RECONSTRUCTING THE LEGACY OF PRAGMATIST JURISPRUDENCE

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Richard Posner has spent several decades on a quest for his Holy Grail, that is, a less controversial and more persuasive account of an earlier doctrine that economic efficiency ought to dictate how judges decide legal cases.[1] In one of his scholarly adventures, a book entitled *Law, Pragmatism and Democracy*, the Justice of the U.S. Seventh Circuit Court of Appeals wrestles with the ghost of John Dewey for the mantle of pragmatist jurisprudence, or the coveted title "steward of pragmatism in the law."[2] Most commentators have seen this work as pitting Posner against Dewey in a contest of pragmatisms, the stakes for which are no less than their respective legacies for legal and democratic theory.[3] Some have sided with Posner and others with Dewey. I contend that the commentaries have misidentified the target of Posner's critique. Posner had another legal theorist in mind and he was disingenuous in naming Dewey.

A careful reconstruction of Posner's argument shows that Dewey's pragmatism provides a genuine middle way between Posner's position and that of his intended rival. So, two theses about this debate punctuate the two major sections of this paper. In the first, the negative or critical thesis states that the commentators have mistakenly taken Posner at his word, trusting that the intended target of his criticism is in fact Dewey. I then locate Posner's quarry and offer an explanation for why he fails to specify the actual prey in his hunt. In the second section, the positive or analytical thesis is articulated: Dewey's pragmatic logic of judgment and exposition effectively mediates the two entrenched accounts of judicial decision-making and their implications for democratic governance. Not only does this reconstruction help clarify Dewey's legacy for legal and democratic theory, but as suggested in section three, it also demonstrates how the activity of reconstruction has political connotations in that it endorses particular values or ends over others. Thus, Posner's project to reconstruct Dewey in the image of his intended adversary is not value-neutral; but in fact belongs solidly within the domain of the political.

Dewey, Hand and Posner's Critique

Posner's writings have been duly acknowledged by his supporters and critics for their impressive quality, their sheer quantity, their breadth and depth of interdisciplinary research and an aggressive writing style unique among sitting judges.[4] Besides adjudicating appeals cases, Posner also serves on the University of

[1] See, for instance, Richard Posner, "Utilitarianism, Economics and Legal Theory," *The Journal of legal Studies*, vol. 8 (1979): 101-22. Id., *Economic Analysis of Law*, 3rd ed. (Boston: Little, Brown and Co., 1986). For critiques of Posner's economic analysis of law, see Ronald Dworkin, "Why Efficiency? A Response to Professors Calabresi and Posner," *Hofstra Law Review*, vol. 8, no. 563 (1980); Arthur Allen Leff, "Economic Analysis of Law: Some Realism about Nominalism," *Virginia Law Review*, vol. 60, no. 451 (1974); James Boyd White, "Economics and Law: Two Cultures in Tension," *Tennessee Law Review*, vol. 54, no. 161 (1987); Robert C. Ellickson, "Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics," *Symposium on Post-Chicago Law and Economics*, *Chicago-Kent Law Review* vol. 65, no. 23 (1989).

[2] Richard A. Posner, *Law, Pragmatism and Democracy* (Cambridge, MA: Harvard University Press, 2003), hereafter LPD. Michael Sullivan and Daniel J. Solove, "Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism, Review of *Law, Pragmatism and Democracy* by Richard Posner," *Yale Law Journal*, vol. 113, no. 3 (Dec. 2003):687-741.

[3] See Ilya Somin, "Posner's Pragmatism," *Critical Review*, vol. 16, no. 1 (Summer 2004): 1-22.

[4] For instance, Posner's long-time rival, Ronald Dworkin, has characterized Posner as "the wonder of the legal world." In an unsympathetic review of *Law, Pragmatism and Democracy*, the reviewer begins: "Richard Posner is a prodigy. A law school professor and full-time federal judge, he is also one of the most prolific writers on legal and political issues in America." "Sense and Nonsense," *The Economist* (June 21, 2003): 77-8.

Chicago law school faculty. If this does not demonstrate his thorough commitment to bridging the theory-practice divide, then perhaps the point is further obviated by his ceaseless attempts to resolve the conflict between the perceived arbitrariness of judicial decision-making (particularly as it relates to different judges' distinct value schemes) and the sanctity of democratic governance. Should unelected judges be allowed to override the will of democratic majorities by invalidating statutes their representatives legislate? According to Posner, what is required in order to harmonize judicial practice and the sanctity of the democratic principle—namely, that majorities or their representatives should dictate the content of public policy—is to create a more diverse judiciary, one that "command[s] greater acceptance in a diverse society."[5] If Posner has hit on the right answer to this longstanding problem, then he has not only discovered his Holy Grail; he has also secured a coveted place alongside Joseph Schumpeter, the elite democratic theorist whom he holds in high regard, and opposite Ronald Dworkin, the renowned critic of legal pragmatism and Posner's perennial adversary.[6]

Although Posner doesn't "think it leads anywhere interesting," he acknowledges that Charles S. Peirce, William James and John Dewey developed an ideational thread tracing back to the ancient Greeks (indeed, to Homer's *Odyssey*) and forward to modern-day American culture (as attested to by Tocqueville) into a robust American philosophy.[7] America's unique homegrown philosophical movement, pragmatism, has in the past two decades been the beneficiary of a spectacular resurgence of interest. Whether Quine, Sellars, Putnam, West or the many others who have taken up the banner of pragmatism, each owes an intellectual debt to the classical pragmatists. Other than the name, though, pragmatic philosophy has little more in common with Posner's brand of pragmatism. According to Posner, classical pragmatists sought to shake the traditional structure of philosophy, beginning with Plato, from its comfortable foundations. Thus philosophical pragmatism, for Posner, is just another kind of anti-foundationalism that eschews formalism in exchange for "what works," or a method "to judge issues on the basis of their concrete consequences for a person's happiness and prosperity."[8] While this anti-foundationalism is central to what Posner calls "everyday pragmatism," which he believes "has much to contribute to the law," it shares more in common with the American ethos than it does with a seventy-year old philosophical movement. So, he concludes, there is "little in classical American pragmatism . . . that law can use."[9]

Rooted in this everyday pragmatism, pragmatic jurisprudence strikes at not only the firm foundations of philosophical system-building, but also at an antiquated account of legal reasoning. According to this account, exemplified by the formalist model of judicial reasoning, judges apply a legal principle, as the first premise of a syllogism, to the facts of the case, as the second premise, in order to impersonally derive a valid legal conclusion.[10] In addition, the judge, reasoning according the principle of *stare decisis*, attempts to maintain continuity between his legal decisions and those of the past, thereby preserving sound legal precedents and

[5] LPD, p. 120.
[6] He even models the book's name after Joseph Schumpeter's *Capitalism, Socialism and Democracy* (New York: Harper and Row, 1948).
[7] LPD, p. 25-6.
[8] Ibid., p. 28.
[9] Ibid., p. 49.
[10] See, for instance, Joseph H. Beale, *A Treatise on the Conflict of Laws* (New York: Baker, Voorhis, and Company, 1935) and Christopher C. Langdell, *Cases on the Law of Contracts* (Boston: Little, Brown and Company, 1871). Jerome Frank characterizes the Formalists' method of legal reasoning in the following manner: "They picture the judge applying rules and principles to the facts, that is, taking some principle (usually derived from opinions in earlier cases) as his minor premise, employing the facts of the case as the minor premise, and then coming to his judgment by processes of pure reasoning." *Law and the Modern Mind* (New York: Anchor Book, 1963), pp. 10-12.

doctrine from one generation to the next. So, a court's judgment is a combination of strict deductive logic and tradition. Also known as the myth of the mechanical jurisprudent, Blackstone's account neutralizes the threat of arbitrarily exercised judicial power, unbounded legal discretion and the interjection of a judge's tastes, values and morals, so as to convert the science of judging into a woeful art. Yet with the advent of the legal realist movement, the myth of the mechanical jurisprudent and with it the formalist account of legal reasoning had reached their respective limits. Legal realism's advocates dispelled the myth by demonstrating that subjective and psychological preferences of judges do influence the selection of facts in an indeterminate case, such that those facts would count as relevant (or as legal facts) for the sake of rendering a court's judgment.[11] The legal realists' endorsement of fact indeterminacy and critique of deductive formalism reflect a pragmatic logic of judgment and exposition elaborated by John Dewey, both in the classroom and in his writings.[12] So, as a movement, legal realism gained much of its inspiration from the kind of philosophical pragmatism Posner rejects. Posner contends that everyday pragmatism, in contrast to Dewey's brand of philosophical pragmatism, "lacks the [liberal] political commitments of the realists" so much so that it indeed has "no inherent political valence."[13]

Posner's partisan attacks on Dewey in chapter three of *Law, Pragmatism and Democracy* (even resorting to use of the codeword and epithet for liberal, "wet") would then appear as evidence of a view that the American pragmatist was a close ally to the liberal-minded legal realists. Yet upon further examination of Posner's account, it is discovered that the legal realists and Dewey part ways on judicial politics. First, Posner distinguishes Dewey's populist democratic theory from his own elitist view of a democracy, in which the best, or "hoi aristoi," rule. Then, to show that Dewey does not merit the praise he has received as a philosopher of freedom and democracy, he casts Dewey as a deliberative democrat with a complementary epistemology, and even worse, as an advocate of a democracy governed by the irresponsible masses.[14] Posner portrays Dewey's epistemology as analogous to a computer networking or "distributed intelligence" system. In this interconnected system of citizen communities, member-inquirers dedicate their combined intellectual capital to discovering truth that is "local," "perspectival" and "shaped by historical and other conditions in which it is produced."[15] Next, Posner contends that an "implication for law of Dewey's epistemology is that courts should either have no power to invalidate legislation or exercise it only in extreme circumstances, when faced by a law patently unconstitutional or utterly appalling."[16] So, Dewey, at

[11] See Morton J. Horowitz, *The Transformation of American Law 1870-1960* (Oxford: Oxford university Press, 1992), pp. 198-202.

[12] According to Horowitz, the "demonstration that deductive logic could not provide a self-executing way to move from the general to the particular was the most important contribution of Felix Cohen [early legal realist] and the great philosopher John Dewey to the Realist critique." Ibid, p. 200. Dewey gave a course at Columbia University Law School titled "Logical and Ethical Problems of the Law," which was well attended by American law teachers, during the summer of 1922. In addition, from 1924 to 1929, he gave seminars in Legal Philosophy at Columbia University. In these courses, he was extremely critical of the early formalism in legal reasoning (particularly Blackstone) and sought a more functionalist approach to such reasoning ("a logic relative to consequences rather than to antecedants"). So, as Horowitz and the historical record confirm, Dewey's teachings were a seminal influence on the Legal Realist Movement.

[13] The only legal realist that Posner seems to respect is Oliver Wendell Holmes, Jr., author of the famous essay read by almost every first year law school student, "The Path of the Law," and of many landmark Supreme course case opinions and dissents.

[14] For instance, when attending one of Dewey's events, most likely his ninetieth birthday party in 1949, General Dwight D. Eisenhower, then president of Columbia University and future president of the United States, declared: "Professor Dewey, you are the philosopher of freedom, and I am the soldier of freedom." Paul Kurtz, *Free Inquiry* vol. 23, no. 4 (October/November 2003): 5.

[15] LPD, p. 52.

[16] Ibid., p. 53.

least on Posner's reading, is a defender of majoritarianism and judicial restraint. Accordingly, he would counsel against judicial review of legislation enacted by popularly elected representatives of democratic majorities. Without exception, the striking down of statutes that reflect the popular will and sentiment of those majorities would offend Dewey's restraintist sensibilities. Not only would liberal-minded legal realists recoil from most restraintist conclusions (such that, for instance, democratic majorities would be better equipped to decide about whether to protect individual rights), but Dewey himself would likewise be the first to quit such a path. Taking an absolutist position on the issue, i.e. that a court can *never* justifiably exercise judicial review, or invalidate a piece of legislation on constitutional grounds, is incompatible with Dewey's scientific and experimentalist approach to problem solving. Thus, Posner must have someone other than Dewey in mind, and the American pragmatist has only served as a convenient proxy, a stand-in, for the genuine object of his critique.

One well-known jurist who did take a stronger, though not absolutist, stand on the issue of judicial review was the American jurist Learned Hand. In the Holmes Lectures given at Harvard, Hand declares that,

For myself it would be irksome to be ruled by a bevy of Platonic Guardians, even if I know how to choose them, which I assuredly do not. If they were in charge I should miss the stimulus of living in a society where I have, at least theoretically, some part in public affairs.[17]

The "bevy Platonic Guardians" Hand refers to are those judges who would override the democratic principle and impose their supposedly enlightened judgments on the will of the majority, such that the average citizen would lose "the stimulus of living in a [democratic] society." Threatening such an outcome are activist judges who adopt excessively interventionist judicial policies. By striking down fashionable laws, these judges undermine the majority's will and subvert democratic choice, for both majority rule and democratic decision-making are tied, at least indirectly, to acts of legislation through the popular election of those who legislate.[18] As a result, statute after statute falls to the judge's gavel, as does the democratic principle.

Yet it might be objected that in Judge Hand's many legal opinions, especially in the area of First Amendment law, he defends the rights of citizens as trumps against majorities. For instance, in the *Masses Publishing Co. v. United States* decision, he argues that the government has no right to interfere with a citizen in freely discussing and deciding what government policies and practices should be tolerated, on the ground that "public opinion . . . is the final source of government in a democratic state."[19] However, Hand defends the right of individuals to participate in associated activity only in virtue of the protected right's majoritarian consequences, namely, that it safeguards the majority's prerogative to

[17] Learned Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958), p. 73.

[18] This of course assumes that the democratic process has not been hijacked by interest groups, which unduly influence the legislator's decisions so that they are not responsive to the majority will, and that voters are able to keep popularly elected legislators accountable through the threat of retrospective voting, or non-election as punishment for legislating in ways inconsistent with the majority's needs and interests. For an argument to the effect that majorities rarely engage in effective retrospective voting due to daunting epistemic barriers, see Ilya Somin, "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory," *Iowa Law Review*, vol. 89, no. 1287 (April 2004).

[19] In full, Hand states, "Words are not only the keys of persuasion, but the triggers of action, and those which have no purport to counsel the violation of law cannot by any latitude of interpretation be a part of the public opinion which is the final source of government in a democratic state." *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917). See Vincent Blasi, "Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten," *University of Colorado Law Review*, vol. 61, no. 1 (1989): 1-37.

determine the society's collective destiny through discussion and debate.

But why would Posner not criticize Hand outright, rather than recruit Dewey as a poor proxy? Hand cuts a striking figure in legal circles, not only because he has been eulogized as the Supreme Court's tenth justice (thrillingly close, yet unsuccessful, in two bids for nomination) but also for his extensive legacy of public addresses and oft-cited court opinions. More revealing for our present concerns though, and particularly for the purpose of explaining why Posner would fail to name Hand, is the fact that Hand is still widely respected among jurists and legal scholars as a judicial conservative. According to Kathryn Griffith, one of Hand's biographers,

Learned Hand's personal predilection would have placed him alongside the judicial protectors of individual liberties, but his understanding of the American democratic system caused him to assume what by modern standards is a very conservative view of the court's role in this effort.[20]

Posner does not wish to steal the mantle of judicial conservativism from Hand, though, since Posner is already the proud owner of it. His wealth-maximization principle coupled with the corollary that wealth should go to those who can use it most productively supports a conservative, market-based view of legal institutions and processes. Instead of seizing the title of judicial conservative, Posner's agenda is to claim that of pragmatism, a title that Hand never had, wished to have nor would have accepted; but one which Dewey gladly assumed and, subsequent to his death, students of his work would have a difficult time bestowing on a judicial and political philosophy as un-Deweyan as Posner's.[21]

Pragmatism and Legal Reasoning

In Dewey's paper, "Logical Method and the Law," he demonstrates that despite the inapplicability of Blackstone's deductive method to legal reasoning, logic still informs the process by which judges deliver judgments and expositions of the law. According to Dewey, logical method applied to legal subject matter is sufficiently similar to logical method applied to logical subject matter. "Such cases," he states, "at least are similar in general type to decisions made by engineers, merchants, physicians, bankers, etc., in the pursuit of their callings."[22] The role and function of the judge is therefore no different in kind than the role and function of his or her fellow citizens in a shared democratic society.

In responding to Justice Oliver Wendell Holmes' statement that the law does not emulate logic, Dewey attempts to correct for the jurist's assumption that all logic is syllogistic on Blackstone's model. Although logic in its orthodox Aristotelian sense is modeled after the syllogism, logic in a more expansive sense includes inductive generalization, scientific reasoning and practical problem-solving activity. So, Dewey declares "the need of another kind of logic which shall reduce the

[20] Kathryn Griffith*, Judge Learned Hand and the Role of the Federal Judiciary* (Norman: University of Oklahoma Press, 1973), p. 41. Although far from Hand in his approach and understanding of the relation between law and democracy, Ronald Dworkin, who served as one of Hand's law clerks, has written a glowing account of the jurist's personality, character and legacy. Ronald Dworkin, "Learned Hand" in *Freedom's Law: The Moral reading of the American Constitution* (Cambridge, MA: Harvard university Press, 1996), pp. 332-47.

[21] Citations of John Dewey's works are to *The Collected Works of John Dewey: Electronic Edition*, edited by L.A. Hickman (Charlottesville, VA: Intelex Corp., 1996), following the conventional method, LW (Later Works) or MW (Middle Works) or Early Works (EW), volume: page number. Dewey quips in the preface to *Logic: The Theory of Inquiry* that perhaps "the word [pragmatism] lends itself to misconception." LW 12:4. But he still preserves the term to describe the school of philosophy to which he belongs and even clarifies its meaning and the course of its growth in the writings of Peirce and James in his paper, "The Development of American Pragmatism," LW 2:3-21.

[22] Dewey, "Logical Method and the Law," MW 15:66.

influence of habit, and shall facilitate the use of good sense regarding matters of social consequence."[23] General principles cannot by themselves dictate the judgments that shall be rendered in particular cases. Similar to the legal realist Jerome Frank, Dewey concedes that often the jurist finds his conclusion before his reasons and then searches for the vindicating premises, as if they were an afterthought.[24] While this method is not identical with the scientific method, since the conclusion is settled before the inquiry, it is according to Dewey, a kind of "exposition," an extension of the logic of judgment: "Courts not only reach decisions; they expound them, and the exposition must state justifying reasons."[25] This "logic of exposition" is both forward-looking and backward-looking, that is, aiming to "reshape old rules of law to make them applicable to new conditions" and respecting the principle of *stare decisis*, or treating like cases alike based on authoritative and controlling precedent.[26]

There is no mistaking the fact that Dewey's logical theory encompasses all problem-solving activity, including and especially that undertaken by citizens of a democracy in their efforts to solve public problems.[27] The legal system assists individual citizens in addressing public issues through a procedurally fair process; one that, according to one commentator, "provides a uniquely democratic . . . mechanism for individual citizens to invoke public authority on their own and for their benefit."[28] Judges have no less a role to play as critical inquirers or problem solvers in democratic society, working side by side with their fellow citizens. In class action lawsuits, for example, counsel provides proof to the judge and jury that a large number of individuals with legally relevant characteristics were harmed. This demonstration of large numbers resembles the principle of majority rule in democratic electoral politics. In both cases, the count justifies the outcome, whether in the choice of a legal remedy or in the election of a government official. Since logic provides a method both for the activities of democratic and judicial decision making, judges serve a dual role in a democratic society: (i) as public problem solvers and (ii) as experts adjudicating controversies between fellow citizens. The two roles are not mutually exclusive.[29] Choosing one role, whether democratic inquirer or expert judge (even jury member), remains a matter of emphasis; and so it is a choice compatible with the simultaneous adoption of the other role. Thus the conflict between perceived abuses of judicial discretion and democratic principle arises only in a mitigated form, i.e. in cases where the judge assumes that her role *qua* expert judge supersedes her role *qua* democratic citizen. However, in most instances, a judge will strike down a piece of legislation as unconstitutional when it offends both judicial and democratic principles.[30] In other words, the practice of judicial review *is* consistent with democratic governance. Yet to assert that the two are consistent is not to offend judicial impartiality, or to make judges the willing pawns of politicians; for, as the economist F. Andrew Hanssen has confirmed in testing simple economic models of judicial discretion, "independent judges may themselves make policy in

[23] MW 15:70.
[24] Frank, *Law and the Modern Mind*, pp. 3035.
[25] MW 15:72.
[26] MW 15:75.
[27] According to Dewey, "logic is really a theory about empirical phenomena, subject to growth and improvement like any other empirical discipline." MW 15:76.
[28] Frances Kahn Zemans, "Legal Mobilization: The Neglected Role of Law in the Political System," *American Political Science Review* 77 (1983): 690-703; cited in Deborah Stone, *Public Policy Paradox*, 3rd edition (New York: W.W. Norton, 2002), p. 344.
[29] To claim otherwise would set up a false dichotomy or Hobson 's choice, a fallacious strategy that belies the admissibility of a third option: viz., the integration of both.
[30] A clear case of this would be the Warren Court's unanimous decision in *Brown vs. Board of Education of Topeka Kansas, 347* U.S. 483 (1954) that the practice of segregation in Southern schools was patently unconstitutional because it violated the 14th Amendment's equal protection clause.

directions that [political] incumbents do not like."[31] Therefore, Dewey provides a genuine middle way between Learned Hand's position, judicial restraint mixed with democratic majoritarianism, and Posner's position, a fusion of purportedly value-free legal pragmatism and democratic elitism.

Final Thoughts

While Dewey and Posner's legal theories are not complementary, their legal views do agree in at least one respect. Both believe that a vitally important characteristic of the judiciary is abundant diversity. While Dewey never explicitly argued for courts composed of judges with diverse ethnic, socio-economic and cultural backgrounds, he did obliquely refer to institutionalizing cultural diversity in a paper entitled "The Principle of Nationality." Dewey declares that,

Variety is the spice of life, and the richness and the attractiveness of social institutions depend upon cultural diversity among separate units. In so far a people are all alike, there is no give and take among them. And it is better to give and take.[32]

Likewise, "give and take" deliberations among members of a diverse judiciary are more likely to lend themselves to the creation of equitable and just results than easy consensus and passive acquiescence among members of a homogenous court. Variety in the ethnic and cultural background of the judiciary's membership is also more compatible with a heterogeneous citizenry.[33] In all likelihood, citizens would resist a mandarin court that privileges its special judgment over the will of a democratic majority. On this matter, at least, Posner and Dewey would agree.[34]

Posner is wrong in asserting that pragmatism, whether his or Dewey's, lacks a political valence. What he means by "without political valence" could be neutral between competing political ideologies or neutral between legal methodologies. Either way, the assumption of neutrality is naïvely positivistic, much as his earlier claim that economic efficiency constitutes a value-free criterion for adjudicating legal cases.[35] Hard cases more often demand hard choices about social values than cold calculations of efficiency. So, the maintenance of a strict fact-value distinction is untenable in most, if not all, legal cases. Moreover, to assert the contrary view is comparable to affirming Blackstone's myth of the mechanical jurisprudent. Posner reconstructs legal pragmatism as a politically sterile position resembling Blackstone's myth more than Dewey's reformist legal and political philosophy. As Jack Knight and James Johnson observe, "Posner's effort to simultaneously defend legal pragmatism and repudiate legal realism is,

[31] F. Andrew Hannsen, "Is There a Politically Optimal Level of Judicial Independence?" *The American Economic Review*, vol. 94, no. 3 (June 2004): 712-29, 727.

[32] MW 10:288.

[33] On the compatibility of Dewey's social-political philosophy with pluralism, see my "In Defense of Democracy as a Way of Life: A Reply to Talisse's Pluralist Objection," *Transactions of the Charles S. Peirce Society*, vol. 44, no. 4 (fall 2008): 629-660.

[34] In the 2004 Presidential Campaign, democratic candidate John Kerry, speaking on the topic of appointing justices to the Federal bench, appears to express a contrary view about promoting diversity in the judiciary, one in line with Supreme Court Justice Potter Stewart's position on the issue. Paraphrasing Justice Stewart, Kerry states: "A good justice is somebody that when you read their decisions you can't tell if they are Republican or Democratic or liberal or conservative, a Christian or a Jew, a Muslim, male or female. You just know you're reading a good judicial opinion." Perry Bacon Jr. "What about the Supremes?" *Time Magazine* (Tuesday, September 7, 2004). Despite the apparent contrariety of the Potter-Kerry's view to the Dewey-Posner view, they can complement each other in endorsing diversity on the bench, so long as the quality of judging is not negatively impacted by promoting diversity, so that each appointee is capable of producing good judicial opinions.

[35] By naïvely positivistic, I mean the caricature of positivism made by some writers—for instance, members of the movement known as Critical Legal Studies, such as Robert Unger and Duncan Kennedy. See Brian Leiter's "The Radicalism of Legal Positivism," *Guild Practitioner*, forthcoming, draft available at <http://ssrn.com/abstract=1568333.,accessed December 12, 2011.

among other things, a sustained attempt to purge the pragmatist legacy of its radical political implications."[36] Since all legal pragmatisms endorse suitable methods for achieving given objectives, they must also espouse particular ends or values associated with those objectives—whether the preservation of the status quo (often associated with judicial restraint) or the pursuit of a transformed future (often indicating judicial activism). On the same rationale, Posner's project in *Law, Pragmatism and Democracy* aims to reconstitute the ends of John Dewey's legal pragmatism so that they are susceptible to objections more felicitously leveled at Learned Hand's legal theory. While the preponderance of evidence indicates this maneuver, Posner's motivations for the sleight-of-hand can only be conjectured at.

In closing, I would like to offer one such conjecture. I believe that Posner's intentions are, first, to obtain the Holy Grail of legitimacy for his conservative legal theory, particularly its efficiency criterion of justice, thereby attracting a broader audience of supporters; and, second, to steal the mantle of pragmatist jurisprudence from a philosophical giant, John Dewey, for the purposes of giving pragmatism a distinctly elitist gloss in the twin domains of legal and political theory. In both respects, Posner's everyday pragmatism fails. Thus, Posner's project is unsuccessful by its own lights and his reconstruction of Dewey's theories of law and democracy does in fact have a political valence—indeed, it belongs squarely within the realm of the political.

[36] Jack Knight and James Johnson, "Political Consequences of Pragmatism," *Political Theory*, vol. 24, no. 1 (Feb. 1996): 68-96, 69.

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