ESSAY

PRAGMATISM AND THE PROMISE OF ADJUDICATION

William Andrew Shutkin*

INTRODUCTION

From Theory to Practice: In the District Court

Following graduation from law school, I spent a year as a law clerk for United States District Court Judge Franklin S. Billings, Jr. in Vermont. Like most clerkships, mine can best be described as a kind of "fourth year" of law school in which much of the doctrinal, largely theoretical, knowledge I had gained in the previous three years was brought to bear in the real world of district court adjudication. In rural Vermont, where the federal court docket is small in comparison to the congested dockets of more populous, more urban districts, the federal courts handle a surprisingly wide variety of matters with both alacrity and thoroughness. From skiing accidents to patent litigation, from complex drug offenses to novel constitutional claims, the cases in the federal courts in Vermont are representative of the varieties of federal litigation nationwide.

Moreover, on account of the manageability of the docket coupled with its diversity, the Vermont federal courts offer in sharp relief a glimpse of the power of federal adjudication to resolve disputes efficiently and competently. Here, in the trenches of the trial courts, all parties, whether represented by counsel or pro se, typically receive abundant opportunities to have their "day in court" and to argue fully the merits of their cases.[1]

It was in this context, sitting alongside the judge's bench, that I observed the age-old practice of adjudication. Whether in

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* Co-Director, Alternatives for Community and Environment; Visiting Scholar, Boston College Law School, 1993-95; Ph.D. candidate (Jurisprudence and Social Policy), University of California at Berkeley; M.A. (History), J.D. 1991, University of Virginia; A.B. 1987, Brown University. This essay was written while the author was a Regents Fellow at Berkeley in 1992-93. The author would like to thank William A. Currie and Joyce Maranville for their generous assistance.

1. In one case before Judge Billings the court allowed the pro se plaintiffs no fewer than six opportunities to appear before the court or to retain counsel despite numerous challenges by the defendants and several no-shows by the plaintiffs.

routine hearings on pre-trial motions or full-blown criminal trial proceedings, I saw the myriad workings of the law in action—as a student, as a lawyer, as a judge. Inevitably, I was moved to reflect on this occasionally wondrous, sometimes stupefying, phenomenon we call adjudication. I thought about what it means to be able to be heard by a judge or by one's peers, about the significance of argument and persuasion, and, more generally, about the virtues of what Roberto Unger calls "open-ended disputes about the basic terms of social life."[2]

Toward a Pragmatic Adjudication

In this essay, I consider the lessons I learned as a result of my clerkship in Vermont. Specifically, I put forward an opinion about the role of adjudication in our democracy and ways to improve that role. First, I briefly examine several perspectives on the practice of adjudication which legal scholars have offered as ways of either discrediting or justifying the activities of courts vis-a-vis social policy. Essentially, these are arguments about the substantive or structural dimensions of adjudication which diminish or, alternatively, enhance the capacity of courts to effectuate beneficial social change.[3] No one really disputes the value of adjudication in dealing with quotidian matters between litigants, although some take issue with its prevalence. It is in the hard cases, where the disposition and distribution of so-called fundamental rights and liberties are at issue, that the role of adjudication in our polity is so vigorously called into question.[4]

Second, I discuss the failure of general theories of adjudication to describe adequately the "nature" of adjudication as it is

2. ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1 (1986). Of course, litigation involves finality in the form of a decision, ostensibly putting an end to Unger's open-ended dispute. Yet, in a broader sense, litigation as it is practiced in this country denotes a dynamic process of continually revised opinions and often reversed decisions. In this way, litigation represents an enduring conversation, an ever-changing, though decidedly stable, discourse.

3. *See infra* notes 13-31 and accompanying text.

4. *See, e.g.*, WALTER K. OLSEN, THE LITIGATION EXPLOSION (1991) (discussing Americans' extraordinary reliance on litigation as a means of resolving disputes); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1978) (challenging the "myth of rights" and the role lawyers and litigation play in altering the course of public policy).

revealed day to day.[5] I then suggest, as many others now do,[6] that we should turn away from sophisticated theoretical analyses and turn instead to pragmatism as a way of talking about and practicing adjudication, whether in terms of routine litigation or more complicated, potentially problematic instances of adjudication.[7]

Pragmatism has become a fashionable discourse, not only in the law schools, but within other disciplines as well.[8] In large measure, this trend in the law signals a flight from the abstract, often sophistic, debates about judicial politics, particularly the legitimacy and authority of judicial acts, which have constituted much of the discourse over the decades. In an effort to "evade," to borrow Cornel West's apt term, the metatheoretical, objectivist dimensions of the traditional discourse, pragmatism stands as a conspicuously experiential approach to law and to social practice generally.[9]

In this light, I set out the features of a pragmatist conception of adjudication.[10] Then, I look at three cases, two from Judge Billings's court and another from the United States Supreme Court, about which I think a pragmatic approach has something compelling to say.[11] Finally, I consider briefly why the courts are an essential element of a pragmatic program and the role

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5. *See infra* note 32 and accompanying text. I use the word nature cautiously since I do not believe there is necessarily an essence to adjudication or any social practice which is logically prior to any uniformity of action vis-a-vis the social practice. Rather, I think that adjudication is a contingent social practice whose character and logic are determined largely by the particular social situation in which the practice occurs. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1968).

6. *See infra* notes 66-73 and accompanying text.

7. *See infra* notes 74-79 and accompanying text.

8. *See infra* notes 66-73 and accompanying text (discussing legal pragmatism). Concerning other disciplines *see* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989) (discussing pragmatism in philosophy); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM: ESSAYS: 1972-80 (1982) (same); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1980) (same); STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989) (discussing pragmatism in literature); ROSS POSNOCK, THE TRIAL OF CURIOSITY: HENRY JAMES, WILLIAM JAMES, AND THE CHALLENGE OF MODERNITY (1991) (same); PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1992) (discussing pragmatism in sociology).

9. CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISMS 5 (1989).

10. *See infra* notes 80-98 and accompanying text.

11. *See infra* notes 103-43 and accompanying text.

which education might play in furthering such a program.[12]

I. THE PRACTICE AND THEORY OF ADJUDICATION

A. Adjudication as Politics or Prophecy

"If the decisions of judges, no less than of legislators, are necessarily political—and hence necessarily grounded in some normative conception of the good—what politics should judges pursue, and on the basis of what conception of the good should they act?"[13] In the light of the sobering yet now banal notion that judicial acts are largely political, Professor Robin West asks, where does this leave judges and constitutional law in the realm of social practice? More particularly, West, a self-styled political progressive, queries whether judges who are currently by and large politically conservative and an adjudicative system which inevitably "exists to protect against change," can promote the kind of politics she espouses.[14] Her answer is a resounding "No!"

West explains that the aim of a progressive politics, or "progressive constitutionalism," is the abolition of subordinating and deleterious hierarchies, and that this necessarily entails distributive means for its attainment.[15] She says that progressive constitutionalism is open-ended, possibilistic and embodies aspirational ideals: the "unlived ideals informed by experiences of oppression."[16]

Conversely, the very idea of adjudicative law, West maintains, is antithetical to progressive constitutionalism. Adjudication, as she conceives it, is authoritarian, conventional, and traditional in its morality and elitist, hierarchical, and non-participatory in its processes.[17] It is, she decries, "particularistic" and "individualistic" whereas "progressivism is anything but."[18] She goes on to explain:

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12. *See infra* notes 144-47 and accompanying text.

13. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 644 (1990).

14. *Id.* at 714 (emphasis omitted).

15. *Id.* at 714-15.

16. *Id.* at 715.

17. *Id.* at 714-15.

18. *Id.* at 716.

> When we read our progressive politics through the lens of the Constitution, and then read the Constitution through the lens of *law*, we burden progressivism with the constraints, limits, doctrines, and nature of law. Progressivism—its very *content*—becomes identified with that which courts might do, and that which lawyers can feasibly argue. In the process, progressivism in the courts becomes weak and diluted. The consequence of this tension is not only, however, that progressivism in the Supreme Court is impoverished, although clearly it is. The consequence is also that progressive politics *outside* the Court is robbed of whatever rhetorical and political support it might have received from a de-legalized conception of the progressive Constitution.[19]

Finally, West lays out what for progressives is a gloomy syllogism. She says that if public morality is embedded in the Constitution, and if the Constitution is a form of adjudicative law, and if adjudicative law is antithetical to progressivism, then "progressive morality will *never* become part of our public morality, regardless of the composition of the Supreme Court."[20]

Thus, she concludes, progressives must look to Congress and legislative action for the possibility of a progressive constitutional discourse. "The key," West urges, "is to create a progressive Congress, and behind it a progressive citizenry. . . . All I want to suggest is that a life spent reorienting progressive constitutionalism toward participatory and democratic forums and away from the insulated and elitist judiciary would be a life well spent."[21]

West's progressive polemic against adjudication resonates with earlier critiques of the practice. Decidedly more irenic in tone and less overtly political, the critiques of Lon Fuller[22] and Donald Horowitz,[23] among others,[24] aggressively set out the

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19. *Id.*

20. *Id.* at 717.

21. *Id.* at 721.

22. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

23. DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

24. *See* Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

perceived fundamental features of adjudication as a means of stemming the rise of so-called public law litigation or structural reform litigation. By putting forward a classical model of adjudication (that is, a model which portrays adjudication as a piecemeal, passive, and retrospective process in which unrepresentative litigants raise exclusively claims of right or accusations of guilt and disinterested judges, constrained by rules and reasoned elaboration, choose among a few remedies) Fuller, Horowitz, and others hope to demonstrate that courts lack the capacity to handle "polycentric" problems or to make social policy.[25] In other words, the redistribution of economic resources and the alteration of contemporary social circumstances—the very desiderata which progressive constitutionalism promotes—are beyond the scope of adjudication and necessarily imperil the practice.[26]

Such a disenchanted view of adjudication is met by an alternative, thoroughly sanguine, interpretation of the practice. Advocated strongly by Abram Chayes in his article, *The Role of the Judge in Public Law Litigation*, this interpretation holds that "we have invested excessive time and energy in the effort to define—on the basis of the inherent nature of adjudication, the implications of a constitutional text, or the functional characteristics of courts—what the precise scope of judicial activity ought to be."[27] Chayes maintains:

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25. HOROWITZ, *supra* note 23, at 17-19; Fuller, *supra* note 22. Horowitz lists as the limiting features of adjudication vis-a-vis social policy, the following: piecemeal and passive process, limited remedies, unrepresentative litigants, consideration of only "historical" as opposed to "social" facts, and, the lack of policy review after the fact. HOROWITZ, *supra* note 23, at 35-51.

Rosenberg, in part, recites the Hamiltonian view of the courts as the "'least dangerous' branch" lacking the power of either sword or purse, thus profoundly limiting their ability to produce social change and leaving the American people free to govern themselves without interference from unelected officials. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 3 (1991).

He explains further that the issue of adjudicative capacity, brought to light when courts are involved in social reform, concerns essentially "the broadening and equalizing of the possession and enjoyment of what are commonly perceived as basic goods in American society." *Id.* at 4. He defines these "basic goods" as "rights and liberties, powers and opportunities, income and wealth," and self-respect. *Id.* (citing JOHN RAWLS, A THEORY OF JUSTICE 440 (1971)). Less abstractly, Rosenberg says these goods include such items as political participation, freedom of speech, non-discriminatory treatment, and the acquisition of material wealth. *Id.*

26. HOROWITZ, *supra* note 23, at 6; *see also* ROSENBERG, *supra* note 25.

27. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307 (1976).

> In practice, all government officials, including judges, have exercised a large and messy admixture of powers . . . . That is not to say that institutional characteristics are irrelevant in assigning governmental tasks or that judges should unreservedly be thrust directly into political battles. But such considerations should be taken as cautionary, not decisive.[28]

Thus, Chayes goes on to celebrate the attributes of litigation and its role in addressing disputes, whether they be matters of private or public law. These attributes include: the professional tradition of judges which insulates them from narrow political pressure; the contextual application of general policy; the participation of interested parties; the variety of information available to the courts; and, the non-bureaucratic, responsive character of judicial actors.[29]

In this way, then, courts and the adjudicative process generally can be seen, as Owen Fiss proposes, as "giv[ing] meaning to our public values."[30] In the light of the modern, bureaucratic state, the adjudicative process best works out what is right and just for our society by objectively approaching the text and history of our laws and social ideas and instantiating them in judicial decisions in actual cases. The process, on this view, is above both interest group politics and the bald force of majoritarianism.[31] To be sure, it, on this view, is a prophetic practice.

These divergent ideas about the practice of adjudication, from West to Fiss, suggest that possibly Chayes's "messy admixture," divorced from his interpretation of the attributes of adjudication, most aptly describes, or at least gets us closest to, a conception of adjudication with which we can live. That is, in the face of a dense, complex web of governmental and social activity, a cogent, monolithic account of adjudicative practice seems elusive. Clearly, there are compelling arguments for and against adjudication, whether or not it implicates matters of social policy. Yet, notwithstanding the lack of an elegant, complete theoretical model, we are left to contend with the practice and its conse-

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28. *Id.*

29. *Id.* at 1307-09.

30. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

31. *Id.* at 9-15.

quences.

B. After Formalism, Legitimacy, and the Rule of Law: Beyond Theories of Adjudication

The perspectives laid out in the previous section can be characterized as both descriptive and normative. That is, each purports to examine the mechanics of adjudication and the realities of social life and then evaluates them in fashioning a model of adjudicative practice consonant with our underlying or immanent social and political principles.

Adjudication has also been approached from an exclusively normative stance. The closely related discourses of formalism, legitimacy, and the rule of law purport to locate adjudicative practice in a larger theoretical framework grounded in liberal political theory[32]. These discourses, or theories, do not attempt to explain adjudication empirically but seek only to evaluate the concept of adjudication in terms of the political theoretical context in which it is embedded, namely, liberalism.

In relevant part, liberal political theory privileges the political and moral autonomy of the individual over the community and therefore holds that judges, as unelected government actors, must remain neutral among competing conceptions of the good. Moreover, to act neutrally is to act according to objective reason or, alternatively, according to consensual will embodied in laws. Otherwise, judges and the government of which they are a part *a fortiori* would act tyrannically, illiberally, by imposing personal preferences and prejudices upon litigants.[33]

These are foundationalist discourses in that they ground moral and political judgment and justify moral and political transformation in terms of transcendent principles. By appealing to foundations which exist beyond any given historical context, the theories of formalism, legitimacy, and the rule of law thus serve to defend against the possibility that knowledge and judgment reflect mere power and politics instead of rightness and

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32. Philosophically, these theories are of a whole. However, for didactic purposes, I will deal separately with each.

33. RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, LAW'S EMPIRE (1986); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 193 (Sanford Levinson & Steven Mailloux eds., 1988); JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

reason.[34]

Further, these discourses represent the core of grand theory in the constitutional law tradition[35] and constitute the backbone of Anglo-American jurisprudence.[36] Nevertheless, as I argue below, the priority which these theories have achieved in our legal tradition is less a result of their coherence than our preoccupation with theory-building.[37]

C. The Failure of Formalism

Formalism in legal practice denotes the practice of extracting intent from legal texts, either by strictly following the letter of the law or adhering to neutral principles of law laid down in advance. Thus, as interpreters, judges either objectively determine what the law is and systematically apply it to the case at hand or, in more difficult cases, consult consistent, intelligible standards which are then applied unfailingly in like cases. In this way, legal formalism promotes liberalism's proscription that judicial decisions not be arbitrary.[38]

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34. Arguments for original intent in constitutional discourse, for example, incorporate each of the theories I have introduced to justify contemporary adjudication. *See* RAOULE BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

35. *See generally* Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); Andrew L. Kaufman, *Judges or Scholars: To Whom Shall We Look for Our Constitutional Law?*, 37 J. LEGAL EDUC. 184 (1987).

36. *See* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1986); LON L. FULLER, THE MORALITY OF LAW (1964); F.A. HAYEK, THE POLITICAL IDEAL OF THE RULE OF LAW (1955); F.A. HAYEK, THE CONSTITUTION OF LIBERTY 162-75 (1960); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed., 1920). Of course, the discursive tradition goes back to Plato. *See* THE PHILOSOPHY OF SOCRATES: A COLLECTION OF CRITICAL ESSAYS (Gregory Vlastos ed., 1971). Perhaps its most robust embodiment, however, came in the seventeenth century in JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2d ed. 1967).

37. As Frank Michelman has noted, the discourse of law generally is "immemorially marked by the habitual equation of legality with formality." Frank Michelman, *~~Private~~ Personal but Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783, 1794-95 (1990); *see also* MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1976); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

38. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Legal formalism, like formalism in linguistic philosophy and foundationalism in moral philosophy, thus 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. Legal rules, on this account, are "formally realizable," self-applying.[39] As literary critics such as Stanley Fish and others have argued, to believe that legal texts or, for that matter, any text, have identifiable meanings is to conceive "truth as something independent of local, partial perspectives."[40] Formalism, in whatever guise, assumes that objective truth exists external to particular circumstances so as to make plain meaning "at once possible and essential" and to "assure order that is principled."[41]

However, as Fish points out, since identifying meanings ineffably involves interpretation, "the meanings that follow [interpretation] . . . will always be vulnerable to the challenge of an alternative specification."[42] Most texts, therefore, are largely indeterminate: singular, coherent meanings simply do not exist.[43] In response to the proponents of a liberal conception of adjudication in which determinate rules operate independent of the subjectivity of judges,[44] Fish suggests that constraints on judicial discretion come not from intelligible rules, but from the practice and profession in which judges operate: their interpretive community.[45] Thus, subjectivity in the alarmist sense, which someone like Fiss describes as a strawman for subjectivity, or "'mere preference' in the sense that makes it a threat to communal norms . . . will derive from norms inherent in some community."[46] Constraints are thus built into practices and professions in the same way they are built into the individuals who comprise them. Consequently, judges "have implicitly accepted some image of what their role in shaping and applying rules in controverted cases ought to be."[47]

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39. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

40. FISH, *supra* note 8, at 5.

41. *Id.* (emphasis omitted).

42. *Id.* at 8.

43. *Id.* at 8-9.

44. *See* Fiss, *supra* note 30; H.L.A. HART, THE CONCEPT OF LAW (1962).

45. FISH, *supra* note 8, at 11.

46. *Id.*

47. Tushnet, *supra* note 33, at 212.

Thus, formalism qua legal theory largely fails to account for the intricacies and complexities which render adjudication a dynamic social practice. By so abstracting the role of the judge into that of a wholly objective, essentially non-human agent, formalism defies the very practice which it is intended to represent.

D. The Impossibility of Legitimacy

The discourse of legitimacy in adjudication, akin to formalism, seeks to justify the authority of judicial acts and the obeyance to that authority in the light of liberal political principles. As Paul Kahn explains, theories of legitimacy have "aspired to achieve an understanding of the political order under which the regulatory demands of the community—a significant aspect of which are law—do not appear as external, coercive commands, but as consistent with, and even an expression of, individual autonomy."[48]

Thus, in seeking to legitimize the political order and particularly the actions of unelected judicial actors, legitimacy theories conceive authority and judicial action as encompassing both the individual and the community, the citizen and the state, so as to "portray the citizen's life under public law as simultaneously the individual's giving of law to himself."[49] Indeed, the discourse is principally played out in the attempt to reconcile the life of the individual with the authority of the state. In turn, this has resulted in appeals to two different models, what Kahn identifies as *reason* and *will*, in explicating and justifying the authority of law. The entire history of constitutional theory can be seen as a dialectic between these two models.[50]

To conceive constitutional law, and consequently constitutional adjudication, in terms of *reason* is to treat the Constitution as an expression of objective universal principles, and as a product of a science of politics, of reason. On this view, the constitutional order is legitimate because "reason is the normatively valuable component of personality. To the degree that one rejects or opposes the constitutional order, one is acting irrationally. The

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48. Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 81-82 (1989).

49. *Id.* at 82.

50. *Id.* at 1-7.

state is, therefore, our better self."[51] Alternatively, a theory of legitimacy based on *will* reconciles the life of the individual and the authority of the state by relying on the idea of consent. That is, "in confronting the constitutional order, the individual confronts only that to which he has already consented to be bound. The binding character of law derives from an affirmative act of the individual."[52]

In spite of such bold efforts to legitimize theoretically the authority of law, Kahn notes the persistent challenges to each of these theories of legitimacy which have resulted in the communitarian turn in contemporary constitutional theory[53]. Kahn describes contemporary constitutional theory as a synthesis of the models of *reason* and *will* which locates the legitimacy of the constitutional order in the "community of dialogue." Such theories are based on communitarian models in political and moral theory and respond to particular problems in the history of constitutional theory itself.

The New Republicans (Frank Michelman, Cass Sunstein, and Bruce Ackerman) and the Interpretivists (Robert Cover, Owen Fiss, and Ronald Dworkin) are the two schools of communitarian theory in contemporary constitutional discourse. Yet, as Kahn explains, each fails to support a concept of authority within a communal, discursive framework because the "authoritarian character of constitutional law is inconsistent with the egalitarian quality of the community of discourse."[54] To be sure, Kahn declares, "The emergence of community as the central conceptual structure of contemporary theory . . . accounts in part for the growing divide between theory and practice in constitutional law."[55]

Ultimately, the failure of theory to legitimize the constitutional order stems from the fundamental disjunction between

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51. *Id.* at 4; *see also* THE FEDERALIST NO. 10 (James Madison).

52. Kahn, *supra* note 48, at 4.

53. *Id.*

> Between reason and will, traditional constitutional theory faced a problematic choice. To choose the abstract principles of reason was to deny any place for the particularity of membership. To choose will, on the other hand, threatened to undermine the moral ground of the constitutional order: Rights are not simply the product of consent.

Id. at 4 (citations omitted).

54. *Id.* at 7.

55. *Id.*

community and authority. As much as we would like to understand the authority of law as at once a product of *reason* and *will*, "[t]heory must go on to seek the resolution of antinomies within which law must live. Law exercises authority, even if it cannot give a theoretically complete account of the legitimacy of that authority. . . . Authority and discourse are both powerfully attractive ideas, but that does not make them reconcilable."[56]

Alan Hyde also has demonstrated the disjunction between the idea of legitimacy and the authority of law. He explains the inefficacy of theories which attempt to legitimize the legal order as deriving largely from their irrelevance. That is, the legitimacy of the legal order has little or nothing to do with the actual practice of law or why individuals comply with or disobey the law.[57] Rather, what explains the authority of legal decisions are the "rational calculations by citizens of the benefits of obedience and the costs of noncompliance . . . shaped powerfully by ideology, false consciousness, or cultural definition."[58]

Thus, again, theory comes up short when pitted against the disparate circumstances of the law in action. Try as it may, the discourse of legitimacy cannot account for realities outside of its own conceptual framework. As with legal formalism, legitimacy theory leaves a yawning gap between itself and adjudicative law.

E. Redescribing the Rule of Law

Within the context of liberal political discourse, the concept of the "rule of law, not men" has traditionally played a central role and continues to wield considerable discursive force.[59] Notwithstanding its prominence, the ideal of the rule of law is, as

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56. *Id.* at 85.

57. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 386.

58. *Id.* at 397. Hyde is critical of Max Weber's conception of legitimacy as a state of widespread belief that an order is obligatory or exemplary and that that belief is a reason for action. *See* MAX WEBER, 1 ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Clause Wittich eds., 1968); MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Edward Shils & Max Rheinstein trans., 1954).

Rather, Hyde looks to Jurgen Habermas's formulation of legitimacy as a "contestable validity claim" grounded in particular substantive, rational interests. JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (Thomas McCarthy trans., 1979). On this view, *"[l]egitimacy means a political order's worthiness to be recognized." Id.*

59. *See supra* note 36.

Margaret Jane Radin states, "deeply contested."[60] No canonical formulation of the meaning of the rule of law exists among those who affirm the ideal, while critical theorists argue that the ideal itself is merely a cleverly masked ideology.

The concept of the rule of law, in the traditional sense, denotes that rules must determine the decisions of judges to the fullest extent possible and that a single right answer in a particular case can be derived from the deductive application of general rules. In this way, the rule of law mimics a formalist conception of rules wherein rules are self-applying.[61] Just as theories of legal formalism and legitimacy purport to show how the legal order confirms liberal political values, so too do rule of law theories speak to constraints which compel judges to act objectively, in accordance with transcendent political principles.

Yet, as Radin persuasively insists with the aid of Wittgenstein's philosophy of language, no rules exist prior to social practice such that they are merely deductive or self-applying. Especially in difficult cases, where social practice has not yet fashioned a cogent rule, deductive rules, and the rule of law generally, have very little to say about what judges actually do in making decisions.[62]

On this view, what Radin deems the "social practice" or pragmatic Wittgensteinian conception of the rule of law, the rule of law is understood best as the "tendency of 'applying' rules to coalesce with 'making' rules; the tendency of the 'rule' to coalesce with the 'particulars falling under it'; the idea that rules are contingent upon whole forms of life and not just specific acts of a legislature; and the essential mutability of rules."[63]

Rather than reject the idea of the rule of law altogether, Radin suggests that we reinterpret the idea so as to view the law as a pragmatic, normative activity: an interpretive practice in which the application and generation of rules exist indistinguishably with the politics, values, and commitments of those who practice adjudication. She urges that we keep the ideal of the rule of law because it "constitut[es] . . . ourselves as a political community."[64] Thus, she hopes to preserve the substance of the

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60. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

61. *See supra* note 39 and accompanying text.

62. Radin, *supra* note 60, at 798-804.

63. *Id.* at 807.

64. *Id.* at 813 (citation omitted).

ideal, namely, notice, non-retroactivity, and the separation of powers, but in pragmatic form.[65]

As Radin effectively demonstrates, traditional theories or concepts of the rule of law as they relate to social practice are effete, empty. Though the ideal which the rule of law discourse promotes is valuable in our political community, its value is not attributable to its theoretical elegance or cogency. Rather, it is valuable because, in the interpretive practice of adjudication, judges sometimes not only consider conventional circumstances but also imagine a better future when deciding hard cases. Judges, then, procure a vision while embracing the realities of particular cases.

F. The Disjunction of Theoretical Discourse and Adjudication: Toward a Pragmatic Approach

As I hope the brief discourses on theories of formalism, legitimacy, and the rule of law have shown, such theories qua theories have less to offer adjudication, either heuristically or practically, than they suggest. By purporting to stand apart from the practice they describe, and to constrain that practice on account of their generality, these theories betray their own impotence: their conceptual transcendence largely negates their constraining influence. "[N]o constraints," Fish dramatically claims, "are more than the content of a practice from which they are indistinguishable—there can be no such thing as theory, and something that does not exist cannot have consequences."[66]

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65. Thus, for instance, a pragmatic rule of law would hold that notice means that a rule will be public whenever there is clear social agreement in practice regardless of whether a court or legislature has promulgated the rule. Concerning the separation of powers, a pragmatic view holds that majoritarian and countermajoritarian commitments, realities and ideals, underlie the Constitution. She explains:

> In this pragmatic view of politics, we are always attempting to accomplish a transition from today's nonideal world to the better world of our vision, and it is a transition that never ends. Moreover, our visions and our nonideal reality paradoxically constitute each other: what we can formulate as being better depends upon where we are now, and the way we understand where we are now depends upon our vision of what should be.

Id. at 816 (citation omitted). Thus judges, as an interpretive community, are always conscious of their obligation "to act as independent moral choosers for the good of a society, in light of what that society is and can become." *Id.* at 817. Law, moreover, is thus continuously reinterpreted. Neither found nor made, it is always contextual, always contingent.

66. FISH, *supra* note 8, at 14.

Grand theory in law, or what Fish calls "theory-talk,"[67] persists more, it seems, of its own momentum than its actual consequences. Though perhaps a worthy academic enterprise, the effort to explain cogently and completely the practice of adjudication in terms of transcendent principles has proved essentially unsuccessful. Possibly failure is inexorable. Again, Fish:

> Both those who fear theory and those who identify it with salvation make the mistake of conceiving it as a special kind of activity, one that stands apart from the practices it would ground and direct. If there were a theory so special, it would have nothing to say to practice at all; and, on the other hand, a theory that does speak meaningfully to practice is simply an item in the landscape of practices.[68]

It is in the light of this perceived failure of theory to address adequately adjudication and to offer ways of improving the practice that I look to a pragmatic approach. Conspicuously anti-foundationalist in tone and substance, pragmatism holds that "no single theory is ever likely to serve satisfactorily as an all-purpose or final guide to life."[69] In other words, to be a pragmatist "means never having to say you have a theory."[70] It also means that the seemingly insoluble questions which foundationalist legal theory has attempted to solve need not preoccupy us any longer, for "[w]e do not solve them: we get over them."[71]

Moreover, pragmatism is committed to the notion that "we can judge what the law is as [a] matter of fact only by telling how it operates, and what are its effects in and upon the human

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67. *Id.*

68. *Id.* at 566 n.44.

69. Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1578 (1990).

70. J.M. Balkin, *The Top Ten Reasons to Be a Legal Pragmatist*, 8 CONST. COMMENTARY 351 (1991).

71. 4 JOHN DEWEY, *The Influence of Darwinism on Philosophy*, *in* THE MIDDLE WORKS OF JOHN DEWEY, 1899-1924, at 14 (Jo Ann Boydston ed., 1977). Richard Rorty puts it a bit differently when he says: "If we pragmatists are good for anything in the present cultural situation, it is because we supply a bit of informed irony about the ever-renewed hope for authority." Richard Rorty, *What Can You Expect From Anti-Foundationalist Philosophers?: A Reply to Lynn Baker*, 78 VA. L. REV. 719, 727 (1992).

activities that are going on."[72] A pragmatist account of law therefore rejects a conception of law as based upon immutable principles and realized in deductive, logical application of those principles. As well, such an account sees the law as an instrument for social ends.[73] As such, pragmatism seeks to make the law work as best it can in the service of democracy.

II. ENTER PRAGMATISM

A. The Primacy of Democracy and Inquiry

In the writings of John Dewey we see pragmatism at its pinnacle.[74] Embracing the faith in scientism which marks much of the intellectual history of the late nineteenth century, including the work of the early pragmatists C.S. Pierce and William James,[75] Dewey believes that abstractions, absolutisms, and autonomous discourses are merely efforts to escape from the realities of human struggles for power or wealth or selfhood. Therefore, Dewey argues that "[i]t is always in place to be doubtful and skeptical about particular items of supposed knowledge when evidence to the contrary presents itself. . . . [A]ll knowledge is the product of special acts of inquiry."[76] "The essential need," he writes, "is the improvement of the methods and conditions of debate, discussion and persuasion. . . . [I] have

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72. *John Dewey, in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 71, 77 (1941) (emphasis omitted).

73. *But see* Sotirios A. Barber, *Stanley Fish and the Future of Pragmatism in Legal Theory*, 58 U. CHI. L. REV. 1033, 1043 (1991) (Barber argues that pragmatists have nothing to say to judges because they are moral skeptics. Only moral realists can advise judges because "[t]hey [are] the only theorists who have reason to accept the meaningfulness of the questions judges face, questions about the demands of justice and law in hard cases."); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 411, 448 (1990) (Smith argues that pragmatism offers little that judges and lawyers do not already know and serves only to remind them to practice pragmatically. Ultimately, pragmatism avoids the difficult and controversial substantive judgments that a better, more courageous theory might offer.).

74. *See* WEST, *supra* note 9, at 71.

75. *See* DAVID A. HOLLINGER, *William James and the Culture of Inquiry, in* IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS 3, 3-22 (1985). In a later work, Hollinger explains that pragmatic scientism was "profoundly under the sway of the ideal of the Knower" but was also committed to the belief that "'finding' was a form of 'making,' that science entailed acting upon and reshaping the world rather than merely mirroring it." David A. Hollinger, *The Knower and the Artificer, in* MODERNIST CULTURE IN AMERICA 42, 53-54 (Daniel S. Singal ed., 1991).

76. JOHN DEWEY, THE QUEST FOR CERTAINTY 193-94 (1929).

asserted that this improvement depends essentially upon freeing and perfecting the processes of inquiry and of dissemination of their conclusions."[77]

Inquiry and knowledge together constitute what Dewey calls "intelligence." The alternatives to intelligence, he warns, "are either drift and casual improvisation, or the use of coercive force stimulated by unintelligent emotion and fanatical dogmatism."[78] Thus, Dewey writes: "Faith in the power of intelligence to imagine a future which is the projection of the desirable in the present, and to invent the instrumentalities of its realization, is our salvation. And it is a faith which must be nurtured and made articulate. . . ."[79]

In turn, intelligence must serve democracy. For Dewey, democracy is the idea of communal life itself which, in practice, provides the framework for individuals to express their interests, to take seriously the consequences of those interests, and ultimately to develop ways of promoting attractive consequences and preventing obnoxious ones. Thus, the ideal community is one in which citizens can plan conduct, learn relevant facts, and make experiments so that they may come up with better resolutions to human predicaments. In short, the ideal community, the ideal democracy, is an intelligent one.

B. The Contours of a Pragmatic Adjudication

Now, with pragmatism's commitment to democracy and to intelligence as a backdrop, we can discuss the constituent features of a pragmatic adjudication. Wedded as it is to Holmes's famous dictum that "[t]he life of the law has not been logic: it has been experience,"[80] pragmatic adjudication privileges method and experiment over pristine deductive analysis. It implements the general inquisitive practice of creative democracy in the practice of adjudication and holds that "[t]here is a difference between the

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77. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 208 (1954).

78. JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 51 (1935).

79. John Dewey, *Need for a Recovery of Philosophy*, *in* ON EXPERIENCE, NATURE, AND FREEDOM: REPRESENTATIVE SELECTIONS 69 (Richard J. Bernstein ed., 1960).

80. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (Dover Publications 1991) (1881); *see* Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988) (discussing accounts of Holmes' pragmatism); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

coherence of ideas . . . and the coherence of our lives or the coherence of practical judgment."[81] Therefore, a pragmatic judge is not committed to any static, substantive conception of justice.[82] She does not emphatically believe in "inalienable human rights," or "one right answer" to moral and political problems.[83] Instead, in a manner similar to John Rawls, she believes that

> [w]hat justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.[84]

The same perspective holds for rights and legal dogma generally. As Dewey explains:

> A moral law . . . is not something to swear by and stick to at all hazards; it is a formula [whose] . . . soundness and pertinence are tested by what happens when it is acted upon. . . . [Although it was thought] that adherence to standards external to experienced objects is the only alternative to confusion and lawlessness[,] . . . [in fact the] test of consequences is more exacting than that afforded by fixed general rules.[85]

Thus, in deciding hard cases, a pragmatist judge looks both backward and forward, to our history of rules, conceptual structures, and social practices as well as to the consequences of our present actions in the light of our aspirations. Yet she comes to the case with no binding commitments to a set of rights or

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81. Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 463 (1987).

82. James Kloppenberg writes of Dewey that he "refused to give priority to any substantive concept of justice, preferring instead to stress the desirability of a certain method of ethics." JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920, at 144 (1986).

83. *See* 1 RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 175-81 (1991).

84. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 519 (1980).

85. DEWEY, *supra* note 76, at 278.

doctrines which will force upon her a certain decision.[86] In this way, pragmatic adjudication provides a modicum of regularity and predictability[87]—treating like cases alike, for instance—while allowing the judge to modify or reject social practices which create human hardship and to promote those which encourage enrichment.[88] Past experiences, then, serve as "intellectual instrumentalities of judging"—they are "tools, not finalities"—and help to promote a better future.[89]

Ronald Dworkin, a critic of pragmatism, holds that pragmatism is exclusively forward-looking, neglecting past practices and principles. Pragmatism, he claims, thus lacks "integrity." It is, on Dworkin's account, a form of bare instrumentalism. He writes, "[t]he pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do."[90]

Dworkin's is an impoverished view of pragmatic practice. To be sure, pragmatic adjudication is concerned with what is best for the future. Ineluctably, however, this determination depends upon the past, particularly the legal professional tradition.[91] Embedded in an interpretive community, judicial acts are always shaped by the recurring norms of judicial practice. Moreover, that the pragmatist judge takes into account "the circumstances" of any particular case is perhaps pragmatic adjudication's most attractive, compelling feature.[92]

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86. *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1378 (1988). In Farber's view, the pragmatic judge recognizes that the practice of protecting unwritten and fundamental rights is strongly embedded in our legal and social traditions and is a valuable part of the constitutional process. However, when considering which rights to recognize, the pragmatic judge will weigh the competing interests at stake, past, present, and future, divorced from orthodox or dogmatic concerns. *Id.*

87. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924).

88. In the context of constitutional interpretation, Robin West explains that a pragmatic judge "supports whatever interpretation of constitutional clauses encourages a free play of the method of intelligence and a liberation of inherent human potentiality." Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 735-36 (1985).

89. DEWEY, *supra* note 76, at 272.

90. DWORKIN, LAW'S EMPIRE, *supra* note 33, at 161.

91. *See* FISH, *supra* note 8, at 87-120.

92. Certainly, it is acknowledged by those calling for a more pragmatic adjudication that most judges and lawyers, if they are good ones, practice in a pragmatic fashion to some degree—they are attentive to circumstances, contexts, and details. Nevertheless, the pervasive influence of abstraction and generality in the practice of law often renders

Pragmatic adjudication engages the complicated, dense character of the context with which it is concerned. It recognizes that society is "composed of overlapping communities with differing experiences"[93] and that these experiences must be considered seriously. Acknowledging that traditional modes of adjudication are to some degree contextual in that they routinely privilege one set of contexts over another, pragmatism demands that all contexts, all sides of a dispute, be listened to closely and scrutinized intelligently.[94] Pragmatism views all thinking as at once contextual, embodied in certain practices, and practical, directed to solving problems.

Characteristics of context include biography, economic and political structure, and membership in racial or ethnic communities, among others, and they shape judicial interpretation of texts and arguments. Attention to context grounds abstract notions like rights and principles in the narratives of the respective parties and thereby enables decisions to comport with particular, situated experiences. Thus, pragmatic adjudication embraces

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pragmatist judges and lawyers blind to the particular features of individual cases. Thus, pragmatism demands of lawyers and judges that they always endeavor to reconstruct events from the perspectives of the various parties and criticize that reconstruction until they are fully satisfied that their efforts represent the "best [they] could do under all the circumstances of this case." Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1728, 1736 (1990). The antithesis of this kind of reconstructive analysis is decisionmaking which relies on abstract principles of law and correspondingly abstract theories of justification. *Id.*

93. Joseph W. Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1840 (1990). Singer differentiates between critical and complacent pragmatism, the former being defined as challenging existing structures, e.g., market, democracy, and the latter as unreflective reliance on common sense and existing practices. Critical pragmatism, Singer rightly describes, has its roots in Deweyan principles. *See* John Dewey, *Philosophers of Freedom*, *in* FREEDOM IN THE MODERN WORLD 236, 249-50 (Horace M. Kallen ed., 1928).

Singer goes on to illustrate effectively a critical pragmatist practice in the light of the recent Supreme Court decision, Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439 (1988). He demonstrates that the Court took a complacent pragmatist stance when it deferred to traditional religious arrangements and conceptions of property in denying the Native Americans' claim that the First Amendment guarantee of free exercise of religion should prevent the government from building a road that would cause a grave threat to the Indians' ability to practice their religion. Singer, *supra*, at 1830-36.

A critical pragmatism, he persuasively claims, would approach existing conceptions of property rights, for example, with the understanding that such conceptions "were *not* made with American Indian conceptions in mind. More precisely, they were explicitly intended to *exclude* American Indian claims to land and to justify settlement of the New World and dispossession of its inhabitants." *Id.* at 1836.

94. *See* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990); Grey, *supra* note 69.

context and attempts to incorporate understanding of one's own experience in the effort to understand the situation of others.[95] Concern for context, on the pragmatic view, entails examination of diverse forms of evidence, whether from the senses, logic, or personal experience. Since pragmatism has "no prejudice whatever, no obstructive dogmas, no rigid canons of what shall count as proof,"[96] pragmatic adjudication is either more or less tolerant of evidence, depending upon the context, than traditional adjudication.

For example, as Martha Minow and Elizabeth Spelman demonstrate, pragmatic adjudication in the context of child abuse cases would discountenance the practice of forcing a child to confront the alleged perpetrator of abuse in open court notwithstanding the Confrontation Clause.[97] This is to acknowledge that child abuse is a serious and pernicious offense which is compounded when the alleged victim is compelled to confront, quite literally, her nightmare. The abstract doctrine of the Confrontation Clause is thus reduced to an examination of several contexts—the framers', the defendants', the children's—and brought to bear in the light of the particular case and its potential consequences.[98]

C. Pragmatic Adjudication and Oppression

A pragmatic approach to adjudication also realizes that traditional adjudication has historically used abstract, general prescriptions in making decisions and, consequently, has overlooked the claims of subordinated groups and the clear patterns of injustice which have given rise to them. As Dewey notes, the "worship of reason discourage[s] reason, because it hinder[s] the operation of scrupulous and unremitting inquiry."[99] As a result, oppression goes either undetected or willfully neglected. Thus, pragmatism is "attractive to subordinated people because it is

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95. THOMAS NAGEL, THE VIEW FROM NOWHERE (1986); THOMAS NAGEL, EQUALITY AND PARTIALITY (1992).

96. WILLIAM JAMES, *Pragmatism*, *in* THE WORKS OF WILLIAM JAMES 44 (F. Burkhardt ed. 1975).

97. Minow & Spelman, *supra* note 94, at 1640-41.

98. *See* William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) (discussing contextual decision making and its merits in the area of welfare reform).

99. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 165 (Beacon Press 1957) (1920).

often their indigenous method. Pragmatism recognizes multiple consciousness, experimentation, and flexibility as tools of inquiry."[100]

Pragmatic adjudication, by encouraging a more inclusive, ecumenical approach to argument and decision making, inevitably facilitates judgments which are more sensitive to the "cries of the wounded."[101] By "direct[ing] our attention to the messy details of the world around us," pragmatism brings to adjudication a genuine concern for the consequences of established legal institutions and the decisions which issue from them.[102]

Ultimately, then, the courtroom is an ideal forum for the pragmatic method. Adjudication facilitates a focus on particular, situated claims and allows varieties of arguments and evidence to be marshalled in support of those claims. In turn, the pragmatic judge is able to reflect critically, conscientiously, on the claims presented and render a decision based on a diverse, comprehensive set of data as well as the traditions and aspirations of the professional culture in which she is embedded. Thus, whether a routine cause of action or a claim involving fundamental rights or contested matters of social policy, pragmatic adjudication provides as good an arena as possible for debating and resolving disputes that have gone unresolved elsewhere.

III. REFLECTIONS ON A PRAGMATIC JUSTICE

Having now discussed what I consider to be the merits of a pragmatic approach to adjudication, and having examined the failure of traditional theories of adjudication to account satisfactorily for the practice, I describe below illustrative cases in which pragmatism speaks constructively to the matter at issue. Through this brief analysis, I hope to show the benefits which

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100. Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764 (1990) (citation omitted).

101. WILLIAM JAMES, *The Moral Philosopher and the Moral Life*, *in* THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 184, 210 (1956).

102. Singer, *supra* note 93, at 1822. *But see* Lynn A. Baker, *"Just Do It": Pragmatism and Progressive Social Change*, 78 VA. L. REV. 697, 697 (1992) ("[P]ragmatism is of scant use for achieving progressive social change."); William G. Weaver, *Richard Rorty and the Radical Left*, 78 VA. L. REV. 729, 755 (1992) (Weaver argues that efforts to press Rorty's pragmatic agenda into the service of law is a mistake if radical left fails to replace the traditions and ways of speaking they claim to deplore. Radical left conforms to a discursive style of representationalist argument instead of creating new languages capable of reshaping beliefs and desires.).

uniquely attend pragmatic adjudication.

A. United States v. Madkour *or, The Priority of Context to Justice*

On July 8, 1989, Michael P. Madkour, a recent graduate of the University of Vermont who had no criminal history, was arrested after agents from the Drug Enforcement Administration observed him dispersing marijuana plants in an area within the Green Mountain National Forest near Lincoln, Vermont. Madkour was charged with manufacturing and possessing with intent to manufacture over 100 marijuana plants.[103]

Under the applicable statute,[104] a finding that the defendant possessed in excess of 100 plants would require imposition of a mandatory minimum sentence of five years notwithstanding that the Federal Sentencing Guidelines, given the same offense conduct and no criminal history would impose a range for imprisonment of fifteen to twenty-one months. The statute further requires that the finding of quantity is not a matter for the jury since quantity is not considered an element of the offense.[105] Instead, the statute contemplates that quantity is a matter to be decided by the court as part of the sentencing procedure. Accordingly, a preponderance of the evidence standard, rather than a beyond a reasonable doubt standard, is used to determine quantity.

Madkour pleaded guilty before Federal District Court Judge Franklin S. Billings, Jr., but refused to admit that the two counts with which he was charged involved 100 or more plants. Ultimately, by a preponderance of the evidence, the court found that 131 marijuana plants were involved. The mandatory minimum thus applied and Madkour was sentenced to five years in federal prison.

At the time of sentencing, Judge Billings made the following impassioned remarks:

> I would like to indicate to you that this case and the sentence therein cries out for justice. We think there's an unjust effect in connection with the mandatory

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103. United States v. Madkour, 930 F.2d 234, 235 (2d Cir. 1991).

104. 21 U.S.C. § 841(b)(1)(B) (1988).

105. *Id.*

> sentence enacted by the Congress covering this matter.
>
> . . . This case illustrates the grave miscarriage of justice that results from this type of statute.
>
> This type of statute does not render justice. This type of statute denies the judges of this court and of all courts the right to bring their consciences, experience, discretion and sense of what is just into the sentencing procedure. And it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just.
>
> It violates the rights of the judiciary and of the defendants and jeopardizes the judicial system. In effect . . . it gives not only the Congress, but also the prosecutor the right to do the sentencing, which I believe is unconstitutional. But, unfortunately, the higher courts have ruled it to be constitutional.
>
> I'm obviously required to follow the law, but the rule of law presupposes that it will serve justice. The mandatory minimum sentences do not serve justice and should be repealed. And this case graphically illustrates the failure of the justice system.
>
> . . . .
>
> I would indicate to you except for the mandatory minimum, that this Court would have sentenced you to the minimum of 15 months.[106]

Notwithstanding Judge Billings's powerful polemic against mandatory minimums, Madkour, a young man who had plainly accepted responsibility for his actions and who had shown no propensity for continued criminal conduct, was sent to prison for a term greater than the amount of time he spent in college. Judge Billings's strong invective was not lost on the Second Circuit, which, in dicta, extolled the importance of judicial discretion and despaired the courts' inability to disregard the clear mandate of Congress, "however ill-advised we might think it to be."[107] Where is the pragmatism, we might query? And what does it possibly have to say about this kind of adjudication?

To begin, it is clear that Judge Billings did all he could to render, in the light of his conscience and experience, what he

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106. United States v. Madkour, No. 89-CR-59-1, slip op. at 9-11 (D. Vt. June 11, 1990).

107. *Madkour*, 930 F.2d at 239-40.

considered a just outcome. Hamstrung by a clear congressional mandate spelled out in the statute as well as in the decisions of higher courts, Judge Billings nevertheless spoke out emotionally and forcefully against the statute. As an attempt eventually to persuade Congress to repeal the mandatory minimum scheme, Judge Billings's dicta sounded a deep chord. In this sense, having considered critically the various arguments before him, and having weighed the competing contexts of the defendant and of the court vis-a-vis Congress, Judge Billings's resounding plea seems an appropriate course of action, a pragmatic response to a difficult situation. In other words, as an attempt to restore the discretion which Congress took away from the judiciary when it enacted mandatory minimum sentences, and as a call for judges "to bring their consciences, experience, discretion and sense of what is just into the sentencing procedure," Judge Billings's dicta resonates with pragmatist ends. Ultimately, Judge Billings's compelling disputation betrays a commitment to the pragmatist notion that the judge's role should be a discretionary, supple one, free from dogmatic or formalistic constraints and dedicated to examining the features of particular contexts.[108]

B. United States v. Manning *or, Balancing Family and Society*

In another case before Judge Billings, the court was actually able to effectuate a pragmatic outcome, however painstakingly.

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108. *See also* Alan M. Dershowitz, *Justice On Trial*, N.Y. TIMES, Nov. 18, 1992, at A27. The same pragmatist diatribe can be inveighed against the Federal Sentencing Guidelines. Designed specifically to take away judicial discretion in hopes of bringing uniformity to all federal sentences, the Guidelines have met fierce criticism at the hands of judges and scholars who claim that the rigid mandatory sentencing formulas which the Guidelines employ result in blatantly disproportionate and unjust sentences. *See* Jose A. Cabranes, *Incoherent Sentencing Guidelines*, WALL ST. J., Aug. 28, 1992, at A11; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991). Ironically, the application of the Guidelines in *Madkour* would have resulted in a significantly lesser sentence than the mandatory minimum imposed by the statute. Nevertheless, both the Guidelines and mandatory minimums serve severely to limit the discretion, and hence the contextual capacity, of courts.

Further, not only do the Guidelines, like mandatory minimums, result in grossly disproportionate sentences, but they operate in a perverse manner, sending minor offenders to prison for long terms while allowing serious criminals, that is, the ones with the most information to give to prosecutors in return for lighter prison terms, to go relatively unpunished. *See* Marcia Chambers, *Sua Sponte*, NAT'L L.J., Oct. 19, 1992, at 13, 13-14.

In the early Fall of 1988, the Vermont police became aware of large telephone bills incurred by Scott and Patricia Manning, unemployed Northfield residents who lived with their four children. At the same time, the police noticed that many of the calls were placed to a residence in New York City, later discovered to be the home of a major drug distributor. A year later, the police became advised by concerned citizens that the Mannings were dealing heroin and regularly making trips to New York to obtain drugs from their source of supply.[109]

After considerable investigation and surveillance of the Mannings' frequent trips to New York from late 1989 to early 1990, the Vermont police arrested the Mannings on June 1, 1990 upon their reentry into Vermont on Interstate 91 following a drug-buying spree in New York. It was later determined that the Mannings purchased at least 250 bags of heroin and one pound of cocaine on each trip.[110] The total quantity of drugs secured amounted to 82.5 kilograms of heroin, 2.46 kilograms of cocaine, and 226.8 grams of marijuana.[111] Further, it was learned that the Mannings had at least ten resale customers who came to their house and purchased drugs.

Under the Sentencing Guidelines, the Mannings faced long prison terms. Scott Manning was found to have a total offense level of thirty, having taken into account an enhancement of two levels for obstruction of justice after determining that he had intimidated potential witnesses.[112] Patricia Manning, the court

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109. United States v. Manning, No. 90-CR-44-01-02, slip op. at 1-2 (D. Vt. Sept. 24, 1990).

110. United States v. Manning, No. 90-CR-44-01-02, slip op. at 2 (D. Vt. Mar. 23, 1990).

111. United States v. Manning, No. 90-CR-44-01-02, sentence at 33 (D. Vt. Apr. 21, 1992). These findings were made after reconsideration of prior findings derived from an evidentiary hearing on March 23, 1992. The court was committed to reaching the most accurate, exhaustive decision it could before passing judgment on the essential matter of quantity, especially in the light of the extraordinary circumstances surrounding the case.

112. The Sentencing Guidelines operate much like a simple index or grid with two axes: one axis denotes the defendant's criminal history category and the other the defendant's base offense level. The criminal history axis is a function of the defendant's past criminal record; the base offense axis is a function of the severity of the instant crime as defined by the Guidelines themselves. With the grid before him, the judge locates the appropriate criminal history category and base offense level and then finds the point on the grid where the two meet. This mechanical calculation results in a specific sentencing range. In turn, the sentencing range can be adjusted — "upward departure" or "downward departure" — depending on circumstances or issues peculiar to the instant case which the Sentencing Guidelines either explicitly contemplated or could not have contemplated at the

held, had a total offense level of twenty six, having deducted two levels for acceptance of responsibility. In all, the Mannings faced ten and six year prison terms, respectively.

The Mannings had argued for downward departures, as allowed by case law and the Guidelines, based on youthful lack of guidance, participation in drug rehabilitation, and family ties and responsibilities.[113] Initially, the court rejected each of these claims, citing the rigorous demands of the Guidelines.[114] Precedent under the Guidelines concerning rehabilitation and family-related claims was clear in its rigid requirement of extraordinary circumstances and arguably did not countenance departure in the Mannings' case. That the Mannings had sold and used drugs in the presence of their children, notwithstanding other factors, strongly militated against their plea for judicial largesse. Clearly, a solid case was to be made that the Mannings had given up any rightful claim to mitigation based on family commitments in the light of their conduct.

However, at the time of sentencing, the court reexamined the defendants' claims of rehabilitation and family ties and responsibilities. The court looked very conscientiously at the Mannings' potential to become better parents and, more importantly, at the fate of the four children, should their parents be incarcerated for such significant terms. At the sentencing, the attorney for Scott Manning pleaded, "[this case] cries out for departure in terms of the background of the defendants and the facts of this case."[115] He went on:

> I would like to encourage the Court to look at what the Mannings have done since [their arrest] and try and give as much emphasis to the progress that they have

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time they were enacted. *See* UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (West 1991); *see also* Freed, *supra* note 108; Alschuler, *supra* note 108; Charles J. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988).

113. *See, e.g.*, United States v. Floyd, 945 F.2d 1096, 1100 (9th Cir. 1991) (youthful lack of guidance is an appropriate basis for downward departure); United States v. Sklar, 920 F.2d 107, 116 (1st Cir. 1990) (rehabilitative efforts may, on rare occasion, serve as a basis for downward departure); United States v. Sharpsteen, 913 F.2d 59, 63 (2d Cir. 1990) (extraordinary family circumstances may be considered for downward departure).

114. United States v. Manning, No. 90-CR-44-01-02, slip op. at 5-7 (D. Vt. Mar. 23, 1990).

115. United States v. Manning, No. 90-CR-44-01-02, sentence at 12 (D. Vt. Apr. 21, 1992).

made since they were arrested. . . .

. . . .

. . . I don't think there's any question that both the Manning [sic], who were severe drug addicts and who would do anything to get a fix, have made remarkable progress since the date that they were arrested. They've put their lives together. They've continued their education. They have four well-adjusted children. And they [have] turn[ed] their attention toward their children.

. . . .

So I really do think . . . the Court if it chose, given the unique family circumstances, just the fact that there's two parents facing incarceration with four young children, I think that in and of itself is unique enough that the Court can take a position that . . . was not a factor considered by the framers of the guidelines . . . and would warrant a downward departure . . . I mean, by the time these folks finish doing the time that's been contemplated by the Court, they will have missed entirely their children's youth. . . .

Now, I think the Court's [sic] in a position to give them another opportunity. And they can justify doing that under . . . the clause and departure section which allows the Court to take into consideration factors that the framers did not consider.[116]

In his allocution before sentencing, Scott Manning echoed his attorney's remarks, explaining "[a]ll that my wife and I are requesting of this Court is that some compassion be considered. Both my wife and I sought recovery as aggressively as we sought to feed our addiction, even more so in some respects."[117] He concluded his plea by claiming, "[e]ach person has a problem in their life and this must be mine."[118]

The Assistant United States Attorney argued vigorously that the children, not their parents, were the true victims of the crime before the court. Thus, the government urged, the children should not "be a valid point for this Court to depart downward . . . . They are victims of the defendants' willful conduct. And we

116. *Id.* at 13-15.

117. *Id.* at 24.

118. *Id.* at 26.

would ask that the Court sentence the defendants within the guideline range."[119]

After careful, deep deliberation, the court decided to grant a downward departure, based on the extraordinary situation of four minor children whose parents faced long prison terms and the defendants' aggressive drug rehabilitation. The court was convinced that the Guidelines simply had failed to account for cases such as the Mannings', where family circumstances and robust rehabilitation combined, and thus reversed its prior ruling.[120] Concerning Scott Manning, the court departed downward by six levels, from thirty to twenty-four. Consequently, the Guideline range was reduced to fifty-one to sixty-three months from ninety-seven to 121 months. The court sentenced Scott Manning to a term of sixty months, or five years.[121] Similarly, Patricia Manning's offense level of twenty-six was reduced by six levels to twenty. Her Guideline range thus shifted from sixty-three to seventy-eight months to thirty-three to forty-one months. She received a sentence of thirty-six months, or three years.[122]

Judge Billings, in reconsidering not only his initial judgment but the very efficacy and fairness of the Guidelines' sentencing scheme, showed remarkable diligence and compassion. Balancing the many competing, compelling interests—the welfare of the Mannings' children, the rehabilitation of the defendants, the legitimacy of judicial acts, the aims of social policy—the court acted pragmatically in working within the boundaries of fixed rules while leaving room for the contingencies of unforeseen circumstance and plain injustice. That the Mannings clearly deserved to be sanctioned for their conduct was never in dispute. The essential question was: for how long should these parents, so remiss in their parental responsibilities yet repentant and committed to rehabilitation, be separated from their four children? In reducing by half what would otherwise be for all intents and purposes a life sentence in the eyes of the children, the court spared all interests from sacrifice by taking most seriously the

119. *Id.* at 29.
120. *Id.* at 31-32.
121. *Id.* at 34-35.
122. *Id.* at 36-37.

interests of the children.[123]

C. Herrera v. Collins *or, What's Wrong With This Picture?*

The Supreme Court heard arguments on October 8, 1992, about whether the State of Texas could execute a man convicted of murder even though new evidence suggesting his innocence had come to light ten years after the crime. At issue in *Herrera v. Collins* was whether the Constitution conferred jurisdiction on federal courts to hear a state prisoner's claim that he was not guilty.[124] Traditionally, federal courts have had jurisdiction to consider only whether procedural errors occurred at trial.[125]

Leonel Herrera was sentenced to die for killing two police officers in 1981 near Los Fresnos, Texas. Herrera was convicted of one of the killings at a trial, and subsequently confessed to the other. He later claimed that he committed neither. In February, three days before he was to die, his nephew came forward to say that his father, Raul Herrera, Herrera's brother, was the actual killer. Raul Herrera had been shot to death in 1984.

A federal district court ordered an evidentiary hearing on the matter and stayed the execution.[126] But after the State of Texas appealed that decision, the Fifth Circuit Court of Appeals reversed the district court.[127] The appeals court held that a claim of innocence based on newly discovered evidence does not alone require a federal habeas corpus hearing, provided the prisoner had a fair trial.[128] The court stated that innocence at this stage of an appeal is, as a matter of law, irrelevant.[129]

Herrera's lawyers had argued that at stake was whether it is constitutional to execute someone who is innocent. They claimed

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123. Making this case even more difficult was the fact that the Mannings' home, pursuant to a provision of the Comprehensive Crime Control Act of 1984, was subject to civil forfeiture since it was used in the course of illegal drug transactions. 21 U.S.C. § 881 (a)(7) (1988). This meant that the children, already rendered parentless, could be made homeless too. *See* Sally Johnson, *When a Forfeiture Means Uprooting the Innocent*, N.Y. TIMES, May 15, 1992, at B20. Ultimately, the United States Attorney for the District of Vermont dropped the forfeiture action, thus enabling the children to remain at home.

124. Herrera v. Collins, 113 S. Ct. 853 (1993).

125. *Id.* at 869.

126. *Id.* at 859.

127. Herrera v. Collins, 954 F.2d 1029 (5th Cir. 1992), *aff'd*, 113 S. Ct. 853 (1993).

128. *Id.* at 1033-34.

129. Joan Biskupic, *Court Ponders Role of Innocence in Death-Row Plea*, WASH. POST, Oct. 8, 1992, at A1, A4.

that the Constitution's prohibition against cruel and unusual punishment and its guarantees of due process forbade executing someone who presented a "colorable claim of innocence"[130]—one that was theoretically plausible. Justice Sandra Day O'Connor, however, took a different approach to the case, explaining at oral arguments that "[w]e don't have an innocent person here. . . . We have a person who has been convicted of the murder, and we have allegations that someone else may have committed the crime."[131] Herrera's lawyers claimed that the nephew did not speak up sooner because he was afraid of retaliation from the police who, the nephew alleged, were involved with his father and Herrera in a drug-trafficking scheme.

If the Court were to rule that federal courts could entertain death-row appeals based on new evidence, Justice Scalia said, "[t]he burden this will put on the system of justice could be enormous."[132] Moreover, a majority of the Court had previously voted to let Herrera's execution proceed.[133] Thus, if he were afforded a new hearing, it would be an admission that the previous vote was in error and would have allowed the execution of a possibly innocent man. As well, the Court in recent years has actively sought to restrict the avenues open for state prisoners' appeals in an effort to bring finality to state convictions.[134]

The Assistant Attorney General for the State of Texas argued that there was no constitutional claim barring Herrera's execution. She maintained that new evidence, coming so long after the fact, is inherently unreliable. Under Texas law, any new evidence that might overturn a conviction must be presented within thirty days of the conclusion of trial.[135] Thus, the Texas Assistant Attorney General argued that the proper way for Herrera to avoid execution on the grounds of new evidence was to apply for clemency from the Governor.

She then acknowledged that no Texas death-row prisoner had been granted clemency in at least the last twelve years. When questioned by Justice Kennedy on whether there is a constitution-

130. Neil A. Lewis, *Court Hears Condemned Texan's Case*, N.Y. TIMES, Oct. 8, 1992, at B22.

131. *Id.*

132. Biskupic, *supra* note 129, at A4.

133. Herrera v. Collins, 112 S. Ct. 1074 (1992).

134. Biskupic, *supra* note 129, at A1.

135. TEX. R. APP. P. r. 31(a)(1) (West 1993).

al bar to executing someone convicted of murder and sentenced to die if videotaped evidence were to appear showing the person was indisputably innocent, the Assistant Attorney General replied "no" and repeated her claim that only the Governor can grant clemency.[136]

The Court ultimately agreed with the Assistant Attorney General in ruling that a state death row inmate who presents belated evidence of innocence is not ordinarily entitled to a new hearing in a federal court before being executed. The 6-3 decision left open the possibility that "truly persuasive" evidence with an "extraordinarily high" chance of success might merit an exception to this rule.[137] Notwithstanding Justice Blackmun's admonition that the Court's approach to death row inmate claims of innocence sanctioned the execution of innocent people, coming "perilously close to simple murder,"[138] the Court held that Herrera's assertion of innocence was merely a claim, devoid of legal weight. Thus, the Court stated, "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."[139] The Court affirmed Texas' argument that a request for executive clemency is the sole method by which a petitioner may raise an actual innocence claim.[140] The Court further explained that

> because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right [of federal habeas relief] would necessarily be extraordinarily high.[141]

Leonel Herrera, 45, was executed by lethal injection on May 13, 1993. "I am innocent, innocent, innocent," Herrera pleaded in a final statement, "[m]ake no mistake about this. I owe society nothing. . . . I am an innocent man and something very wrong is

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136. Lewis, *supra* note 130.

137. *Herrera*, 113 S. Ct. at 869.

138. *Id.* at 884 (Blackmun, J., dissenting).

139. *Id.* at 860.

140. *Id.* at 866.

141. *Id.* at 869.

taking place tonight."[142]

What the *Herrera* case shows with disturbing clarity is that something *is* very wrong with an adjudicative process that frames issues of life and death in terms of mindless formulations of constitutional law, administrative burdens, and degenerate hypotheticals. Thus, that Herrera's lawyers felt compelled to ground their argument in the theory that the Constitution forbids the execution of an innocent man suggests the perverse potential of traditional modes of adjudication. Moreover, the very notion that a concern for not opening the floodgates of death-row appeals could trump the opportunity for a potentially innocent man to be vindicated offends even the most morally ambivalent among us. Certainly, in a society allegedly committed to fairness and decency, if not to justice, there can be no theory or policy which would deny an individual such as Leonel Herrera, given the compelling context from which his plea arose, the opportunity to demonstrate his innocence.

A pragmatic approach to the *Herrera* case, then, would take seriously the context surrounding the prisoner's claim—the nephew's story and motives, for instance, or the district court's reasoning for initially granting a new hearing—and the consequences of denying him a new hearing—the likely futility of an appeal for clemency to the Governor of Texas and ultimately his execution. Rather than transforming the essential claim of innocence and its particulars into an abstract discourse about possible burdens on the judicial system or sophomoric hypotheticals, pragmatic adjudication would focus on the specific facts alleged by the death-row inmate and would demand that the court and the parties not forget that the issue is above all else one of life and death. Matters of theory and policy must therefore be secondary.

As *Madkour* and *Herrera* serve to demonstrate, adjudication as it is sometimes currently practiced falls well short of satisfying even the most meager standard of justice. If justice means anything in this society, it is an enduring commitment to the humane and compassionate governance of human affairs, a deep respect for the life and liberty of every individual, as shown in *Manning*. In this light, there can be no valid argument made in defense of sending a person to jail mandatorily for a harsh term

142. *Man in Case on Curbing New Evidence Is Executed*, N.Y. TIMES, May 13, 1993, at A14.

when the offense at issue involves a relatively harmless drug and the defendant has demonstrated no proclivity for crime. Similarly, no good case can be made for denying a convicted murderer on death-row the opportunity to be heard when extraordinary new evidence appears at a later date which might well acquit him of the offense and, consequently, spare his life. When adjudication is reduced to a venue for reckless theorizing or hypothesizing, or to a process in which the judge herself is rendered helpless by a lack of discretion, we reduce the practice to a pathetic ritual, a Foucaultian sham in which violence is exercised through the very institutions which purport to be neutral and just.[143]

IV. THE PROMISE OF ADJUDICATION IN AMERICA

A. The Adjudicative Moment

Recognizing, as Wallace Stevens did, that "We live in an old chaos of the sun,/Or old dependency of day and night,"[144] that human experience is more a product of contingency than design, more a result of ancient influences than sophisticated metatheories, we should be sensitive to the incompleteness which inheres in all human practices. We should avoid allowing our conceptions of a perfect practice to get the better of us, such that we are distracted from confronting the often banal, though difficult, circumstances of our all-too-human world.

Perhaps when Congress stripped the judiciary of most of its discretionary power in handing down sentences, it sought to achieve a kind of perfection: seemlessly uniform sentences in the federal courts. Yet, in attempting to realize this impossible goal, Congress took away from the courts their exceptional and essential capacity. The ability of a judge to listen to all sides, to deliberate freely, to reflect on those deliberations, and, ultimately, to render a decision, results largely from the wide discretion which judges are often granted. Though judges frequently fail to use intelligently the discretion they are given because they are insufficiently grounded in pragmatist practice, that is not the fault of the practice. Judges still retain the potential to listen

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143. Noam Chomsky & Michel Foucault, *Human Nature: Justice Versus Power*, *in* REFLEXIVE WATER: THE BASIC CONCERNS OF MANKIND 171 (Fons Elders ed., 1974).

144. WALLACE STEVENS, *Sunday Morning*, *in* THE COLLECTED POEMS OF WALLACE STEVENS 66, 70 (1991).

with gravity and urgency to the pleas of disgruntled parties. Without that discretion, they are but mere functionaries.

B. Courts and Congress: A Dialectical View

I return for a moment to Robin West's call for a legislative turn in progressive constitutionalism.[145] I would heartily agree with her, especially in the light of mandatory minimums, that we who are concerned with progressive change should look to Congress for some relief. It is only fitting in a democracy that citizens should hold accountable their elected officials for policies they find offensive or unjust.

Notwithstanding the importance of legislative reform for social change, however, the courts, too, have an essential role to play. Standing as they do in a dialectical relationship with Congress, the courts are in the position to enforce or to protest, through judicial review, legislative action. They are, in effect, both the catalyst and the retardant for legislative ends. More importantly, we have frequently observed the substantial shortcomings of representative government when it comes to effectuating social policy on a broad scale. In the face of our profoundly pluralistic society and the conflicting interests which obtain as a result, Congress has often been reduced to gridlock. Progressive reform from legislatures thus becomes a distant hope.

It is in these moments, when the sheer size and diversity of our nation seems to overwhelm its capacity to move forward, that the courts look most salutary and promising for positive social change. It is in the courts that the episodic, disparate crises of our modern times appear in micro form. Brought by litigants, "disputes about the basic terms of social life"[146] are heard and acted upon by the court as long as they are ripe and justiciable. Regardless of the often paralyzing force of pluralism, the courts operate dutifully. And though the consequences of judicial decisions will be shaped by the larger social milieu into which they are cast, a decision is nonetheless issued, a dispute is nonetheless settled.

We should thus look both to the courts and to Congress for the kind of change West envisages. As well, we should insist that these institutions become more pragmatic in their practices. We

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145. *See supra* notes 13-21 and accompanying text.

146. UNGER, *supra* note 2, at 1.

should demand of them that they confront the contingencies of human experience embodied in particular parties and face the consequences of their decisions on those parties and the rest of society. We must not allow judges or legislators to turn a blind eye to these considerations in an attempt to preserve the too fragile ideal of uniformity, or efficiency, or the rule of law. Ultimately, we should make the courts and Congress accountable for the injustices they alone create.

To this end, we should train lawyers, judges, and lawmakers to be better listeners, better imaginers. If we are able to imbue such actors at an early stage—high school, say, or even law school—with a deep sense of the inequality and contingency of human life, and to engender in them a critical stance toward such notions as impartiality, objectivity, and the like, then we will have come a long way in generating a more responsive and more responsible legal culture.[147] Through their own education and experience, then, lawyers, judges, and legislators should be themselves empowered to hear and to recognize, if not to understand, the pleas of those either too long denied a voice or simply unheard in the quest for an allegedly perfect practice.

147. For an impassioned plea which resonates with my own, *see* RICHARD WEISBERG, POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE (1992). The call to imagination and empathy through education has also been made for some years by Michael Lerner, editor and publisher of *Tikkun*.