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Legal Pragmatism: Banal or Beneficial as a Jurisprudential Position?

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I. Introduction

Legal pragmatism is a visible movement in law academia today. The group advocating this stance is composed of a wide-ranging and diverse set of individuals. The list includes Daniel Farber,[1] Thomas Grey,[2] Margaret Radin[3] and Judge Richard Posner[4] among many others. Advocates of this stance insist that adoption a pragmatic conception of law practice can help law as a social tool function more effectively. More specifically legal pragmatism is advocated as a judicial stance. A glance at the group listed as legal pragmatists raises the question of whether there is a cohesive center to such a stance. If right-wing judges and leftist-feminists can advocate the same stance something is definitely suspicious. One suspects that there might not be any guts to a stance that can claim adherents from such otherwise radically opposed camps. The possibility immediately occurs that the concept is either so bland or "banal" as to command universal acceptance or the project functions as a smoke screen for individual agendas. David Luban argues, for instance, that "if legal pragmatism is only eclectic, result-oriented, historically minded antiformalism it turns out to be a remarkably uncontroversial doctrine. It stands free of philosophical controversy only because it stands free of all controversy, and it avoids controversy by saying very little."[5] And a leading advocate of neo-pragmatism, Richard Rorty, believes that all legal professionals are already pragmatists whether they describe themselves as such or not. He further claims that one is hard pressed to find a real formalist among the legal ranks.[6]

I think that these characterizations are wrong. To argue for this conclusion I will lay out a general conception of legal pragmatism that tries to be fair to its various proponents. First I will outline a "classical" or "rule of law" model of jurisprudence that is represented in its most contemporary form by Dworkin’s "law as integrity." After this traditional jurisprudential stance is characterized it will then be contrasted with the precepts of legal pragmatism. I identify a core set of claims made by proponents of a pragmatist model of law. These are described as composed of an emphasis upon instrumental reasoning, eclectic perspectives, foundationless inquiry and attention to context. After this, I investigate efforts to empirically test the effectiveness of dominant legal ideology.

The conclusion argued for in this paper is that empirical studies of judicial decisionmaking and the court system show the practical and ideological limits of the "rule of law" model. Through studies of judges' use of precedent, to institutional competency, to the effectiveness of courts in bringing about their remedial orders, all the available data point out that the legal model is essentially flawed in its picture of the judicial process. At the same time all the data are not only consistent with legal pragmatism’s main tenants but reflects good reason for adopting legal pragmatism as a normative. So, legal pragmatism is, indeed, a beneficial jurisprudential position. It is also not banal and would

force changes in legal practice.

II. What is Legal Pragmatism?

In a movement with so many voices or such diverse interests and political positions one would expect differing views within self-described legal pragmatists. This expectation is not disappointed. There are so many diverging and politically polarized advocates of legal pragmatism that one really can't help but think that it is a stance without any controversial implications. Maybe legal pragmatism advocates are advocating a placeholder without any reference. I think, contrary to this possibility, that there is a substantive set of central claims that the proponents of legal pragmatism would agree to. And these claims have important implications for law as a social practice.

a. The Classical Model

The most accepted model of legal practice, the "classical model" emphasizes the use of specifically legal tools in the domain of law. In fact, the ethos of professionalism encourages the belief that law is in some sense a unique science. Not only does the practice of law encourage insularity between law and other disciplines, but the manner of education in law school is shockingly formalistic. The picture of law still dominant today (in action if not theory) was historically advocated by Christopher Columbus Langdell. From his position as Dean of the Harvard Law School he advocated the combination of Socratic teaching methods and the use of the casebook. The assumption was that the data of legal science was the case, or written judicial decision. From leading cases or precedents legal principles were to be distilled principles which would then be applied to further cases by way of analogy in order to determine decisions. This picture of law is notable for its very narrow set of acceptable legal data.

The most influential contemporary version of the classical picture of jurisprudence is offered in *Law's Empire*.[7] In it Ronald Dworkin claims that continuity (consistency) with past judicial decisions should be maintained as the highest legal virtue. He labels his stance "law as integrity. In "law as integrity" judges try to create a unified narrative in the face of the difficult case. When deciding a case that is controversial the judge tries to look over law's history, all the important precedents, and decide in a way that is as consistent and shows the most "integrity" with the tradition.[8] He even personifies the type of analogical reasoning law rests upon by using the example of a "chain-novel" to illustrate how he would like judicial decisions to be made. Each judge is thought of as an author that will contribute a chapter to a novel. After each chapter is written the next author must write the following chapter in a way that preserves the most internal consistency and integrity with the preceding writing. Legal rules, earlier cases and principles are described as the tools, which are used to help the judge/author decide present controversies. That law as integrity is the dominant theory of law in law schools today proves that Dworkin's jurisprudential stance fits the legal profession's standard ideology perfectly. That Dworkin is vehemently against legal pragmatism shows that at least he sees it as a threat to law's status quo.

This classical model presents a picture of legal reasoning that emphasizes the power of legal argumentation as traditionally understood. The judge carefully reviews the precedents (the relevant cases), makes distinctions according to accepted models of legal reasoning and interpretation, follows analogies, and derives the correct and lawful result in the current case from the specifically

legal tools offered him from within the classical legal model tradition. Such a model encourages the legal practitioner, and most importantly the judge, to label certain data legally relevant and other data as extra-legal or irrelevant. This both encourages a sense of legal and analytical rigor and allows the legal profession to ignore larger questions about the nature of its discipline.

b. Legal Pragmatism

Legal pragmatists almost unanimously hold a set of claims to be essential to their stance which would broaden the tools and the reasons a judge would be expected to employ in legal decision-making. Thomas Grey sums up the general outlines of belief in legal pragmatism as follows:

> Law is contextual: it is rooted in practice and custom, and takes its substance from existing patterns of human conduct and interaction. To an equal degree, law is instrumental, meant to advance the human good of those it serves, hence subject to alternation toward this end. Law so conceived is a set of practical measures for cooperative social life, using signals and sanctions to guide and channel conduct. More precise and determinate general theories of the nature and function of law should be viewed with suspicion."[10]

This summary raises many of the recurring ideas that Thomas Cotter finds can be summarized under the labels "contextualism, antifoundationalism, instrumentalism, and perspectivism."[11]

Contextualism

Contextualism, as the name implies, puts particular emphasis upon consideration of specific context.[12] As Judge Posner describes it, contextualizing the process of judicial decisionmaking "disconnects the whirring machinery of philosophical abstraction from the practical business of governing our lives and our societies."[13] Here is sounded the constant refrain of the contextualist - "return from abstraction to the concrete." This emphasis upon the importance of context helps explain the legal pragmatist's interest in Oliver Wendel Holmes. One of Holmes's favorite strategies is described as piercing the essentialist notions of legalistic thinkers who were attached to ideas of law as having "timeless provenance with a necessary internal structure and set of external relations" by using "historical analysis to demonstrate that these abstract concepts have a terrestrial origin in a specific context, derived from particular and contingent needs, and not infrequently based upon mistake."[14] The basic claim attached to a contextualist critique is that all legal decisionmaking takes place in a specific and individual context that is so constitutive of the decision that the further decision making is taken out of context the further it is falsified as to its actual nature. According to the legal pragmatist, this abstraction from context is exactly what the traditional picture of legal analysis encourages us to do. The rule of law advocate is interested in applying universal labels and generalized concepts and principles in order to show the impartiality and generality of law. The legal pragmatist, on the other hand, emphasizes the specific and unique aspects of each case and questions the assumption that legal analogy from case law precedent is always the best tool with which to decide each controversy. Of course questioning the use of case law precedent should not be thought of as forcing the pragmatist to ignore precedent. Use of precedent *may* very well be the most pragmatic move for a legal practitioner who is properly sensitive to context. What legal pragmatists argue for is rather a change of emphasis. Instead of seeing case law precedents as the

most central and somewhat insular data with which to work, data that carries an intrinsic duty to be obeyed, the legal pragmatist looks more carefully at context in order to not only see analogies and disanalogies between cases, but also so as to look to context-specific factors that analogical reasoning from precedent might be unable to recognize.

Antifoundationalism

The second characteristic of legal pragmatism is an antifoundationalist stance. Foundationalists hold that there is one foundational principle (or a core set of principles) and that all legal decisions can be deduced from this. While set in this stark form foundationalism might seem implausible, most legal theorizing assumes a moderate view very similar to it (often called pejoratively legal formalism). Moderate forms of foundationalism all include the idea that the judge has a sufficient set of tools from within the traditional materials of court decisions and classical ideas of legal reasoning to make proper decisions in present cases. In other words the case method suffices to bring about good judicial decisionmaking. Dworkin's law as integrity adds legal principles to this story, but still entails a somewhat limited set of legal materials which are foundational to a properly made judicial decision. The search for a foundation is seductive to rule of law theorists because, if identified, such a foundation could be used to deduce legal decisions.

While a foundationalist picture of legal decision-making might not be necessarily committed to a deductive methodology, indeed foundationalism and deductive methodology seem analytically distinguishable, this would conflict with what are normally thought to be the classical model's virtues of clarity and certainty. Indeed, the reliance that the classical model of legal reasoning places upon foundations is only explained by the hope that such a foundation can be used within a deductive scheme so as to arrive at correct legal conclusions.[15] So, while analytically foundationalism may be separable from deductive methodology, in legal practice they are almost invariably conflated. Because of this, the legal pragmatist's advocacy of antifoundationalism should be read as being suspicious of the legal faith in deduction from foundational starting points.

As with contextualism, the pragmatists claims to antifoundationalism are better read as advocating a change of emphasis rather than a wholesale elimination of the traditional sources of foundations in legal decisions. So, for a specific instance, a proponent of the classical model might claim that many judicial decisions in the U.S. are founded upon, and deduced from, the Constitution. Antifoundational theorists would reject this assessment if it is meant to be taken as a complete and accurate description of the reasons for the decision.[16] First, they "reject the idea that correct outcomes can be deduced from some overarching principle - or set of principles."[17] While the Constitution might have been a very strong factor in a given decision, antifoundationalists will claim that deduction from it will never be the complete story because even the clearest rule will need to be interpreted in order to be applied. So, though the recurring claims to found a decision upon the Constitution might seem to vindicate the foundationalist stance, the fact that the Constitution can be appealed to in so many diverse ways, and that all of these methods of appeal are contestable, points towards a more multileveled approach. Second, antifoundationalists reject many metaphysical implications that such a search for foundations usually entails.[18] For example, the claim that a legal decision is required by the Constitution implies that there is "The meaning of the Constitution." Such an essentialistic or Platonist picture of constitutional law is empirically doubtful given the various and incompatible decisions that have been "deduced" from the very same

constitutional document. To paraphrase Rorty, the legal pragmatist thinks that an advocate of the classical model of legal reasoning holds to a belief that there is one language that law speaks, and that other ways of speaking are not legally proper because of some essential and determinant qualities of law. On the other hand, while antifoundationalists will agree that the words of the Constitution help ground legal decisions, emphasis will also be placed upon other factors and reasons relevant to the decision as well. Law can speak various languages and see various meanings in documents such as constitutions. As a result of the suspicion towards foundational explanations what goes into the judge's toolbox becomes a problem to solve, and cannot be decided by an appeal to a clean, isolated and empirically unproven method. Antifoundationalists hold that there is no central or finished set of legal materials that can be relied upon to arrive at a proper decision every time. Once again, as with contextualism, it is really a matter of emphasis that changes with legal pragmatism, and not a wholesale rejection of tools and methods offered by the classical model of legal reasoning.

Instrumentalism

Much like the doctrine of contextualism, the stance of instrumentalism advocates an investigation of legal effects and institutional capabilities when attempting to make the proper judicial decision. The instrumentalist is therefore properly described as "forward looking,"[19] with an "orientation towards the future."[20] This, in distinction to the normal description of legal decision making as based almost wholly upon relevant legal precedent, brings in a whole new set of reasons to bear upon the judge's choices. As opposed to what might be considered the immediate issues of equity between the parties in court, a "consequentialist" perspective has to acknowledge and analyze the potential effects of the decision upon future cases and society at large. The legal pragmatist therefore emphasizes "the primacy of consequences in interpretation."[21]

Though this aspect of the legal pragmatist's set of claims may seem the most banal, it is actually probably the most important and far-reaching aspect of the position. While the classical model points backwards and attempts to answer questions by appealing to the essential attributes of legal concepts, the legal pragmatist's instrumentalist approach places such concepts under constant evaluation. For instance, when confronted with a dispute over breach of contract a classical practitioner will try to see if the essential aspects of a contract are present, and if so if there are present any mitigating factors that have been previously recognized as legally cognizable. In other words the dispute is one that is treated as mainly conceptual. The legal pragmatist judge, on the other hand, would look to these factors, but would also be interested in the possible societal results if contracts were treated this way in the future. This inquiry clearly implicates more than the previously accepted essence of a legal contract. This forward looking aspect of legal pragmatism, this empirical results-based methodology, also distinguishes it from other "law ands." For instance, Critical Legal Studies, while emphasizing context and lack of foundations does not recommend any methodology for adjusting for legalistic/rationalistic biases. The same holds true for Law and Literature. On the other hand, while the Law and Economics movement could be thought to be forward looking, the methods adopted by its practitioners are generally not instrumental but rationalistic and a-priori in nature. This armchair-based and rationalistic quality of Law and Economics analysis helps explain why it has so successfully infiltrated legal academia.

Perspectivism

Finally, many of the themes discussed in the first three attributes of legal pragmatism are further extended in the doctrine of perspectivism. Perspectivism entails a suspicion of broad "conceptualisms and generalities."[22] Once again there is an emphasis upon the priority of experience.[23] Furthermore, avowal of perspectivism brings about the conclusion that "eclecticism"[24] in potential reasons and considerations that a court must face is inevitable. The judge must face the multiple perspectives available. As opposed to legal formalism which "holds that determinate meanings exist in legal texts which can be discerned by reason and that objective, immutable principles simultaneously inform and transcend the practice of applying rules"[25] perspectivism emphasizes that all is messy, open-ended, and subject to revision in light of another perspective or further information. John Dewey put the importance of perspectivism in relation to reason by arguing that a "nominal and esthetic worship of reason" can actually discourage effective reasoning because it hinders "scrupulous and unremitting inquiry."[26] In other words, perspectivism in relation to the idea of reason ensures we don't use an impoverished idea of reason (because, for example, "reason" is characterized as a-contextual) to exclude relevant considerations or ways of analyzing issues that don't fit the reigning clichés. As with the emphasis upon instrumental reasoning, perspectivism forces those within the legal system to include more data and face the empirical results of conceptual schemes.

III. Descriptive Accuracy

The first way to decide between the classical "rule of law" view of law and the judge's activity (represented by Dworkin's view of Integrity) and the legal pragmatist's view is to look to their respective accuracy as to the description of judicial decisionmaking that they offer. Do judges follow precedent and the rules of legal reasoning as the traditional picture of legal decisionmaking holds? Or, does the more messy, broad-based and eclectic picture of decisionmaking adopted by the legal pragmatist better sum up judicial activity?

First, politicians do not act as if the judge is a non-political actor that is largely controlled by rules of legal reasoning and case precedent. The powerful fights over who gets appointed as judge show that other interests are believed implicated. That the rule of law picture is not the only possible one, or even the most plausible picture of court functioning, is also shown by conceptual studies of court systems like that offered by Martin Shapiro.[27] Shapiro argues that the court is best thought of as a triad system using a "big-man" in the middle, which is premised upon the hope that the process will create (at least) the appearance of consent from both parties to the conflict. If this is true, then the classical ideal of judicial decision-making might substantially misconstrue the judge's proper considerations. Under another view, Robert Dahl's description of the Supreme Court as one aspect of a governing coalition that bows to any significant political pressure, the Court is both situated in the political arena and described as essentially helping to further political policies. This claim is obviously incompatible with the classical view.[28] Finally, Stuart Scheingold argues that the classical picture of legal analysis advocated by the legal profession (which he calls "legalism") not only has an implicit world view that eliminates conflicting signals, but also that:

> What may make legalism a bit more deluding than some other world views is its covert character. Law Professors and lawyers do not believe that they are either encumbered or enlightened by a special view of the world. They simply feel that their legal training has

> taught them to think logically. In a complex world, they have the intellectual tools to strip a problem, any problem, down to its essentials.[29]

He further argues that this implicit worldview is so flawed as to be actually dangerous because it is so seductive and effective in ignoring its own substantive assumptions.[30] As opposed to the rule of law picture of legal decision making, the legal pragmatist's stance can accommodate these conflicting messages and roles and does not rest upon hidden or unquestioned assumptions of neutrality or objectivity. So, in distinction from the foundationalist-like claims of the rule of law theorist, which rest upon a specific and essentialist description of the court, legal reasons, and judicial decisionmaking, legal pragmatism as a descriptive doctrine is more flexible and therefore justified in the face of controversy over the court's role.

Historical analysts have also disputed the essentialistic aspect of the picture of judicial decision-making attached to the classical rule of law picture. For instance, Gary Peller sees the picture of judicial neutrality and proceduralism as an ideology first embraced in the 1950's because of the breakdown of other traditional value systems and the specter of Nazism. Therefore calls for "principled decisions" and "neutral processes" (such as were sounded at the time by scholars such as Wechsler) were elements of a situated ideology that was supposed to both avoid taking political sides and give broad valid rules of justice.[31] Another legal historian, Morton Horwitz, argues that the concept of the rule of law actually is a ideological tool that was in service of powerful industrial interests in the U.S. As he puts it, the ideology was fostered because: "There were, in short, major advantages in creating an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making "legal reasoning seem like mathematics," conveyed "an air . . . of . . . inevitability" about legal decisions."[32] If any one or a combination of these historical descriptions is accurate, then the legal model is flawed. On the other hand, the truth of either description, or both, helps the legal pragmatist's case. The pragmatist agrees that all court decisions, and all courts, are situated in a specific context and reflect a specific perspective. The legal pragmatist also allows much more consideration of the fact that the law serves various instrumental purposes that originate many times from outside the legal system, and this, as the historians have made clear, is a very plausible conclusion.

Finally, the lynchpin of the classical picture, the authority of precedent, has been severely challenged by empirical research into judges' actual decision results. In a study by Sheldon Goldman results were found that implied that judges were more affected by their political stance, or the previous roles that they played within the legal system, than legal precedent.[33] Other studies were able to claim an 85% prediction success rate on future cases based upon a categorization of the judge's "values."[34] One study that compared the political stance or "attitude" of the individual Supreme Court Justices before they were appointed to their judicial seat with their positions in decisions made by the Court while they were on it found that they could predict the Justice's vote with an 80% chance of success.[35] The authors of the study concluded that this data showed that Supreme Court justices were not bound either by precedent or by the doctrine of judicial restraint in their voting patterns.[36] In a broader follow up study the authors found "exceptional support for the attitudinal model."[37]

Jeffrey Segal and Harold Spaeth devised a test of the "legal model" to test whether Supreme Court justices would follow previous precedents even if they disagreed with them.[38] First, they determined that for precedent to have significant influence on decisions it must cause a justice to vote in a way that he or she would not have otherwise voted. Second, they wanted to create a falsifiable test. This forced them to adopt a narrow focus upon the votes of individual justices during their tenure on the Court. The focus of the survey was on justices who voted in the minority position in a precedent-setting case. What was surveyed was whether or not the justices who voted in the minority position "subsequently adopted the majority position."[39] The supposition being that if the justice adopts the majority position he or she did so out of respect for precedent. The cases used in the sample were arrived at by: (1) limiting the selection to "major cases" as listed in *Congressional Quarterly's Guide to the U.S. Supreme Court*; starting with the Warren Court; (3) excluding unanimous decisions; (4) excluding from the group of cases those that contain no "progeny" during the analyzed period as well as cases that "resolved a nonrecurring issue"; and (5) excluding "cases that marked the virtual end line of decisions."[40] They determined progeny by Shepardizing the precedents.[41] Then they determined "whether the dissenting justices from the landmark cases adopt the majority's results and/or standards in the subsequent decisions."[42] Their conclusion was that "Supreme Court justices are not influenced by landmark precedents with which they disagree."[43] In fact, according to their results 90.8% of the votes conform to the justices' previously revealed preferences and only 9.2% of the time did a justice switch to the position established by the earlier case.[44] This conclusion clearly calls into doubt the power of precedent.[45] This analysis is further supported by empirical results in Rosenberg's "Judicial Independence and the Reality of Political Power," where after defining judicial independence as being shown by decisions that are mostly unaffected by partisan politics he concludes that many times "in response to congressional preferences the Court effectively revised its earlier decisions."[46] If precedent was of the overriding importance as Dworkin and the legal model would have it, then this revision due to political pressure should be less present.

What the empirical data show is that there is very good reason to doubt the veracity of the "legal" or "rule of law" model of courts and judicial decisionmaking. As opposed to an ideal like "law as integrity" offered by Dworkin, the legal pragmatist's picture of a future-looking, context dependent, antifoundationalist, instrumentalist and perspectivist stance not only accepts the devaluation of precedent that seems empirically supported, but also allows for a picture of judicial decisionmaking where judges vote their preferences. This only means to the legal pragmatist that judges are responding to reasons other than those encompassed in the case law precedents in front of the court. At the very least the conclusions found in the attitudinal literature surely point to a need for more critical study of what reasons and factors are really determining the decisions. What for the "legal model" theorist are "extra-legal" reasons (and therefore illegitimate considerations) are for the legal pragmatist fair game as tools to reach the best decision possible. Furthermore, a legal pragmatist has the ability to accept and react to empirical findings such as those discussed above, while the legal model theorist must just repeat that precedent really, really, matters. So, the legal pragmatist's picture of the legal decision-making has the potential to be descriptively more accurate. But maybe that is unfortunate. Might it be the case that as a normative ideal the legal model should be encouraged?

IV. Normative Ideal

Perhaps the classical ideal, or the rule of law plus moral principles ideal of Dworkin's law as integrity, are better taken not as true descriptions, but as ideals that the court system and judges should work toward instantiating. The picture of case by case adjudication based upon strict adherence to previous decisions, analogical reasoning and a sense of equity is inviting. It holds out a hope for having one's day in court, of having precedent-restricted judges give out legally rigorous analyses that explain clearly and concisely why a certain outcome was foreordained. It pictures the court as a neutral and passive social resource to be used when injustice occurs in the normally well-greased operation of the society at large. It also holds out the hope that such resolution of conflicts can avoid the overtly "political." Finally, it carries a picture of swift and true ability to bring about the mandated results - after all a decision becomes the law and the law must be obeyed.

But, as shown in the last section, this picture has the effect of seriously distorting the actualities of a judicial proceeding. Such a distortion refutes the possibility that the legal model is normatively appealing. First, the implications of court decisions are never really restricted to the two parties at hand. Collateral effects are unavoidable. Even in the legal model, previous cases are used to determine the case at hand in what is idealized as a largely deductive process. But what if the situations are different (as logically they always will be)? For instance, what if the social context surrounding the legal issue has changed drastically? Then the deduction would actually distort the issues in front of the court. In fact it seems clear that the claim attached to the classical model that reduction to past cases and the individual situation at hand is sufficient for judgment actually distorts the conflict in order to impose a "legal" solution. As Donald Horowitz puts it "it is precisely this ability to simplify the issues and to exclude interested participants that may put judges in danger of fostering reductionist solutions."[47]

Furthermore, the isolationist aspect of litigation attached to the traditional adversarial legal model of reasoning gives the judge too much confidence in the non-probabilistic style of reasoning preferred in legal arenas while, at the same time, limiting the kind of information thought relevant.[48] Specifically, facts characterized as "social" (and which the legal pragmatist would describe as contextual) are particularly difficult to bring to the court's attention under the legal model. This is because "judicial decisions tend to be abstracted from social contexts broader than the immediate setting in which the litigation arises."[49] The traditional legal model carries with it a set of epistemological assumptions that limit what type of reasoning is allowed and what types of data are processed. Because of this set of limiting assumptions, "the litigation setting creates the danger of doing too little at one time and thus magnifies the possibility of unanticipated consequences that a more comprehensive view might perceive and attempt to limit or control."[50] Horowitz describes these handicaps as "problems of vision" and "problems of information."[51] He argues that two especially big problems are the way that searching for "the controlling issue" and putting the case in terms of "rights of the parties" so narrows the focus of a court that the judge cannot see how far-reaching the decision's effects will be.[52] The ideal (or ideology) of the "controlling issue" can easily slip into the practice of reductionism. For instance the constitutional jurisprudence of gender and race discrimination should acknowledge that these two categories of discrimination overlap and influence each other in ways that are difficult to litigate when the ideology of a controlling issue forces the litigant to categorize the discrimination as exclusively one or the other. Even worse, because the controlling issues are so very important, any social consequences that result from an overlap between issues are in effect invisible to the court. In other words, it is as a result of being

"principled" as opposed to being "empirically" oriented that clear structural discrimination of a type that law has been legislated in order to combat is legally ignored in a court of law. An essentialistic and concept-based method of analysis has the potential to exclude a socially relevant issue (such as the relationship between gender discrimination and race discrimination) with the result that a decision could cause unforeseen and irreversible consequences. The legal model has no tools to even test for this possibility. For instance, the legal system's inability to account for the discriminatory effects of gender/race intersection forces public discourse to treat it as a less fertile issue to raise. One especially problematic omission is the consideration of social costs imposed by such decisions. If the court system treats such issues as irrelevant, and law is used by oppressed groups as a legitimization tool (as it currently is), groups thus rendered legally invisible suffer from an apparent lack of legitimacy. Even if their grievance is empirically real the legal system can decide it is legally irrelevant on a-priori conceptual grounds. Another notorious instance in the same area of race issues is that of the imposition of the death penalty. Statistical studies have showed conclusively that capital punishment is handed out in a manner that is racially influenced. The Supreme Court in *McCleskey v. Kemp* used the ideology of the controlling issue combined with the individual adversary model to ignore this data.[53] What is most telling about this case is that, for all the legal establishment's embarrassment over the decision (because empirically so unjust), it was a principled and "legally proper" decision. That is, the reasoning in the decision followed precedent and appealed to the classical model of adversarial litigation between two parties to ignore empirical data of system-wide discrimination. *McCleskey* is a good example of the results of following "law as integrity" as a model. The only way to critique the decision effectively is to look at the legal content of the decision, and then contrast it with the empirical data, data that the traditional model of legal reasoning was all too able to define as legally irrelevant. It is hard to think of a clearer indictment of traditional pictures of legal decision-making.

It should be clear that legal pragmatism allows for the development of tools to face these empirically troubling issues. First, the pragmatist’s epistemological assumptions allow much more data into the courtroom as relevant. The pragmatist always emphasizes context. Of course judges within the rule of law model do situate it within their common-sense context, but they do so unconsciously, therefore enhancing the possibility that their education, social position, etc. may distort the accuracy of their controlling perceptions. The legal pragmatist, on the other hand, in explicitly admitting the importance of context, allows this aspect of the case to come into debate, therefore raising at least the possibility that information about context could better inform the decision. This shows as well the anti-reductionist strand of legal pragmatism. Reasons are up for grabs, and therefore more information might be necessary to avoid the problems of distorted vision or missing information. The legal model, on the other hand, has a narrow view of relevant reasons and therefore reduces the information available to the court. Finally, because the legal pragmatist allows in instrumentalist reasons, some of the potential secondary effects of a decision could be acknowledged before hand and brought into consideration. Certainly the legal pragmatist cannot offer the pristine picture of law that the traditional rule of law model offers. There may be real costs to the loss of the ideals of fairness and neutrality that the classical model is purported to dispense. But, once again, the legal pragmatist is not advocating an unprincipled and random decision. Indeed it very well may be the case that much of the classical or rule of law model is pragmatically justified. But a little suspicion of its premises might help avoid decisions like *McCleskey*. Just a slight curbing of the classical model's ideology could allow in empirical data that is currently deemed constitutionally/legally irrelevant even if clearly true empirically. Here it should be plain

that a misleading clarity is not normatively desirable. One can, that is, be a reductionist to a fault.

This analysis is made even more compelling if the movement towards a more public law litigation model that Abram Chayes identifies is unavoidable.[54] As society becomes more industrialized acts that were once easily labeled individual implicate much more of the public. And, as experience has borne out, the public/private distinction is an extremely slippery one. Chayes argues that in opposition to the private law model (read legal model) there is a countervailing "public law litigation model" that describes much of the business courts are doing today. The public model is as follows:

> (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
>
> (2) The party structure is not rigidly bilateral but sprawling and amorphous.
>
> (3) The fact inquiry is not historical and adjudicative but productive and legislative.
>
> (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
>
> (5) The remedy is not imposed but negotiated.
>
> (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
>
> (7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping litigation to ensure a just and viable outcome.
>
> (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.[55]

Chayes makes the contrast as if the private litigation model was really plausible as a true description of the court at one time. A survey of the eight categories can easily call into question the ability of their opposites to have ever been the truth. But either way, in a context with class-action suits, controversies over constitutional rights, etc., most of these factors will be present in just about every significant controversy. If that is the case, then clearly the rule of law model is insufficient as an ideal for courts to aspire to.

Finally, the legal model has another fatal flaw due to its lauded ability to focus upon the issue at hand and deduce conclusions from precedent - it ignores or greatly misconceives the court’s ability to implement the decision. As Gerald Rosenberg puts it:

> Treating courts and judges as either philosophers on high or as existing solely within a self-contained legal community ignores what they actually do. This does not mean that

> philosophical thinking and legal analysis should be abandoned. It emphatically does mean that the broad an untested generalizations offered by constitutional scholars about the role, impact, importance, and legitimacy of courts and court opinions . . . must be rejected . . . . they must be treated as political institutions and studied as such.[56]

By studying the actual measurable effects upon society of such legal icons as *Brown*[57] and *Roe*[58] Rosenberg directly tests the value of the myth of the legal model. If the legal model, as a normative stance, cannot handle the empirical (or political) issue of whether its verdict will have the intended effect, then another model will have to be adopted that can better handle the necessary adjustments. That is, even if the legal model correctly arrives at the proper principle, it cannot handle properly the remedial side of law. Therefore, once again, the legal model proves inadequate as an ideal.

Rosenberg argues that the Supreme Court, and courts in general, are largely ineffective when mandating significant social change unless factors extraneous to the courts actual internal institutional capabilities are available. He sums up these conditions as follows:

> Condition I: Courts may effectively produce significant social reform when other actors offer positive incentives to induce compliance.
>
> Condition II: Courts may effectively produce significant social reform when other actors impose costs to induce compliance.
>
> Condition III: Courts may effectively produce significant social reform when judicial decisions can be implemented by the market.
>
> Condition IV: Courts may effectively produce significant social reform by providing leverage, or a shield, cover, or excuse, for persons crucial to implementation who are *willing to act*.[59]

It is significant that none of these conditions refer to any factor that the traditional model can acknowledge. So, for example, Rosenberg argues that *Brown*, while serving as an icon of progressivism to the law community, really had no significant impact upon U.S. race relations. It was only with social action and congressional activity that the ideas embodied in *Brown* were furthered. His evidence is pretty damning to a holder of the traditional isolated defender of justice picture of law. Not only does the most narrow version of the deduction from case to case model completely ignore such issues, but even Dworkin's reason plus moral principles picture of integrity has no room for such issues. If, as Rosenberg shows, that for ten years after *Brown* nothing happened and, in fact, the decision was "flagrantly disobeyed,"[60] then a desirable model of court and judicial decisionmaking had better be able to handle such matters. The issue of institutional competency is one that must be faced. As he puts it "Courageous and praiseworthy decisions were rendered, and nothing changed. Only when Congress and the executive branch acted in tandem with the courts did change occur…In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform."[61]

What this analysis shows is that the legal model (or legal model plus morality) fails not only as a descriptive theory of judicial activity but, possibly more importantly, also fails as a normative ideal

for judges and courts to aspire to. Not only does such a model exclude reasons that are necessary to understand the actual controversy, but at the same time the model also encourages a dangerous disregard for the collateral effects of any decision. Finally, even supposing a decision using the classical tools of legal analysis could get us to a correct decision in the case as to legal doctrine the model does not provide the intellectual tools necessary to see that the solution can and will be implemented effectively. Once again, the legal pragmatist's stance seems clearly superior. True, the legal pragmatist's picture creates problems as well - it allows into court a much messier set of issues, reasons, and factors to be considered. But the rule of law picture carries equal or greater evils without even the hope of resources that can help remedy the failures.[62] One virtue of the legal pragmatist's model is that it can put the classical model's virtues to work if proven to be instrumentally viable. On the other hand, the classical picture has such an rationalistic and exclusionary bias that other options are systematically defined out as "not thinking like an attorney." Further, a properly humble pragmatism should respect the ideals of the classical model of law and utilize them until better tools are demonstrated to be available and implementable without thereby incurring greater costs. Pragmatism, while evolutionary and contrary to more rationalistic or a-priori methodologies, is perfectly compatible with conserving traditional tools as long as there are no better ones around.[63]

V. Conclusion

The worry that motivated this paper was that legal pragmatism as a doctrine might be so banal as to be uninteresting or functions as a cover for personal agendas. Hence the question - is legal pragmatism practical as a jurisprudential position? The first step in answering this question was the identification of a core set of claims made by the legal pragmatist that were explicit enough and strong enough to actually eliminate or oppose other possible jurisprudential stances. A traditional or classical picture of law was developed as a model to contrast with the pragmatic conception. Through a survey of legal pragmatist literature I came to a working set of claims that characterize the stance. Legal pragmatists first emphasize the contextual nature of the process and advocate a "return from abstraction to the concrete." Second, they dispute the need and/or availability of foundations from which to deduce legal decisions. Third, the legal pragmatist adopts an instrumental stance towards reasoning and looks more to the future and therefore, at the same time, devalues the *a priori* importance of legal concepts and precedent held central to the legal model. Fourth, an emphasis in placed upon the multiplicity of perspectives available and necessary to accommodate within the system.

Once these definitional claims were set out, the question became which of the two models (classical v. legal pragmatism) was more descriptively accurate. The conclusion was that legal pragmatism is a much more empirically sound doctrine than the rule of law or legal model. First, politicians just do not act as if it is unimportant who becomes a judge - clearly they think more is determining decisions than just legal precedent. Second, conceptual studies of the courts have offered up alternative models that seem equally plausible. These models, though, don't rest upon use of the paradigm rule of law picture of legal tools as much as they highlight the less isolated position the courts have in the greater context of political and social life. If the court functions as a consensus maker or political legitimator the legal model is not only false, but also a pernicious ideology masking the real function of the court. This was Sheingold's argument. Legal pragmatism can adapt to these criticisms and has the descriptive capacity to acknowledge all these factors and/or roles of

the court.

Another type of study that vindicates the pragmatist's stance over the traditional legal model is historical treatment of the legal enterprise. It appears from the conclusions of historical studies that many of the ideals within a law as integrity or legal model are inseparable and contingent upon context. Whether neutrality becomes an attractive prospect because of the problems with other political stances or it is the case that law can be used to encourage dominant interests in society, the legal model once again becomes false and the legal pragmatist is vindicated as to his or her descriptive accuracy. Finally, empirical studies have shown that adherence to precedent by judges in making decisions is much less pervasive than the legal model would require. Factors thought extrinsic under the legal model are much more controlling than precedent and legal analysis. The legal pragmatist explains that this is because reasoning, just like the legal enterprise, is a much more varied and heterogeneous process than usually imagined. The rule of law advocate just has to claim that really, really, precedent matters; though we just cannot show how it works. So, from a survey of empirical data analyzing courts' functioning and judicial decisionmaking it seems clear that the legal pragmatist's stance is empirically superior to the stance advocated by the law as integrity theorist or any other variation on the classical picture of legal reasoning.

But maybe the legal model functions better as a normative stance. This claim was easily disproved as well. The legal model so distorts what is actually happening in the court system that it results in lack of effectiveness and unforeseen consequences. The idea that every controversy has a "controlling issue" is a legalistic type of reductionism that really amounts to concept mongering. The simplification such an ideology allows rules out admission of information that could help the court better see the situation at hand, and would help the court acknowledge future results of any decision. Furthermore, adherence to the legal model encourages the judge to adopt a picture of reasoning that ignores the largely probabilistic nature of life events, therefore further limiting the type of reasoning and information thought legitimate. The legal pragmatist, because of a lack of one controlling picture of the legal process, can allow in such considerations and therefore has tools available to deal with such issues. If litigation goes on in a context where many people in addition to just the named parties to the action are effected then the admission of more information, and the conceptual admission of the multiple roles that the court has to fulfill, points to the legal pragmatist's stance as the normatively more desirable one to adopt. Finally, if a court adheres consistently to the rule of law model, then the chances that its remedy will be effective are reduced. As Gerald Rosenberg has shown, the court must have allies from outside its own institutional limits in order to be effective when mandating significant social change. The strict follower of the rule of law or law as integrity model, though, will not be able to face such issues and therefore might be completely ineffective. What this means is that even if the court could use rule of law methods to get to a "correct" decision, not facing institutional limits of the court as a political entity could have fatal effects upon the implementation of the decision.

Empirical studies of judicial decisionmaking and the court system both show the flawed nature of the "classical model" of law as represented most centrally today by Dworkin's "law as integrity." At the same time, all the data are not only consistent with legal pragmatism's main tenants but also reflect good reason for adopting legal pragmatism as a normative stance from which to study and conceptualize judicial decisionmaking and the legal institution in general. So, legal pragmatism is, indeed, a useful jurisprudential position. Beyond this, it is a substantive position that promises to be

beneficial if adopted in practice and not only in theory. Legal pragmatism promises to make legal practice a more empirical and less dogmatic profession. It furthermore promises to force legal professionals and the legal profession as a whole to provide data in order to justify their claims to social efficacy. Just as Dewey argued that worship of an idealized picture of Reason can get in the way of furthering the quest for more reasonable results, worshipping an idealized conception of Law and Legal Professionalism can get in the way of bringing about a more effective legal system, characterized as one of many humanly created social systems aimed at the resolution of social conflicts and the pursuit of justice.

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Notes

1. See Daniel A. Farber, "Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century", 1995 *University of Illinois Law Review* p. 163 (1995).

2. See Thomas G. Grey, "Holmes and Legal Pragmatism", p. 41 *Stanford Law Review* p. 787 (1989), "Freestanding Legal Pragmatism", 18 *Cardozo Law Review* 21 (1996).

3. See Margaret Jane Radin, "The Pragmatist and the Feminist", p. 63 *Southern California Law Review* 1699 (1990).

4. See Richard A. Posner "Pragmatic Adjudication", p. 18 *Cardozo Law Review* p. 5 (1996), *Overcoming Law* (Cambridge: Harvard University Press, 1995).

5. Luban, David, "What's Pragmatic About Legal Pragmatism?" 18 *Cardozo Law Review* p. 45 (1996).

6. Rorty, Richard, "The Banality of Pragmatism and the Poetry of Justice", p. 63 *Southern California Law Review* p. 1811 (1990).

7. Dworkin, Ronald, *Law's Empire* (Cambridge: Harvard University Press, 1986).

8. The more controversial aspect of Dworkin's theory, that judges use principles of morality and these are properly called parts of the law, is largely irrelevant to this paper (as well to his critique of legal pragmatism).

9. It is important to note that while Dworkin's view of law as integrity is controversial for its claim that judges use moral reasoning in legal decisions as rules of law, the basic characterization of the judge as engaged in a principled process of reasoning from cases to a conclusion without looking in large part to future effects, institutional competence, etc. closely parallels other "rule of law" ideals. It certainly is consistent with Langdell's picture of the case method (just allows a slightly larger domain as to the nature of legal data), and easily combines with Edward H. Levi's portrayal of legal reasoning in *An Introduction to Legal Reasoning* (1949). Another clear picture of such a view of law is offered by Owen M. Fiss in "The Supreme Court 1978 Term, Forward: The Forms of Justice", p. 93 *Harvard Law Review* p. 315 (1978).

10. Grey, Thomas C., "Freestanding Legal Pragmatism", 18 *Cardozo Law Review* pp. 41-42 (1996).

11. Cotter, Thomas F., "Legal Pragmatism and the Law and Economics Movement", p. 84 *Georgetown Law Journal* 2074 (1996).

12. Grey, op.cit., "Freestanding Legal Pragmatism", p. 22.

13. Posner, op.cit., *Overcoming Law* p. 463.

14. Tamantha, Brian Z., "Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction", p. 41 *American Journal of Jurisprudence* p. 315 (1996).

15. Indeed that the two intuitively go together is shown very clearly by looking at the philosophy of Descartes, where both are packages as if necessary compliments of each other.

16. Warner, Richard, "Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory", 1993 *University of Illinois Law Review* p. 541 (1993).

17. Cotter, Ibid., "Legal Pragmatism and the Law and Economics Movement", p. 2085.

18. Smith, Steven D., "The Pursuit of Pragmatism", p. 425.

19. Posner, Richard, The Problematics of Moral and Legal Theory (Cambreidge: Harvard University Press, 1999) p. 10.

20. Rosenfeld, Michel, "Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech", p. 18 *Cardozo Law Review* p. 98 (1996).

21. Posner, op.cit., *Overcoming Law* p. 252.

22. Posner, op.cit., *The Problematics of Moral and Legal Theory*, p. 227.

23. Smith, Steven D., "The Pursuit of Pragmatism", p. 100 *Yale Law Journal* p. 430 (1990).

24. Luban, David, "What's Pragmatic" p. 43.

25. Shutkin, William Andrew, "Pragmatism and the Promise of Adjudication", p. 18 *Vermont Law Review* p. 66 (1993).

26. Dewey, John, *Reconstruction in Philosophy* (Boston: Beacon Press, 1957). p. 165.

27. Shapiro, Martin, *Courts, A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1986). see especially pp. 2-6 for this analysis.

28. Dahl, Robert A., "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker", p. 6 *Journal of Public Law* p. 277 (1957).

29. Scheingold, Stuart A., *The Politics of Rights* (New Haven: Yale University Press, 1974). p. 161.

30. Ibid. p. 179.

31. Peller, Gary, "Neutral Principles in the 1950's" p. 21 *Journal of Law Reform* p. 561 (1988). Unfortunately the article is significantly flawed by a erroneous interpretation of John Dewey's influence on the ideology in question. Though this is a significant mistake it does not impinge upon the validity of the critique of proceduralism as an ideology.

32. Horowitz, Morton J., *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977). p. 254 (1977)(quoting O.W. Holmes).

33. Goldman, Sheldon, "The Effect of Past Judicial Behavior on Subsequent Decision-Making", p. 19 *Jurimetrics Journal* p. 208 (1979).

34. Rohde, David W. and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W. H. Freeman, 1976). p. 157 (1976).

35. Segal, Jeffrey A. and Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices", p. 83 *American Political Science Review* p. 561 (1989).

36. Ibid. p. 562.

37. Segal, Jeffrey A., et al, "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited", p. 57 *Journal of Politics* p. 821 (1995).

38. Ibid. p. 976.

39. Ibid. p. 978.

40. Ibid. p. 979.

41. Ibid. p. 981.

42. Ibid. p. 971.

43. Ibid. p. 983.

44. Indeed the only attempt at empirical refutation of this result that this author has studied infers from the use of precedent in briefs and in court opinions that precedent must have influence. This argument, of course, is viciously circular and does nothing at all to refute a claim of ideology. See Jack Knight and Lee Epstein, "The Norm of Stare Decisis", p. 40 *American Journal of Political Science* p. 1018 (1996).

45. Rosenberg, Gerald N., "Judicial Independence and the Reality of Political Power", p. 54 *Review of Politics* p. 369 (1992).

46. Horowitz, Donald J., *The Courts and Social Policy* (Washington: The Brookings Institution, 1977). p. 23.

47. Ibid. p. 32-36.

48. Ibid. p. 45.

49. Ibid p. 37.

50. Ibid. p. 255.

51. Ibid. p. 256.

52. McCleskey v. Kemp, Superintendent, Georgia Diagnostic and Classification Centre (1987), p. 481 U.S. 279 p. 309.

53. Chayes, Abram, "The Role of the Judge in Public Law Litigation", p. 89 *Harvard Law Review* p. 1281 (1976).

54. Rosenberg, Gerald N., *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: The University of Chicago Press, 1991). p. 342.

55. *Brown v. Board of Education*, p. 347 U.S. 483 (1954)(*Brown I*) and *Brown v. Board of Education*, p. 349 U.S. 294 (1955)(*Brown II*).

56. *Roe v. Wade*, 410 U.S. 113 (1973).

57. Rosenberg, Ibid., *Hollow Hope*, pp. 33-35.

58. Ibid. p. 52.

59. Ibid. p. 71.

60. It may be argued that my argument here seems somewhat one-sided. But given the huge investment the legal profession has in the legal model a little committed advocacy of the other side should be excused as a necessary strategy.

61. Indeed, to see an argument for the inherently conservative nature of pragmatism see William James, *Pragmatism (1995) p. 83-84.*
