knowledge generated via the consensus of scientific communities. Later, the philosopher John Dewey applied these insights to social and educational theory, as well as to politics and law.<sup>29</sup>

This evolutionary, fallibilistic notion of knowledge and belief contrasted with the accepted foundations of American jurisprudence at that time, best known in the formalism of Dean Langdell at Harvard

24. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 864 (1989); Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 545 (1988). See also LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 201 (2001).

25. Grey, *supra* note 24, at 796–97.

26. *Id.* at 799–802.

27. See Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 326–27 (1996).

28. See Wells Hantzis, *supra* note 24, at 551–52. Wells Hantzis takes seriously the affinities between Peirce and Justice Holmes, while not claiming any causal relationship—citing also the work of Max Fisch, Rand Rosenblatt, and Marcia Speziale. *Id.* at 545–46 (citing Max Fisch, *Was There a Metaphysical Club in Cambridge?*, in *STUDIES IN THE PHILOSOPHY OF CHARLES SANDERS PEIRCE* 3 (Edward Moore & Richard Robin eds., 1964)). See also M. H. Fisch, *Justice Holmes, The Prediction Theory of Law, and Pragmatism*, 39 J. OF PHIL. 85 (1942); Note, *Holmes, Peirce, and Legal Pragmatism*, 84 YALE L.J. 1123 (1975); Marcia J. Speziale, *By Their Fruits You Shall Know Them: Pragmatism and the Prediction Theory of Law*, 9 MANITOBA L.J. 29 (1978–1979).

29. See, e.g., MENAND, *supra* note 24, at 235–37.

Law School.<sup>30</sup> The legal formalists, like the logical positivists, believed that it was possible to discern certain foundational doctrines, or truths, from which the law could, and should, be derived by a process of deduction.<sup>31</sup> Thus, adjudication was a simple process of discerning the immutable principle and then applying it, deductively, to the facts. It was this approach that Oliver Wendell Holmes Jr. challenged with his famous statement that “[t]he life of the law has not been logic, it has been experience.”<sup>32</sup>

Holmes has been seen by many legal scholars as having introduced pragmatism into law, its study, and adjudication<sup>33</sup>—although there has been some debate on this point. For example, Heidi Feldman recently nominated Benjamin N. Cardozo as the true father of pragmatism in the U.S. legal tradition, challenging accepted wisdom and indeed reviving older arguments about whether Holmes was a pragmatist at all.<sup>34</sup> She based her argument on the famous set of cases loved by all teachers of torts, *Baltimore & Ohio R.R. v. Goodman*, decided in 1927 by then-Justice Holmes<sup>35</sup> and *Pokora v. Wabash Ry.*, decided in 1934 by then-Justice Cardozo.<sup>36</sup> The two cases, coming before the Supreme Court a mere seven years apart, involved very similar facts; in each, a motorist was killed or injured by a train at a railroad crossing. The issue was what the standard of negligence should be in such a case, and who should decide: the judge or the jury. Holmes saw the standard of care as a rule of law to be determined by the judge in the first instance and then applied in a uniform fashion in all future cases.<sup>37</sup> Cardozo, by contrast, saw the question of negligence as an issue that depended heavily upon the context and thought that it therefore should, like most questions of negligence, be given to the jury.<sup>38</sup> In this sense, Feldman argued, Cardozo was the truer pragmatist, favoring judgments reached through collective deliberation within a structured social practice and embracing a fallibilistic notion that there was

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30. Grey, *supra* note 24, at 816–25.

31. *Id.* at 822.

32. O. W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

33. See, e.g., David Luban, *What's Pragmatic about Legal Pragmatism?*, 18 *CARDOZO L. REV.* 43, 53, 61–62 (1996).

34. Heidi Li Feldman, *Cardozo Not Holmes, Fallibilism Not Skepticism, Pragmatism Not Legal Realism* (Feb. 16, 2012) (working paper) (on file with author). Earlier arguments against Holmes as a legal pragmatist focused some of his statements expressing negative sentiments towards at least some forms of pragmatism as well as the inchoate nature of the pragmatism that appeared in his writings. See generally Grey, *supra* note 24, at 788–90, 864–70. See also H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984).

35. 275 U.S. 66 (1927).

36. 292 U.S. 98 (1934).

37. *Goodman*, 275 U.S. at 70.

38. *Pokora*, 292 U.S. at 101–02.

no one answer to the question of negligence in this situation; it could vary from case to case.<sup>39</sup> In Feldman's view, Cardozo's pragmatism may also explain the curious fact that he explicitly did not overrule Holmes's decision in *Goodman*, betokening perhaps an incremental notion of knowledge as well as respect for his predecessor on the Supreme Court.<sup>40</sup>

Cardozo's *Nature of the Judicial Process* was delivered as a series of four lectures at Yale before its publication in 1921; here he addressed the question of what a judge does when he decides a case.<sup>41</sup> To this Cardozo gave an extensive answer, beginning by describing the "stream of tendency"—the instincts, traditions, acquired convictions, and the like, from which each human being in the position of a judge begins.<sup>42</sup> He proceeded to discuss what he believed to be important sources of the law: (1) logic or analogy, (2) history or evolution, (3) custom, and (4) the welfare of society.<sup>43</sup> Only the first source would conform with the standard assumptions of the case law method as taught in law school, under which the student seeks to find the principle underlying previous cases and then applies it by analogy to new situations. In the main, Cardozo thought that judges should adhere to precedent, in part because it gives the law coherence, consistency, and predictability.<sup>44</sup> Principles, however, only take the judge so far; they can be expanded to the limit of their logic but are confined in many cases to their historical context and the need to be capable of evolution.<sup>45</sup> In regards to the second source of law, he declared in true pragmatist fashion that "[t]he rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of jus-

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39. Feldman, *supra* note 34, at 13–14.

40. *Id.* at 14.

41. *Id.* at 10.

42. *Id.* at 12.

43. Cardozo describes these as part of a "line of logical progression" along which "the directive force of a principle" moves, denominating them respectively the methods of philosophy (analogy), evolution (history), tradition (customs) and sociology (social welfare and justice). *Id.* at 65–66. This last "method of sociology" he later associates with "social justice," the "welfare of society," and also "social welfare" (under which he covers "many concepts more or less allied"). *Id.* at 62, 67–68. He also lists "equity and fairness" as aspects of social welfare. *Id.* at 113. At another point Cardozo elaborates on his basic four-point structure, breaking the final point down into "utility, and the accepted standards of right conduct" in the section of the book which discusses the method of sociology, *id.* at 111–12, while elsewhere he describes the "prevailing standard of right conduct" as the point at which the methods of tradition and of sociology overlap and meet. *Id.* at 59–60.

44. *See, e.g., id.* at 67, 112.

45. *Id.* at 51, 113.

tice.”<sup>46</sup> Third, custom is another source of law available to the judge, but he (always a male at that time) must choose among customs and traditions in many cases. Fourth, “[t]he final cause of law is the welfare of society.”<sup>47</sup> In sum, Cardozo concluded, “logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.”<sup>48</sup>

Both because the law must change to fit the social and economic needs of the time and because statutes tend to leave gaps that must be filled by the courts, judges must often function, in Holmes’s description, as “interstitial legislators.”<sup>49</sup> How, then, as the realists argued, is the law not simply subject to the arbitrary wishes of the judge? Cardozo’s answer lay in the individual judge’s professional standards, study, personality, and experience of life.<sup>50</sup> The judge was an individual with a particular perspective, formed by all of these influences. However, he was called upon to reach his judgments based not on his own convictions but upon “what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct.”<sup>51</sup> This is a difficult task, especially in a diverse nation with competing interests and priorities. But Cardozo believed that “[t]he training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions” and “help to broaden the group to which his subconscious loyalties are due.”<sup>52</sup> Except for some who may still embrace the total skepticism of some legal realists and early scholars in the Critical Legal Studies movement, Cardozo’s vision remains an aspiration. Yet many modern scholars, particularly those of race and gender studies, are skeptical of this vision as idealistic; and many, like Professor Hernández, urge the need to broaden the group from which judges are drawn in order to make them more inclusive in their vision of the public good.<sup>53</sup> Others in the

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46. Feldman, *supra* note 34, at 23.

47. *Id.* at 66.

48. *Id.* at 112.

49. *Id.* at 69–70. See also Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1658 (1990).

50. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 161–63 (1921). See also Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 11 (1996); William Andrew Shutkin, *Pragmatism and the Promise of Adjudication*, 18 VT. L. REV. 57, 66 (1993).

51. CARDOZO, *supra* note 50, at 142–43.

52. *Id.* at 176.

53. Hernández, *supra* note 5.

critical, pragmatist, and social science traditions have adopted or urged adoption of methods to reconsider and widen situated perspectives. These methods would permit social scientists, legal scholars, judges, and others to, at least partially, bracket their preconceptions in order to improve understanding of different possible frameworks for interpreting the social events with which they must deal in their professional lives.

Dewey's 1924 essay, *Logical Method and Law*, was consistent with Cardozo's philosophy of adjudication, although Dewey repeatedly cited the writings of Oliver Wendell Holmes Jr.<sup>54</sup> Logic, Dewey pointed out, was not purely deductive but rather "empirical and concrete,"<sup>55</sup> and scientific method proceeded by investigation, hypothesis, confirmation, constant retesting, and revision in the face of further evidence or analysis.<sup>56</sup> Thus, logic was always relative to consequences.<sup>57</sup> Dewey, therefore, criticized jurisprudence that rested on formal logic and consistency irrespective of the consequences of applying principles to real people and real world problems.<sup>58</sup> Legal rules in fact function as "working hypotheses, needing to be constantly tested by the way . . . they work out in application to concrete situations."<sup>59</sup> Whatever law or concept works well in one century may not in another.<sup>60</sup> Thus, Dewey ended his essay with a plea for a more experimental and flexible logic in law.<sup>61</sup> At the same time, he cautioned that legal rules should not be changed except where the circumstances required. Society needed as much certainty and predictability as possible, but total stability was only possible where social conditions remained the same.<sup>62</sup>

In contrast to Feldman's argument, legal theorist Thomas Grey and others, like Dewey, have turned to Holmes as a key source for their conception of legal pragmatism. And indeed, Grey uses Dewey and neo-pragmatist scholars like Richard Rorty to illuminate the pragmatist in Holmes. As Grey noted,

My thesis is that while there are indeed multiple and apparently clashing strands in Holmes' thought, most of them weave together reasonably well when seen as the jurisprudential development of

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54. See, e.g., John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 20–21 (1924).

55. *Id.* at 19.

56. *Id.* at 18–19.

57. *Id.* at 19–20, 26.

58. *Id.* at 20–22.

59. *Id.* at 26.

60. Dewey, *supra* note 54, at 27; see also *supra* note 4 and accompanying text.

61. Dewey, *supra* note 54, at 27.

62. *Id.* at 24–25.

certain central tenets of American pragmatism. Conflicts do remain . . . but they can be explained by a characteristic paradox—the man was disabled by temperament, by experience, by the historical context in which he found himself from adequately practicing the pragmatism he so eloquently preached.<sup>63</sup>

Grey identified three primary facets of Holmes's approach that mark it as pragmatic. First, Holmes viewed legal inquiry as combining situated or historical perspectives with analytical ones, challenging the division between doctrine and fact—and thus echoing Peirce's insistence on moving beyond a simplistic division between deductive and inductive modes, via a kind of reasoning that Peirce called "abduction."<sup>64</sup> While experience may be the life of the law, Holmes recognized that law also requires some continuing efforts at systematicity and generalization marshalled with an eye to results, i.e., instrumentalism.<sup>65</sup> This leads to Grey's second point, that Holmes was a pragmatist in this "practical approach to legal 'logic,' or doctrinal conceptualism."<sup>66</sup> And finally, Grey claims Holmes as a pragmatist because Holmes viewed legal reasoning through the eyes of practicing lawyers attempting to predict how judges would rule in individual cases.<sup>67</sup>

In her important work on Holmes's pragmatism, Wells (Hantzis) provides a vastly different reading of Holmes's decision in *Baltimore & Ohio R.R. v. Goodman* than Feldman, noting:

[Holmes] does not use abstract legal reasoning in his decision; he merely makes the common sense observation that it is the motorist who must stop for the train . . . . [He] does not frame the issue as a two-fold problem in which fact and value are distinct such as: 1) what does the law . . . require; and 2) do the facts show that this requirement was met. Instead, he expresses himself in terms that defy an easy separation between fact and value. . . . [H]is judicial technique is plainly consistent with his view . . . that the decision in the individual case comes first while abstract normative principles

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63. Grey, *supra* note 24, at 788; Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473 (2003). Of interest to our discussion of Cardozo in comparison with Holmes is Grey's quotation from Cardozo, who deeply admired Holmes's famous comment that experience trumps logic when dealing with law; of that comment, Cardozo said "Here is the text to be unfolded. All that is to come will be development and commentary." Grey, *supra* note 24, at 792 (quoting Benjamin N. Cardozo, *Mr. Justice Holmes, in MR. JUSTICE HOLMES AND THE SUPREME COURT 3* (Felix Frankfurter ed., 1931)).

64. Grey, *supra* note 24, at 836–837. As Wells Hantzis explains, the concept of abduction is quite complex but it exists as a category that is neither purely deductive nor purely inductive—just as for Holmes the process of legal generalization is neither purely based in principles nor in facts: "For both Peirce and Holmes, then, generalizations have their origin in the observation of individual cases"—but the observations or "facts" themselves are already interpreted through pre-formed conceptualizations or working hypotheses. Wells Hantzis, *supra* note 24, at 570, 555.

65. See Grey, *supra* note 24.

66. *Id.* at 837.

67. *Id.* at 836–37.

are only formulated in the context of a later analysis of the results in individual cases.<sup>68</sup>

Wells (Hantzis) compares this approach to the mixed/abductive approach of Peirce, and also connects it with a theory of embeddedness whereby judges reach appropriate results through connecting facts and values:

[A] judge is able to reach an appropriate result in the individual case whether or not she is able to articulate any general moral or legal principles relevant to the case. Her result in the case arises from an interconnected theory of fact and value which may be approximately reconstructed by examining [their] decisions in a number of cases, but which is never entirely severable from the ongoing process of adjudication.<sup>69</sup>

It is both the case that the “received legal tradition” shapes judges’ understanding of cases by providing “the possible frameworks” for interpretation, and also that within those frameworks judges decide based on rich, deeply embedded responses to the particulars of each case.<sup>70</sup> For Wells (Hantzis), it is easy to reconcile Cardozo’s decision in *Pokora* with Holmes’s decision in *Baltimore & Ohio R.R.* by alluding to the different factual and surrounding social situations. In both cases, the judges were moving fluidly between legal principles and the particulars given by the social and factual situations.<sup>71</sup> Wells (Hantzis) points out that the latter, more intuitive part of judging is, as in the Hernández quote above, subject to all the problems and prejudices of a particular judge’s own experience.<sup>72</sup>

In this sense, Holmes’s focus on context exposes a weakness that his version of pragmatism alone cannot fix: the limits set on the life of the law by the fact that judges are human and potentially blinded by the limited character of their own experiences. In later work, Wells addresses this in her analysis of “situated decisionmaking”:

The recognition that legal judgments are situated is the first step towards an authentic ideal of fairness. If our judgment is inevitably limited by our perspective, the consideration of the character of that perspective is the beginning of rational inquiry. The point of this inquiry is a form of justice that is not rooted in images of detach-

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68. Wells Hantzis, *supra* note 24, at 572–73.

69. *Id.* at 573.

70. *Id.*

71. *Id.* at 574 (“Not even a full statement by the judge of which facts are relevant and which are not would enable a subsequent judge or a legal scholar to unpack fully the legal or moral principles that lurk behind the judge’s decision.”). See also Catharine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L. J. 329, 345 (1994) (finding Holmes’s views as representing a “moderate position” between formalism and realism).

72. Wells Hantzis, *supra* note 24, at 594.



ment and remoteness. Rather it is contained in two related commitments: first, a commitment to be scrupulously honest about the limits of one's own particular viewpoint, and, second, a commitment to be genuinely open to understanding and respecting the viewpoints of others. . . . To honor [these commitments], . . . we must abandon the pretense that our methods of analysis are universally correct . . . .<sup>73</sup>

This is a call to a form of humility that is important as a part of any ethically responsible legal method.<sup>74</sup> Here, Wells' position connects well with the work of empirical methodologists who feel it is important to state the limitations of their approaches, and the ways the situated character of their work—whether qualitative or quantitative—affects what they do and do not capture. It also connects with the insights of critical race and feminist scholars who document and theorize how gender and race affect the frames of interpretation created by institutions, including legal institutions, and imposed on “traditional outsiders.”<sup>75</sup>

In any case, most would agree that Holmes and Cardozo both made important contributions to a tradition rooted in pragmatism within U.S. law. That pragmatist tradition also connects with legal realism.<sup>76</sup> To the degree that judges relied on more formalist readings of legal rules, declining to look outside of the doctrines themselves, both legal pragmatism and legal realism pushed the judiciary to broaden its vision.<sup>77</sup> The pragmatists, building from a theory of truth as tentative,

73. Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1746 (1990).

74. One of us has argued elsewhere that standard legal reasoning as it is taught in United States law schools has what might be termed a humility deficit—that is, it does not encourage incipient lawyers to seek and acknowledge limitations built into legal approaches. ELIZABETH MERTZ, *LAW SCHOOL LANGUAGE: LEARNING TO “THINK LIKE A LAWYER”* (2007).

75. Catharine Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347 (2000). For a few of the many writings on these topics, see CYNTHIA GRANT BOWMAN, LAURA A. ROSEN-BURY, DEBORAH TUERKHEIMER, AND KIMBERLY YURACKO, *FEMINIST JURISPRUDENCE: CASES AND METHODS* (4TH ED., 2010); CRENSHAW, KIMBERLÉ, NEIL GOTANDA, GARY PELLER, AND KENDALL THOMAS, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2005); GABRIELLE GUTIÉRREZ Y MUHS, YOLANDA FLORES NIEMANN, CARMEN GONZÁLEZ, AND ANGELA HARRIS, *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* (2012); WILLIAMS, *supra* note 15; Carbado and Roithmayr, *supra* note 9; Martha A. Fineman, *Feminist Legal Theory*, 13 J. GENDER, SOC. POL. & L. 13 (2005); Gómez, *supra* note 9; Obasogie, *supra* note 9; Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). W.E.B. Du Bois's *The Souls of Black Folk* (1903) was an early, powerful effort at reframing dominant understandings of the experience of race and racism in the United States.

76. There are also, perhaps predictably, debates over this relationship.

77. We write “to the degree” here because we are convinced by writers attacking the standard narratives about these supposedly “opposed” schools of thought that things are actually much more complicated. See, e.g., BRIAN Z. TAMANAHA, *supra* note 2; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). Formalists were generally not as dense about law in

believed in the possibility of an inquiry resulting in the best possible approximation of truth available at a particular time and place. Although this inquiry was not completely objective, because it was carried out by human beings with perspectives formed by their life contexts, it was nonetheless not entirely subjective either.<sup>78</sup> The training and professional ethics of judges, as well as the necessity of giving reasoned explanations of their holdings, arguably—in the best-case scenario—could help constrain them from making simply *ad hoc* decisions. The kind of pragmatism described by Wells, drawing on Peirce and Holmes, could push judges to admit the limitations of their own perspectives and to examine their situatedness. Because it embraced social science inquiry, legal realism encouraged judges to rely not only on their own intuitions, but on available empirical knowledge, so that they could make legal decisions with better understandings of how law was working “in action.”

### III. GROUNDING LAW IN SOCIETY: TOWARD A BALANCED REALISM

While pragmatism furnishes a set of philosophical principles from which socially grounded theories of adjudication could build, legal realism provides a tradition for thinking about how judges could bring empirical, “real-world” knowledge to bear on the Anglo-American common law framework. That common law framework is one building block of the search for justice in the U.S. We now consider how a combination of pragmatism, realism, and respect for textual tradition can work together in service of justice. Legal realism, particularly in the big tent form pursued by some of today’s new legal realists, takes seriously the normative dimension required for translation of social science in legal settings. In this respect, the movement pushes beyond mere empiricism (what “is”) to ask how law receives social science knowledge (what “ought to be” under law). For example, we can ask how the common law system is actually working in particular places and times, but then compare this to various normative aspirations of the law. The effort to balance these different aspects of the common law system was already evident in the work of the original realists, and it is coming more to the fore in the work of some new legal realists.

One of the leading original legal realists was Karl Llewellyn, at times dismissed as a complete skeptic who failed to seriously consider

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practice as some have thought, and realists did not trash or ignore formal doctrine to the extent some have indicated, either.

78. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 172–77 (1921).

the effect of legal rules on judicial decisionmaking.<sup>79</sup> However, Llewellyn did acknowledge that judges operate under some constraints or “steadiying factors.”<sup>80</sup> Among these were the impacts of occupying a professional role with accompanying norms and expectations, the effects of group decisionmaking by judges, and legal doctrine. Thus, by the end of his career Llewellyn had become concerned about the extent of undue skepticism regarding the effects of legal rules. His concern was that it had created an unbalanced view of appellate judges, and he attempted to correct for that.<sup>81</sup> The balance Llewellyn sought was partially an attempt to generate a descriptively adequate account of judging, taking seriously both the effects of operating within a rule-centric system of legal discourse and reasoning, and simultaneously the realist insight that those rules by themselves were inadequate to account for the whole complex process under consideration.

We can still hear echoes of Llewellyn’s concern for balance today in the writings of Brian Tamanaha, a leading legal theorist of the new realist movement.<sup>82</sup> He worries about the effects of skepticism on the judiciary and on the rule of law:

The threat to the rule of law . . . is not that judges are incapable of rendering decision in an objective fashion. Rather the threat is that judges come to believe that it cannot be done or that most fellow judges are not doing it. This skepticism, if it becomes pervasive among lawyers, judges, and the public, will precipitate a self-fulfilling collapse in the rule of law.<sup>83</sup>

Like Llewellyn, Tamanaha points out the constraining influence of a system of rules and of common law reasoning on judging. He reads some of the older realist work as attempting to warn judges of the pitfalls of their prejudices so that they might guard against them, and summarizes empirical research supporting the idea that even today, judges do adhere to rules and precedent in many situations.<sup>84</sup> Here we can return to Hernández’s use of empirical studies to identify a bias in judges’ attitudes; this could be the first step in helping those

79. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 135 (1994); François Ost & Michel van de Kerchove, *Constructing the Complexity of the Law: Towards a Dialectical Theory*, in *THE LAW IN PHILOSOPHICAL PERSPECTIVES* 147, 160 (Luc J. Wintgens ed., 1999); George Fletcher, *Comparative Law as a Subversive Discipline*, 46 *AM. J. COMP. L.* 683, 687 (1998).

80. KARL LLEWELLYN, *THE COMMON LAW TRADITION* 19 (1960).

81. R.H. Clark, *Karl Llewellyn on Legal Method: A Social Science Reconsideration*, 14 *TULSA L.J.* 491, 498 (2013).

82. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 236 (2006). Tamanaha actually turns to Cardozo for inspiration in describing balanced realism. TAMANAHA, *supra* note 2, at 6.

83. TAMANAHA, *supra* note 82, at 236.

84. *Id.* at 239–41.

judges to take conscious stock of unconscious biases so that they could better adhere to the spirit of the laws they are charged with enforcing.

Along with the effects of professional socialization and professional norms surrounding legal reasoning, Llewellyn also pointed to the effects of working in groups as a potential constraint on judges. In an interesting update on Llewellyn's observation, Adrian Vermeule has urged jurists to consider the implications of the fact that "real-life" judges are not a monolithic block, but exist as a collective that is unlikely to adopt any single mode of interpretation, and thus will always be in situations of responding to judges—or trends in judging—that differ from their own.<sup>85</sup> He points out many ways in which the complications of reality fly in the face of presumptions of uniformity among the judiciary. For example, while in the abstract, lower courts are supposed to automatically follow the guidance of upper courts in a hierarchical system, in fact, lower courts sometimes remain recalcitrant or openly defiant.<sup>86</sup> Vermeule's realist observations invite jurists to pay more attention to empirical work on how different judges and courts actually work on the ground, in different places, at different levels of the system, and at different times in history. Here, those of us who are new legal realists happily recognize a door that could open between the theorizing of jurists and the empirical research of social scientists. Social science can help in solving the difficulty of applying rules in new situations where very serious considerations weigh on both sides. These situations are often inescapably tragic, as to accomplish justice in one sense may in another sense inflict serious harm on someone.

In a recent paper, Curtis Nyquist discusses this inevitably tragic character of judicial decisionmaking. He suggests that within a realist approach lies a duty to honor the commitments that Wells described: ". . . a commitment to be scrupulously honest about the limits of one's own particular viewpoint, and, second, a commitment to be genuinely open to understanding and respecting the viewpoints of others."<sup>87</sup> Nyquist draws on work by Martha Nussbaum and Joseph Singer to formulate a "conflicting considerations" approach to judicial balancing that he characterizes as consistent with realist thinking:

The Nussbaum/Singer understanding of tragedy captures an essential difference between teleological balancing and conflicting considerations. A judge applying a teleological view of balancing can

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85. Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 561 (2005).

86. *Id.* at 561–62.

87. Wells, *supra* note 73, at 1746.

slip easily into formalism, separating herself from the result, thinking that the rule decides the case and since the opposed policies occupy different regions in the force field, a decision one way or the other does not inflict harm. A judge with a conflicting considerations understanding of policy realizes, as each opposed policy operates throughout the field, she has no choice but to impose harm.<sup>88</sup>

Of course, legal scholars from numerous schools of thought would point out that their perspectives take account of the need to weigh the relative harms caused by differing legal decisions. But Nyquist's point is not about which choice a judge makes, but rather about the degree of certainty, and perhaps of pain, with which that judge goes about making a decision. In other words, a judge might come to the same outcome or decision, but do so through a different process, in which the full range of human suffering at stake is thoroughly and respectfully considered. This again is a call to humility as an important safeguard on the process of judicial decisionmaking.

Some key themes emerge from our brief review of balanced realism. A realist judge of this kind would approach appellate decisionmaking as a search, in the best pragmatist tradition, for the best available truth in the situation, with full consideration of relevant contexts and norms. Several collegial contexts would provide important guidance, including: (1) the context provided by the wider community of judges and legal professionals who together engage in a collective process that generates precedent and norms for interpreting legal texts; and (2) the narrower context of the court on which a judge sits, and within which judges struggle together, sometimes in tension, sometimes not, to reach decisions. These group contexts are part of the real world of judging, and they include a set of orientations toward legal rules that is important. At the same time, realist judges pay their moral dues by giving full consideration to—indeed, agonizing over—real world consequences of decisions, not shirking their duty to seek a deeper meaning in the rules as they apply them with humility, and serious attempts at openness in Wells (Hantzis)'s sense.<sup>89</sup> In performing this difficult balancing act, the realist judge engages along with others in the community of judges in a collective process that attempts to generate some stability and continuity while also remaining flexible enough to do justice in changing times and circumstances.

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88. Curtis Nyquist, *Re-Reading Legal Realism and Tracing a Genealogy of Balancing*, 65 *BUFF. L. REV.* 771, 851 (2017) (discussing MARTHA A. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND GOODNESS IN GREEK TRAGEDY AND PHILOSOPHY* (2001) and Joseph William Singer, *Legal Realism Now*, 76 *CAL. L. REV.* 465 (1988)).

89. And here drawing on social science to broaden perspectives or consider alternative viewpoints can be helpful.

Finally, if we look back to the original U.S. legal realists, we see that many of them wound up in public service, working to apply their ideas as judges or as architects of the administrative state.<sup>90</sup> Thus, grasping how law operates both on paper and in action was a first step; the next crucial step, for many of them, was to put that knowledge to work for the public good.

#### IV. RICHARD D. CUDAHY'S QUIET JURISPRUDENCE: IN SERVICE OF JUSTICE

What does all this have to do with Judge Richard D. Cudahy of the Seventh Circuit? It is our contention that his methods of judging and of being a judge are best understood against the background of legal pragmatism and as a compelling example of balanced realism. This is best seen in the following aspects of his jurisprudence: First, Judge Cudahy had great respect for the appellate process as a pragmatic and collective search for understanding, in which judges had to balance applying rules and taking account of the reality within which those rules had effect. Second, in deciding cases, he was always aware—sometimes painfully so—of the consequences of any decision in the real world and how it would affect the parties. Finally, Judge Cudahy saw law, regulation, and government as potential sources of public good, when wielded wisely.

First, Richard Cudahy had immense respect for the appellate process and, as Judge Richard Posner has noted, was the most collegial of judges:

[D]espite our frequent disagreements, our personal and professional relations remained . . . entirely cordial. Judge Cudahy deserves the primary credit. . . . It is not fun to be a dissenter, yet Judge Cudahy never allowed his feathers to be ruffled. He helped to establish what has proved to be a durable tradition in the Seventh Circuit, which is that disagreements are not personalized, and ideological and other clashes, even when they engage the deepest beliefs of the judges, do not produce anger, rancor, or incivility. This triumph of civility not only makes the lives of the judges more pleasant but also improves the quality of the court's work.<sup>91</sup>

It was clear to us as judicial clerks that Judge Cudahy always considered the views of his judicial colleagues as worthy of respect and gave

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90. Robert Gordon, *Willis's American Counterparts: The Legal Realists' Defence of Administration*, 55 *TORONTO L.J.* 405 (2005) (realists involved in administrative law); WILLIAM W. FISHER, III, MORTON J. HORWITZ, & THOMAS A. REED, *AMERICAN LEGAL REALISM* (1993) (overview including discussions of realists who became judges).

91. Richard A. Posner, *A Heartfelt, Albeit Largely Statistical, Salute to Judge Richard D. Cudahy*, 29 *YALE J. ON REG.* 355, 362–63 (2012).

them serious consideration even if he ultimately disagreed. Although as clerks we were not privy to his conversations with the other judges, we were constantly exposed to the same qualities of his personality when we met to discuss cases with him before oral argument. Judge Cudahy was open to all perspectives and sources of information. He listened to every point we made or argued. He was comfortable, and taught us to be, with uncertainty when confronted with the necessity to make a decision; he could think in shades of grey. He realized that adjudication at the level of the federal appellate court did not involve deduction or mechanical application of discernible rules; rather, it required choosing, and he did so with integrity. In the midst of it all, he displayed trust in the process of appellate adjudication as probably the best process available to get to the correct results, even if slowly and by tiny increments.

Although he kept his deeply held religious values separate from his choices as a judge, his beliefs were apparent in his approach to others—whether colleagues, clerks, or litigants. Richard Cudahy had a deep reservoir of principle upon which to draw, in part due to his Catholic faith and liberal Catholic social theory. For years, he went on an annual retreat to Gethsemani Abbey in Kentucky and took other judges with him. Trappist monks did, and still do, operate Gethsemani. The best-known monk from the Trappists at Gethsemani was Thomas Merton, the poet and contemplative writer whose books Judge Cudahy often read.<sup>92</sup> Merton, who died in 1968, was interested in non-violence, ecumenical dialogue, and race and social justice issues during the turbulent 1960s. Merton's social ideals and his vision of non-violence captures the spirit in which Judge Cudahy approached appellate adjudication:

Nonviolence seeks to “win” not by destroying or even by humiliating the adversary, but by convincing him that there is a higher and more certain common good. . . . Non-violence, ideally speaking does not try to overcome the adversary by winning over him, but to turn him from an adversary into a collaborator by winning him over.<sup>93</sup>

This is a perfect description of the way Judge Cudahy approached colleagues with whom he disagreed, even on matters of deep principle, as Judge Posner attested to in the quotation above. It also captures the nature of his persistence in the face of disagreement with one of his former clerks, a co-author of this Article, in the years immediately

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92. Email from Dr. Janet Cudahy, Judge Cudahy's widow, to Cynthia Grant Bowman (Feb. 8, 2017).

93. THOMAS MERTON, FAITH AND VIOLENCE: CHRISTIAN TEACHING AND CHRISTIAN PRACTICE 12 (1968).

preceding his death. His former clerk had become involved in the grassroots struggle to keep the process of hydrofracturing<sup>94</sup> out of New York State, where she lived. Judge Cudahy, a long-time student of energy policy, disagreed about the wisdom of this environmental strategy. When he became aware of their disagreement in the course of exchanging Christmas greetings, he wrote to the former clerk, making arguments in favor of the use of natural gas and hydrofracturing. On numerous occasions thereafter, when the former clerk checked her mailbox in rural upstate New York, she would discover formal envelopes from Judge Cudahy and discover that they contained articles on the subject. This principled disagreement persisted until his death.

Judge Posner's tribute contained a statistical analysis which, *inter alia*, pointed to the fact that Judge Cudahy's opinions were heavily cited by other judges, "a sign of influence."<sup>95</sup> Some of his most heavily cited work dealt with procedural issues, which was not surprising given the wider reach of procedural opinions across different substantive legal areas—but this was a signal of how well and carefully he dealt with technical legal questions.<sup>96</sup> One of us worked on an opinion with Judge Cudahy which had a basic procedural lesson about the federal rules governing pleading as its major theme: claimants do not need to state facts in detail, "nor do [the rules] require a claimant to demonstrate that proof based on the pleadings will prevail."<sup>97</sup> Reaching this deceptively simple-sounding conclusion required lengthy, thorough consideration of Illinois law regarding agency, Illinois law governing negligent misrepresentation, and federal securities law—all parsed in excruciating detail.<sup>98</sup> Upon receiving the opinion, one of the other judges on the panel commented: "When I first came to the court, one of our brothers told me that one of the greatest pleasures of serving on CA 7 would be watching Dick Cudahy tackle a complex case." Judge Cudahy conveyed his deep dedication to this craft with enthusiasm and a dry wit that kept everything in perspective. Thus, his realism was disciplined by an appreciation and respect for the doc-

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94. Hydrofracking, or hydraulic fracturing, is a process by which vast amounts of water are injected under pressure into a drilled well in order to release natural gas.

95. Posner, *supra* note 91, at 357.

96. *Id.*

97. Rankow v. First Chi. Corp., 870 F.2d 356 (1989).

98. The word "excruciating" captures some Cudahy clerks' sense of the level at which we knew we would have to work in responding to our judge's persistent pushing on details and his exacting standard for precision. On the other hand, this was a standard to which he held himself, as he left long workdays with stacks of briefs and showed up the next day with full mastery of the materials (and MORE questions for his clerks!). As painful as it may have been sometimes to meet those standards for and with him, one could hardly ask for a better apprenticeship.



trinal and statutory frameworks within which he took it as his duty to work.

Second, Judge Cudahy always saw the judicial inquiry as one that had to be undertaken in light of the consequences for the parties to the decision and for the rest of society. Each case and each person should matter. As Wells and Nyquist indicated, a pragmatist approach with deeper ethical roots requires not just superficial review but a searching examination undertaken with humility. We have selected some cases from our clerkship years to illustrate this point. One continuing theme in Judge Cudahy's chambers was the need to dig deeply into each case, to be sure that no one owed a remedy under law was neglected. The staff attorneys at the Seventh Circuit, who were assigned to the court in general rather than to any particular judge, always knew they could bring cases that troubled them to this judge. A particularly vexing problem was posed by the flood of habeas petitions, often submitted *pro se*, with which staff attorneys had to deal. It was not uncommon for staff attorneys who thought they had found a potentially meritorious claim (very rare at the times we served) to seek out Judge Cudahy for counsel.

*LaSalle National Bank v. County of Lake*, decided in 1983, involved the vicarious disqualification of litigation counsel.<sup>99</sup> An attorney who had previously worked as First Assistant State's Attorney for Lake County, Illinois had joined a large Chicago law firm which was representing a client in a case substantially related to matters that the attorney would have been privy to through his prior employment.<sup>100</sup> After finding that it was ethically necessary to disqualify the attorney himself from the case based on a conflict of interest, the Seventh Circuit also had to decide whether all the attorneys in his large new firm must be disqualified as well. Here, Judge Cudahy was very concerned about what the consequences of such a wide-ranging decision would be, in particular, upon the job prospects and choices of young attorneys who might work in government service and later transition into private practice:

If past employment in government results in the disqualification of future employer from representing some of their long-term clients, it seems clearly possible that government attorneys will be regarded as "Typhoid Marys." Many talented lawyers, in turn, may be unwilling to spend a period in government service, if that service makes them unattractive or risky for large law firms to hire.<sup>101</sup>

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99. 703 F.2d 252 (7th Cir. 1983).

100. *Id.* at 256-57.

101. *Id.* at 258.

Judge Cudahy regarded public service as a noble profession but understood its potential long-term financial downside for attorneys with growing families. Lest talented young attorneys like his clerks become reluctant to work for the government, his opinion advocated for screening devices, often referred to as “Chinese walls,” which a law firm could use to ensure that an attorney new to the firm was prevented from gaining any knowledge of or participating in representation involving his or her prior employer.<sup>102</sup> If such devices were in effect upon the date he or she joined the firm, the other members of the firm would not be vicariously disqualified.<sup>103</sup> This had not been done in the case on appeal, so both the lawyer and the new firm were disqualified. The Cudahy decision in *LaSalle National Bank* was influential and has been repeatedly discussed in academic and professional commentary on the subject.<sup>104</sup>

Another case from that same year, early in the Judge’s tenure, involved facts only too familiar today: the Immigration and Naturalization Service (INS) was seeking to deport a Hispanic man who was undocumented; he had been living and working in Chicago for almost a decade, had married, and had two children under the age of three who were American citizens.<sup>105</sup> The Board of Immigration Appeals (BIA), which had held a hearing in the case, had already issued a final opinion denying his motion to reopen the proceedings based on extreme hardship.<sup>106</sup>

Judge Cudahy and the clerk assigned to the case agonized over the decision, discussing the impact not only on the life of the particular man involved and his family members but also on the many others in that same situation, as well as principles of morality and ethics. The judicial clerk, who was a single mother, told him about a Mexican woman whose help with the clerk’s house and young child had been critical to the clerk’s ability to succeed as a law student. Although that woman had proper “papers” and thus could work with the approval of the legal system, she had a child whose father was an undocumented worker and the woman worried about the future of her

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102. *Id.* at 258–59.

103. *Id.* at 259.

104. See, e.g., Craig A. Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 NOTRE DAME L. REV. 399, 404, 408–11 (1984); Samuel R. Miller & Irvin H. Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 BUS. LAW. 631, 643–45 (1985); Polly M. Faltin, “Agonizing” over Disqualification Decisions: Factionalizing the “Bright Line” Rule in *Ex rel. Wal-Mart Stores, Inc. v. Kortum*, 31 CREIGHTON L. REV. 279, 292–93 (1997).

105. *Diaz-Salazar v. INS*, 700 F.2d 1156, 1158, 1161 (7th Cir. 1983).

106. *Id.* at 1158.

son's father and its effect upon their child. In short, in considering this case, judge and clerk took into account many sources beyond precedent and law, in good pragmatic fashion. In the end, however, Judge Cudahy painfully decided that he simply could not overturn the final decision of the BIA on the basis of extreme hardship (the circumstances were not, after all, unique).<sup>107</sup> To reopen the deportation proceedings would not comport with the discretion granted by law to the court below, and it would do violence to the procedural structure within which such decisions were to be made. His sadness over this decision was clear. The day after the argument, Judge Cudahy called the clerk into his office and suggested that she bring her Mexican friend and her child's father to his chambers, so that he could marry them, thus allowing him to apply to stay in the country.

In short, Judge Cudahy's insistent humanity and compassion required him to consider each litigant with respect. He discouraged us from becoming jaded or hurried in dealing with the cases assigned to us; we were first and foremost public servants who owed an explanation to the people who had come before the Seventh Circuit. Here his dedication to a shared process of reasoning and accountability as a core foundation for law became apparent. One of us worked with Judge Cudahy on a dissent in which he spelled this out:

I write separately to address the problem that occupied most of the defendant's brief, and which has been dealt with summarily by the majority: whether changes between the indictment and the proof at trial varied or amended the indictment, in this case. This court addresses many claims that we conclude to be without merit; it has been our custom to state some reason for our conclusions, even if the reasoning can be summarized in a sentence or two. This procedure seems basic in most cases to the legitimacy of the system.<sup>108</sup>

Providing a reason and reading the defendant's arguments with care—these are ways of ensuring dignity and accountability that produce a sense that the procedures to which litigants are subjected are just. And indeed, there is empirical socio-legal research that supports Judge Cudahy's observation, demonstrating that providing "procedural justice" can in fact be crucial to the legitimacy of a legal system.<sup>109</sup>

This brings us to a third and final point: Judge Cudahy saw himself and his colleagues as entrusted with making decisions that would serve the public good. Like many of the early Realists, he hoped that a pragmatic orientation toward the problems posed by law could result in outcomes that served both justice and the public. This concep-

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107. *Id.* at 1160.

108. *U.S. v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (Cudahy, J., dissenting in part),

109. *Id.* at 1241. *See generally* TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

tion of his role was particularly evident in another case decided during the 1982–83 term, *MCI v. AT&T*,<sup>110</sup> the antitrust lawsuit coming out of the breakup of the old Bell system monopoly of the telecommunications field. The clerk who wrote the *LaSalle National* case described above was appropriately and completely walled off from all knowledge of the *MCI* case because she had accepted a post-clerkship position with the law firm representing MCI. Thus, the following description of the case is not derived from any of her personal knowledge, but is instead based primarily on Judge Diane Wood’s excellent article in the *Yale Journal of Regulation*.<sup>111</sup> Judge Wood commented that Judge Cudahy’s background in business and expertise in regulated industries made him uniquely fit to write this complex opinion.<sup>112</sup> Moreover, in Judge Wood’s opinion, his antitrust decisions in general reflected Judge Cudahy’s ability to remain true to the law while at the same time “keep[ing] pace with the sweeping developments in the twin fields of competition policy and economic regulation.”<sup>113</sup>

*MCI v. AT&T* involved, among other things, a claim that AT&T had engaged in predatory pricing and had unlawfully failed to interconnect MCI to Bell’s local distribution facilities. After rejecting an argument that AT&T’s conduct was immune from the antitrust laws because the FCC regulated its activity, Judge Cudahy focused on AT&T’s ability to control prices or exclude competition.<sup>114</sup> In so doing, he directly confronted the question of the appropriate scope of antitrust law on a modern regulated industry: whether to focus on economic efficiency and consumer benefit, or on the political and social consequences of concentrations of economic power.<sup>115</sup> In Judge Wood’s opinion, his own philosophy of the role of the courts and of antitrust law decided the case, as he wrote:

We acknowledge with approval the populist origins of the antitrust laws as well as the preeminent role of the Sherman Act as a charter of economic freedom. But we also believe that, as we have pointed out, larger concerns about broad pro-competitive policy, economic concentration and political power have been, and are being at this very moment, effectively addressed by the regulators, and possibly by the Congress. Hence, we have tended to believe it appropriate to focus at this time and in this case upon the specific issues of eco-

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110. *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1092 (7th Cir. 1983).

111. Diane P. Wood, *Theory and Practice in Antitrust Law: Judge Cudahy’s Example*, 29 *YALE J. ON REG.* 403 (2012).

112. *Id.* at 408.

113. *Id.* at 405.

114. *Id.* at 409–10.

115. *Id.* at 410–11 (quoting *MCI*, 708 F.2d at 1110).

conomic efficiency and consumer benefit which are directly presented.<sup>116</sup>

As a consequence, Judge Cudahy confined his decision closely to the facts of the case, applied a “sophisticated appreciation of the problems of determining real costs” and how to measure them, and rejected MCI’s predatory pricing theory.<sup>117</sup> In doing so, Judge Cudahy was not only deciding the case on narrow grounds, but was also exhibiting a preference for a New Deal style of economics and government—not opposing concentrations of economic power *per se*, but relying upon regulation of the large industries, producing benefits to the consumer by specialized agencies of the modern administrative state, back-stopped by judicial review. In terms of pragmatic adjudication, he was essentially making law in a new and uncharted economic terrain in the public interest, bringing to bear on his decision his own legal training and experience both in business and government service, as well as his own commitment to democracy and its procedures, just as Cardozo counselled in his 1921 book. Going back to our first point, Judge Cudahy here also functioned as a balanced realist, bringing to bear the craft of legal reasoning, taking rules seriously, and undertaking a realist assessment of pragmatic outcomes.

In his approach to the public good, we see also that Judge Cudahy respected the institutions of the state—in particular the judiciary—and the need for stability amidst incremental change. This sometimes led him to defer to precedent or to his perception of the appropriate role of the courts even when it meant deciding a particular case against his heart and against the sense of broader justice that resided therein. We have seen this at work in the discussion of the *Diaz-Salazar* case above, where his respect for procedure led him to an outcome that contradicted his personal sense of morality. And yet at the same time, as in the *MCI* case, we have seen how Judge Cudahy shared Dewey’s view of the role of the state as a social organization to achieve a growing social understanding of an evolving and social subject of study, a process in which the courts had a distinct role to play. In this regard, he shared common ground with a number of the original Realists who wound up as judges or administrators.

## V. CONCLUSION

Benjamin N. Cardozo, quoting Eugen Ehrlich, an Austrian legal scholar and sociologist of law, declared in 1921 that “[i]n the long run

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116. *Id.* at 411 (quoting *MCI*, 708 F.2d at 1110–11).

117. Wood, *supra* note 111, at 411–12.

‘there is no guaranty of justice . . . except the personality of the judge.’”<sup>118</sup> Our caveat is that the personality of the judge interacts with his or her legal training to different effects—in Judge Cudahy’s case, striking a balance between respect for legal rules and procedure on the one hand, and on the other hand a sincere struggle to achieve justice in particular situations with the realities of law clearly in view. This was helped in no small part by his rejection of grandiosity and his embrace of humor and humility. Judge Cudahy’s balanced realism placed him at eye-level with those ruled by the law, while always retaining the judge’s role as dutiful interpreter of legal rules as interpreted within a community of legal experts.

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118. Cardozo, *supra* note 78, at 16–17.

