TWO VIEWS OF THE LEGAL CATHEDRAL: JUDICIAL DECISION MAKING FROM THE TOP DOWN AND THE BOTTOM UP

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I. Lawyers are from Venus, Political Scientists are from Mars: An Introduction

A dominant paradigm in the American political science study of law and courts renders the judicial task absurd: judges ought to be unflinching rule followers, yet that is unrealistic, unworkable, and probably even impossible. This paradox flows from the work of generations of political scientists who have tried to demystify, and often to debunk, judicial decision making (Pritchett 1948; Schubert 1958, 1959, 1962, 1965; Ulmer 1960; Nagel 1961; Spaeth 1961, 1964, 1979; Rohde & Spaeth 1976; Segal & Cover 1989; Segal & Spaeth 1993, 2002; Epstein & Knight 1998; Epstein et al. 2001; Braman 2009; Epstein et al. 2013; Black et al. 2020). In contradistinction to the extralegal motivations these scholars have sought to reveal behind judicial decisions, their accounts tend to endorse an idealized view of judicial decision making as rigid adherence to legal rules. The rules, in turn, are supposed to be wholly determinate. In recent decades, this view came to be known as "the legal model." In the words of the political scientists who have put forth this view most insistently: "We do not dispute the normative correctness of the legal model. That is indeed how judges should decide their cases—if only they could" (Segal & Spaeth 1993, 363).

The reasons that judges cannot satisfy "the legal model" center on the fact that judging involves contestable value judgments. In scores of studies reaching every level of the federal judiciary and most state courts, political scientists have demonstrated that political ideology and partisanship influence judicial decisions (Pinello 1999). Indeed, the view that judges primarily

reach their decisions based on their attitudes or ideological views has been, for many decades, "both the major approach guiding [political science] research into judicial decision making and the major approach to question, supplant, or dethrone in directing and even in justifying further or alternative research" (Maveety 2003, 22). Recently, political scientists have also examined how strategic calculations influence judicial decision making (*see* Epstein et al. 2001, Epstein & Knight 2013). Whether uncovering the role of judicial attitudes or strategies, however, political scientists' studies of judicial behavior hinge on the same assumption: judges ought to be rigidly following legal rules. After all, if judges were not supposed to be rigid rule followers, then it would hardly be interesting, or at least not self-evidently interesting, to reveal that they are not.

How did an apparently unrealistic and unworkable model become the standard by which judges are judged by political scientists? And what if the judicial philandering it revealed—or at least some of it—was fidelity to a different conception of law and the judicial role? While objectively applying legal rules has seemed to some a commonsense judicial ideal, from a legal perspective, that sense must be questioned. Indeed, the fundamental question of twentieth century jurisprudence has been identified as whether conceiving of law as a set of determinate rules "is a pernicious myth that obscures analysis of the virtue and efficacy of law as a means of social control of human behavior" (Oakley 1993, 512). Jurisprudential debates about the nature of law persist to this day. By the early twentieth century, however, formulaic adherence to legal rules had been cast in the American legal academy as "mechanical jurisprudence," a stultifying approach to judicial decision making that sacrificed justice for certitude (Pound 1908). It would never fully recover.

In the 1920s and the 1930s, the legal realist movement amplified the critique of mechanical jurisprudence, attacking rigid rule following as both a descriptively inaccurate

account of judicial decision making and an impoverished judicial ideal. The former attack served the latter. Seeking to reveal that judges were not actually rigid rule followers, the legal realists hoped to prompt them to use their discretion—an inevitable part of judicial decision making, on the realists' view—in more humane, responsible, and responsive ways. Instead of an abstract rule-based approach, the realists thus advocated a dynamic view of law and judging that was first and foremost geared to human wants and needs, particularly those of the poor and the downtrodden, whose unmet needs were so apparent during the Depression (Purcell 1973, 89-91). In the wake of the legal realist movement and the social and economic upheavals that drove it, most in the American legal academy came to agree that faith in determinate legal rules was misguided. The "lasting legacy of legal realism," it has been said, was "a challenge: explain how legal *in*determinacy can be reconciled with the rule of law" (Shaw 2013, 668).

Midcentury legal academics rose to the occasion by tying legitimate judicial decision making to the underlying purposes and principles of laws, as well as to the broader purposes and principles of American law and society. By the 1950s, this dynamic yet principled approach, known as Legal Process Theory, had gained widespread acceptance in the American legal academy (Eskridge & Frickey 1994). From the mid-1950s through the mid-1960s, it enjoyed "general hegemony in legal scholarship" (Wolitz 2019, 154). Legal Process Theory's influence was vast. It has been identified as the foundation of mainstream legal scholarship today (Barzun 2013, 2). As Legal Process Theory's most influential proponents, Henry Hart and Albert Sacks, encapsulate their view in 1958, law is an "ongoing, functioning, purposive process," "a continuous striving to solve the basic problems of social living," and judicial discretion is an intrinsic and indispensable part of that process (1994, cxxxvii, 148, 158 [tent. ed. 1958]).

Midcentury political scientists studying courts display a remarkably different orientation toward law and judicial decision making. In 1958, the pioneering scholar of judicial behavior Glendon Schubert published "The Study of Judicial Decision-Making as an Aspect of Political Behavior" in the *American Political Science Review*, enlisting novel empirical methods to reveal that Supreme Court justices were not rigidly applying legal rules, but rather, were importing values, attitudes, and contextual considerations into their decisions. That is, Schubert revealed that Supreme Court justices were not doing what legal academics neither thought they were doing nor should be doing. Moreover, Schubert's revelations were largely consistent with law professors' prescriptions for responsible judicial decision making. As Legal Process Theory's Hart and Sacks reflected, "if law is concerned essentially with the pursuit of purposes, and purposes have continually to be evaluated," how can "ethics … be distinguished sharply from law"? "Must [the legal decision maker] not inevitably, at least with problems of any novelty, make a choice among the possible purposes to be pursued and the possible ways of accomplishing them?" (1994, 108-09 [tent. ed. 1958]).

Schubert was not the first political scientist to cast a cold, empirical eye on the judicial process. In fact, he lamented that "in a profession of political 'scientists,' no one appears to have tried to replicate" (Shubert 1958, 1009) the political scientist C. Herman Pritchett's (1948) efforts to analyze bloc affiliations on the Supreme Court, first undertaken in the late 1940s. Yet, as this lamentation suggests, Pritchett's quantitative approach had not taken off; moreover, Pritchett had positioned his empirical efforts as a supplement, not a replacement, for more legally sensitive analysis. Schubert, on the other hand, was determined to remake the political science study of courts, heretofore known as "public law," into the critical, quantitatively sophisticated study of "judicial behavior"—an enterprise premised on revealing the extralegal determinants of

judicial decisions (1963; see also Gillman 2001, 470). He was remarkably successful. Indeed, much as Legal Process Theory has been identified as the foundation of mainstream legal scholarship today, Schubert's skeptical efforts to reveal the putatively extralegal determinants of judicial decision making are seen as the font of today's mainstream approaches to the political science study of judicial decision making (Maveety 2003, 14-16).

How did American political scientists and legal academics, students of the same courts, occupying similar positions in similar academic institutions at the same time, develop such divergent views of legitimate judicial decision making? I find the answer in their divergent views of American democracy. Focusing first on the political science side of the story, I examine the midcentury timeframe in which the study of judicial behavior took off and "the legal model" was effectively born, as I argue, alongside political scientists' efforts to reveal ideologies and strategies as the true determinants of judicial decisions. While legal academics in this era put their faith in Americans' widely shared purposes, contemporaneous political scientists saw American society as a mosaic of specialized groups, driven by the free and open pursuit of self-interest. On this view, broadly known as "pluralism," political scientists celebrated the interplay of competing interest groups as yielding a stable, moderate, and broadly representative politics: the key to American democracy in a world increasingly given to violent absolutism. But pluralist political scientists did not put their faith in the struggle of groups alone. Rather, they trusted in groups shepherded and moderated by political elites—quintessentially judges—who enforced and reinforced "the rules of the game" (Truman 1951): the impartial norms of fair play that kept the otherwise self-interest-driven system in line.

As I argue, midcentury political scientists' embrace of this model of pluralism as democracy powerfully mediated their efforts to reveal the purportedly extralegal determinants of

judicial decision making. Concomitantly, the pluralist mindset gave rise to the basic tenets of "the legal model"—the rulebound judicial ideal that established values, attitudes, and contexts as outside the law and beyond legitimate judicial consideration in the first place. However, pluralism was not the only vision of democracy nor was "the legal model" the only vision of legitimate judicial decision making that midcentury American courts scholars embraced. In the final section of the paper, I thus turn to the development of the very different view of legitimate decision making that came to predominate among American law professors at the same time that "the legal model" captivated political scientists studying judicial behavior. While political scientists took their orientation from pluralism, those in the legal academy took powerful inspiration, as I argue, from pragmatism, and particularly from democratic pragmatism, which gave crucial shape to the dynamic and purposive approach to judicial decision making that they developed, and which remains the foundation of mainstream legal scholarship to this day. If pluralism promotes an approach to judicial decision making from the top down, the democratic pragmatist tradition points the way toward a view from the bottom up.

II. The Legal Model is Dead, Long Live the Legal Model

The disciplinary lenses of midcentury law and political science cast long shadows. In this section, I trace how the basic thrust of "the legal model" emerged as the foil to midcentury political scientists' attempts to uncover the real "laws" of judicial behavior in the mold of empirical, methodologically sophisticated scientists. Then, I trace the tenacious hold of "the legal model" up to the present. Sometimes overtly but more often covertly, that model has lived on in judicial behavior scholarship. Even today, "the legal model" remains the predominant account of *legitimate* judicial decision making in the American political science study of law and courts, crucially underwriting political scientists' revelations about the forces that actually drive

judicial decisions, be they attitudes, strategic considerations, or other—sometimes even legal—goals. In Section III, I return to the 1950s to identify the precepts of "the legal model" in the pluralist paradigm that predominated in political science at the time.

A. The Coevolution of the Legal and the Attitudinal Models

"[I]t appears that a major burden of their studies of the judicial process is to demonstrate that law is not an important element in court decisions," a flustered law professor wrote, critically reviewing the early work of political scientists holding an empirical lens up to courts in the late 1950s and early 1960s (Mendelson 1963, 593). Glendon Schubert was the progenitor of this approach. In the late 1950s, Schubert ushered a new mindset into the political science study of courts: "the analysis of judicial decision-making as an aspect of political behavior" (Schubert 1958, 1007). Eschewing legal doctrine and what judges wrote in their opinions, Schubert focused on judicial voting patterns, employing a set of quantitative research techniques designed to reduce judicial decision making to judges' preexisting attitudes, group dynamics, and game theory (1958, 1959; *see also* 1965).

The investigations undertaken by Schubert and the other "new behavioralists," as the reviewing law professor called them, due to their nearly exclusive focus on judges' voting behavior, had no place for law as a genuine influence on judicial decision making. However, law did not drop out of the equation. To the contrary, a rulebound model of law had to be assumed, and judges had to be obliged by it as such, if the factors that the new behavioralists revealed were to be revelatory. Under a more capacious model of judicial decision making, judges' contemplations of their colleagues' views, the impact of their decisions, or the way they fit into the larger framework of American society, for instance, might have been wholly unremarkable; they might have even been commendable. The reviewing law professor thus

reflected, "apparently law - regarded as a body of rules - is largely a myth" (Mendelson 1963, 593). He did not seem terribly worried about this development, but neither did he seem to accept the premise.

In the 1990s, the political scientists Jeffrey Segal and Harold Spaeth dubbed Schubert's rulebound conception of law "the legal model" and claimed to vanquish it with "the attitudinal model," on which, "the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices" (1993, 65). The attitudinal model also drew on Schubert's work; indeed, Segal and Spaeth credited Schubert with the first in-depth attitudinal model, although they quibbled with some of his methods (*id*. at 67-69). Refining Schubert's methodology, Segal and Spaeth adduced powerful statistical evidence that Supreme Court justices' ideological attitudes seem to explain their decisions in a range of cases far better than rigid adherence to legal rules (1993; *see also* 2002). In a follow-up work, they concluded that precedent, which they deemed "the lifeblood of the legal model" (Segal & Spaeth 1999, 314), had rarely influenced the justices, based on a largescale statistical analysis of how stringently the justices had adhered to precedent - and more specifically, on evidence of justices refusing to follow the precedents of cases that they had dissented from in the first place.

A number of critics charged that Segal and Spaeth's legal model failed to capture more realistic and sophisticated understandings of the judicial role (Caldeira 1994; Rosenberg 1994; Smith 1994; Gillman 2001). This led subsequent political scientists to invoke "the legal model" less overtly. However, it did not dampen political scientists' enthusiasm for the attitudinal model, which arguably remains the dominant account of actual judicial decision making in political science today (Pickerill & Brough 2017, 34-35). Unsung but equally significant in this predominance is the attitudinal model's indispensable foil, "the legal model." For unless judges

are supposed to be unflinching rule followers, then why go to such lengths to demonstrate that they are not?

B. The Consolidation of the Legal Model

In the early 2000s, a group of political scientists launched a concerted effort to update the attitudinal model based on the insight that judges do not have free rein to promote their attitudes on the bench. As these scholars suggested, harkening back to the early work of Walter Murphy, this means that judges will often act strategically (Epstein & Knight 1998; Epstein et al. 2001). For instance, lower court judges may moderate their preferences in order to avoid reversal by appellate courts; Supreme Court justices may do the same in order to avoid effective reversal by Congress or the Executive; and judges on the Supreme Court and other collegial courts may compromise in order to forge a majority opinion coalition. This led to what are known as strategic or rational choice accounts of judicial decision making, which treat judges as strategic actors seeking to rationally maximize their goals—generally understood in terms of ideology or attitudes, although recent work posits an array of personal and professional goals (e.g., Epstein et al. 2013, Black et al. 2020)—in view of constraints, such as the preferences of other judges or other aspects of institutional contexts that limit single-minded preference promotion.

Schubert (1958, 1959, 1962) has also been recognized as a progenitor of this approach, particularly in his early analysis of Supreme Court decision making in the 1930s through the lens of game theory (Epstein & Knight 2000, 627-28; Segal 2003, 90-93). Schubert's analysis of the judicial strategizing leading up to Justice Owen Roberts' famously changed vote on the constitutionality of New Deal legislation may seem remote from more recent strategic exposés of the leisure, reputational, and interpersonal goals informing judicial decisions. On closer inspection, however, both approaches are parasitic on the basic thrust of the legal model in much

the same way that the attitudinal model is. In each case, the assumption that judges ought to be unflinching rule followers motivates the revelation that they have acted differently. In turn, the non-rulebound factors that judges have consulted, which might otherwise be deemed reasonable and lawful, derive their extralegal purchase as violations of the rule-following standard. A more recent study aptly encapsulates this posture: "as strategic political actors," circuit court judges will try to "shirk" rather than follow Supreme Court precedent that goes against their preferences (Songer et al. 1994, 679, 693). In short, when judges are exposed as extralegal preference maximizers, "the legal model" lives on in their (undischarged) duty to rigidly follow precedent that they think is wrong.

A contemporary trend among strategic courts scholars recognizes that fidelity to law may itself be a judicial goal. Some political scientists have even claimed to demonstrate, empirically, that "law matters" to judges (Bailey & Maltzman 2008; Richards & Kritzer 2002). Yet, in these and similar accounts, fidelity to law is cognized as routine adherence to legal rules (Bailey & Maltzman 2011, 2008; Spriggs & Hanford 1998; Wahlbeck 1997) or compliance with monolithic decision structures that operate much like rules (Bartels 2009; Richards & Kritzer 2006, 2003, 2003). As such, fidelity to law can only exist in contradistinction to the influence of judges' other values or attitudes. The law that matters as law is thus, again, formal rules and precedents, much like "the legal model." Moreover, this law only matters so much: while these accounts find the rule-following expectation partially met, they also invariably find that rules or decisional regimes frequently fail when it comes to subordinating judges' putatively extralegal preferences.

A recent account of a gamut of factors influencing judicial strategy insists, "as long as the judge is acting within his jurisdiction, he is doing law" (Epstein et al. 2013, 59). This seems to suggest a refreshing willingness to conceive of judicial legitimacy in terms beyond "the legal

model." Yet, these authors ultimately undercut that prospect by lumping together all judges acting within their jurisdiction, which is to say, all formally authorized judicial decision making. If all formally authorized judicial decisions are equally "doing law," whatever the results, then law can offer no meaningful guidance to judges, beyond authorizing their decision-making power. Without some meaningful notion of law as a guide to the substance of judicial decisions, there are scant grounds for judicial legitimacy. Ironically, this standardless-ness thus tends to reinforce "the legal model"—mechanical, unworkable, and perhaps even impossible as it may be—as still the only meaningful legal standard that there is. In the next section, I turn to the disciplinary forces that forged this model.

III. A Preface to Judicial Behavioralism

As the disciplinary historian John Gunnell explains, by the mid-1950s, pluralism played a dual role in American political science: it served as "the standard explanatory and descriptive account of politics and a normative theory of liberal democracy" (1995, 19). Theories of pluralism celebrated the bargaining and competition of overlapping interest groups - themselves comprised of self-interested individuals, aggregating, disaggregating, and reaggregating with other individuals who shared their interests - as effectively representing the wants, needs, and aspirations of Americans (Farr 1995, 204-205). In retrospect, midcentury pluralist theory is understood as having been fashioned after midcentury America itself. On Edward A. Purcell's iconic account, this was, in significant part, a response to the Cold War and the unforgotten horrors of World War II. In contrast to the specter of authoritarianism abroad, American political scientists came to see a tolerant relativism as a defining American good, whose promise was borne out in America's pluralistic social structure; in turn, relativistic pluralism at home,

particularly in contrast to authoritarianism abroad, was apprehended as functional democracy (Purcell 1973, 254-62).

While the midcentury attraction to pluralism can be made sensible, it has been aptly charged with foreshortening American political scientists' visions of democracy, civic engagement, and a more just society (e.g., Mills 1956; Walker 1966; Bachrach 1967; *see generally* Connolly 1969, ch. 1). I argue that the pluralist mindset foreshortened political scientists' conceptions of law and judicial decision making in similar ways, circumscribing the judicial role and limiting law's power as an agent of social change. In the subsections that follow, I begin by introducing the pluralist paradigm and then highlight a tension in classic formulations of pluralism between a view in which the overall peace and stability of American society depended on the pursuit of self-interest, narrowly construed, and a view in which a shared set of social norms, or adherence to "the rules of the game," served as the true bulwark of the American system.

On the pluralist view, these procedural rules were ably stewarded by a dedicated network of public servants, epitomized by impartial judges. Schubert and the "new behavioralists," however, turning to the empirical study of judicial decision making in earnest in the late 1950s, found that the pluralist view of judges was decisively inaccurate. Accordingly, Schubert resolved the tension in classic accounts of pluralism by extending the self-interest-based logic of pluralism to judges. This had the effect of reconstituting the study of judicial decision making as the study of how self-interested behavior drives the judicial process, still an apt description of much of the political science study of courts today. Admittedly, this was an approach that the foremost pluralists themselves rejected, holding judges, at least ideally, above the fray of interest group competition. Nonetheless, within the logic of the pluralist paradigm, it was not

unreasonable to bring judges into the fold of self-interest. As I explore in Section IV, however, by revealing personal attitudes and judicial gamesmanship as the true determinants of judicial decisions, Schubert somewhat paradoxically set himself up to reinstate an even thinner version of the pluralist belief in the judicial duty to impartially uphold "the rules of the game": "the legal model."

A. Three Cheers and Two Tiers for Pluralism

Pluralism can be seen as reconceiving theories and practices of democracy for mass, industrial and consumerist American society, rather than early agrarian America. The influential political scientist, Robert Dahl, famously took this approach in his 1956 book, *A Preface to Democratic Theory*, commending a form of government that he called "polyarchy." It was not exactly majority rule—which is a myth, anyway, Dahl pointed out, given the mass of non-voters, uninformed voters, and candidates' unknown or contradictory policy positions—but a group-centric or "minorities rule" version of democracy (1956, 126-132). That is, instead of the people ruling, groups could, and in modern America, they did: as Dahl claimed, in the "'normal' American political process … there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision" (145, 150). Other political scientists focused more squarely on pluralism's aptitude as a modern system of social organization. "Between Adam Smith's invisible hand and our well-developed system of lobbies and pressure groups there is a tempting analogy," one wrote. "If the former was the means of regulating the market, the latter is the means of regulating society" (Blaisdell 1958, ix-x). He concluded by promising the reader much that would "fill in the gaps in his knowledge of the politics of democracy as practiced in the United States."

While midcentury faith in pluralism was widespread, the political scientist David Truman's 1951 book, *The Governmental Process*, stands out. Truman attempted "a restatement of the role of groups in the political process"—a restatement in which interest groups were the "weft of the fabric" of American government and the "balance wheel" of American society (1951, ix, 46, 514). Truman's restatement also reveals the roles of masses and elites in the pluralist paradigm. Pluralists came to see classical theories of democracy as idealistic and untenable in view of mounting evidence that the average American was politically uninformed and apathetic (Purcell 1973, 258-59). Thus, they turned to social elites, whose education, established roles, and connections in the community were thought to position them as capable and moderate mouthpieces of mass interests; in turn, mass apathy could be recast as "socially beneficial, since it helped preserve democratic stability" (259-60). Truman expresses this mindset in asserting, as an "inevitability," that "individuals and groups are not equally and continuously active in government matters, any more than individuals are within the organized interest groups to which they belong." To insist otherwise is to be duped by "the myth of omnivigilant citizenship, the picture of the nation as a sort of continuous town meeting," Truman continues (1951, 355-56). "Wouldn't a really healthy citizen in a really healthy country be as unaware of the government as a healthy man is unaware of his physiology?"

Notwithstanding this healthy unawareness, Truman matter-of-factly provides that the "well-organized, cohesive group that enjoys skillful leadership" will be thoroughly aware of the policy issues bearing on its interests. "This awareness, particularly on the part of the active minority," i.e., the group's leadership, "is one of the consequences of effective organization and of continued existence as a political interest group" (357). Groups like trade associations and corporations are thus "likely to be persistently aware in detail of policy proposals affecting

them," Truman explains. Moreover, their savvy leadership can be counted on to manipulate "the size of the public" on any given policy measure impacting group interests—which is to say, the segment of the population aware of the measure and its public policy implications— "in order that the composition of the public may be as favorable to [the group's] position as possible" (358).

B. Divided We Stand United

As Truman artfully puts it, "society … is a mosaic of overlapping groups of various specialized sorts" (1951, 43). In keeping with the mosaic metaphor, the overall vision is more appealing than its parts. Indeed, Truman impresses that the fundamental stabilizing force of the pluralist system is many people's overlapping memberships in multiple, sometimes clashing interest groups, which, "*in the long run* imposes restraints and conformities upon interest groups upon pain of dissolution or of failure" (168). That is, when overlapping groups clash too much, their members retreat into the less troublesome of the groups, causing outlier groups to moderate their approaches or die out. Membership, in this sense, "should not be understood narrowly": it must encompass "fellow travelers" in actual groups as well as membership in "potential groups" (158-59). Yet, potential groups are hardly groups at all, but rather, as Truman puts it, indicated "in attitudes widely held but not at the moment the basis of interaction and claims upon others" (514). Moreover, certain potential groups are particularly critical for the American enterprise. Without them, "it is literally impossible to account for the existence of a viable polity such as that in the United States."

These bedrock potential groups are widely held social norms that cut against the specialized, self-interested logic of the rest of the pluralist system. Intermittently, Truman refers to them as "the rules of the game": "interests the serious disturbance of which will result in

organized interaction and the assertion of fairly explicit claims for conformity" (512). In other words, the violation of these rules will call defensive groups into being in order to uphold the social consensus. In America, these rules center on "the value generally attached to the dignity of the individual human being, loosely expressed in terms of 'fair dealing' or more explicitly verbalized in formulations such as the Bill of Rights," Truman explains. For the masses, "they may be loose and ambiguous," yet they are apt to be "more precise and articulated at the leadership level" (512). The most significant leadership in this regard is not, however, the usual cadre of corporate lobbyists. Rather, on Truman's account, "one may think of the principal government leaders—legislative, executive, and judicial—as the leaders of these unorganized groups" (448-49).

In the first place, those "who aspire to, or occupy, public office of whatever sort are particularly likely to identify with these expected behaviors as part of their desired or existing roles." So too, "the group life of government agencies … reinforces the claims of these unorganized interests, which overlap those of the official group itself" (513). Government service thus positions those within its ranks to identify with the social norms that Truman variously refers to as "potential groups," "unorganized interests" or "the rules of the game." But not all government posts are equal. "More than any other segment of the governmental institution, the courts are looked upon as the guardians of the 'rules of the game'," Truman asserts (486). "Judges are expected to identify themselves with those 'rules' and to afford privileged access to the interests reflecting them." "To a greater degree than legislators or executives," he insists, judges are the "leaders of widely shared but unorganized interests … which must be effectively represented in court decisions."

C. Judicial Behavior and the Two-Mind Problem

In Truman's group interpretation of politics, a diverse array of specialized, self-interested activity nonetheless yields, in the aggregate, a surprisingly coherent and functional mosaic. As Dahl's frequent collaborator, the economist Charles Lindblom, expressed the view, "people can coordinate with each other without anyone's coordinating them, without a dominant common purpose, and without rules that fully prescribe their relations to each other" (1965, 12). Yet, on closer inspection, Truman's "rules of the game" bely each of these assumptions: they signal a common enterprise, underwrite a social consensus, and specify standards for people's relations, particularly for elite conduct. Further, among elites, Truman casts judges as "the guardians of the 'rules of the game'," the selfless stewards of widely held social norms, which must be enforced in judicial decisions (1951, 486). This role could not depart further from the particularized self-interest driving the interest group system. Pluralism seemed to be of two minds.

Glendon Schubert, the pioneering political scientist who developed both the attitudinal and the strategic models, alongside their legal foil, in the late 1950s, resolved the two-mind problem by extending the logic of particularized self-interest to judges. Why should they be set above the self-interested drives that drove the rest of the world? Moreover, the judges he saw handing down the landmark decisions of the day did not seem to be neutrally upholding uncontroversial social norms. In his breakthrough piece in the *American Political Science Review*, "The Study of Judicial Decision-Making as an Aspect of Political Behavior," Schubert thus extended Truman's lenses of group dynamics and game theory to judicial decision making (Schubert 1958, 1007). Of course, Truman had emphatically exempted judges from these lenses. Schubert was not unaware of this; he disagreed. While drawing on Truman's broader pluralist

vision, Schubert disparaged Truman's take on the judicial role as "even more spectral than his treatment of this point in regard to the administrative bureaucracy" (Schubert 1958a, 18). He saw Truman's assertion that judges identified with their official roles, making them less influenced by special interests than other political actors, as wholly fanciful.

The polyarchist, Robert Dahl, was more willing than Truman to entertain the baser motivations of public officials, including judges. Accordingly, Schubert was more favorable to Dahl's formulations of pluralism than to Truman's. Indeed, in a textbook he wrote on judicial behavior, Schubert (1960) even excerpted a recent essay by Dahl (1957), in which Dahl concluded, after analyzing the entire history of Supreme Court review of national legislation, that the "main task of the Court is to confer legitimacy on the fundamental policies" of the currently dominant lawmaking alliance (Schubert 1960, 265, quoting Dahl). On Dahl's account, this alliance was itself "an aggregation of minorities" forged by executive leadership. In other words, it was "polyarchy" all over again: an array of interests bargaining, compromising, and coalition-building in order to capture as much favorable policy as possible. Yet, this was a significantly worse look for the Court than for American society in general, particularly if one envisioned the Court as the stalwart guardian of fundamental civil rights and liberties.

Dahl exposed the Court as just another player in the power politics of the day, albeit one with the special role of rubber stamping the brokerage of the powers that be. Or at least this seemed to be Dahl's message, since Schubert ended the excerpt there. This was not wholly inaccurate; it arguably captured the thrust of Dahl's argument. Nonetheless, it had the effect of omitting Dahl's actual conclusion, in which he turned a near about-face: "Yet the Court is more than this … The operation of [democracy] presupposes the existence of certain rights, obligations, liberties and restraints … at its best the Court operates to confer legitimacy, not

simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy" (Dahl 1957, 294-95). Ultimately, Dahl thus concluded that the Court is much more than a rubber stamper for the dominant coalition's particularistic policies. Indeed, "at its best," the Court upholds the basic prerequisites of democracy.

Unlike Truman, Dahl did not go out of his way to distinguish judges as the archdeacons of pluralism. However, in a passage that Schubert also excluded, Dahl made clear that in general, "the politically active and influential segments of the population" were entrusted with maintaining the democratic framework; in this process, the Court played its part by enforcing and reinforcing "certain rights, obligations, liberties and restraints" that were crucial to that framework (Dahl 1957, 295). In his *Preface to Democratic Theory*, Dahl referred to this as "the underlying consensus": the basic set of social norms that must exist "[p]rior to politics, beneath it, enveloping it, restricting it, conditioning it … among a predominant portion of the political active members" (1956, 132). Without this consensus, Dahl explained, "no democratic system would long survive." His view was significantly less exacting than the total self-identification with the "rules of the game" that Truman required of judges, but he was nonetheless convinced that political elites, including Supreme Court justices, were crucially conditioned to observe and enforce a shared set of norms that kept the American system in bounds.

This view was wholly foreign to Schubert. As he would come to articulate his own, starkly opposed premises about judicial behavior more forthrightly, several years later: "I start with the assumption that Supreme Court justices can, with very few exceptions," be classed as the type of "man who displaces his private motives on public objects, for which he then provides a rationalization in terms of the public interest" (Schubert 1965, 12).

IV. The Iron Law of Pluralism

As I argued in Section II, the revelations of Schubert and his successors about the supposedly extralegal determinants of judicial decision making are motivated by the assumption that judges ought to be rigidly following legal rules. Otherwise, it would hardly be revelatory to show that judges take other factors into account in rendering impactful decisions about often-complex situations. But why should judges be held to the expectation of rigid rule following, particularly given the mountain of evidence that political scientists have amassed showing what an unreasonable expectation it is? Much as pluralism sheds light on Schubert's reformulation of the study of judicial decision making as the study of how private motives drive judicial behavior, it also explains the impossible obligation of "the legal model." This explanation requires several steps.

First, we need to better understand how pluralism mediated the way that midcentury political scientists looking to empirically analyze judicial behavior were prone to understand law and judicial legitimacy. This enables us to see how, in the late 1950s and early 1960s, these scholars confronted a judiciary that simply could not be shoehorned into the classic pluralist paradigm: judges were not observing their proper role of neutrally upholding social norms. With this in mind, we can better see how judicial behavioralists' commitment (conscious or unconscious) to salvaging the broader pluralist worldview required extending the remaining pluralist logic of self-interest to judges. In turn, we can see how this view of judges impelled judicial behavioralists to "the legal model's" rigidified view of judicial duty as the best possible antidote to self-interested judging, with the paradoxical effect that they came to recuperate an even more narrow and implausible prescription for judicial legitimacy than the one they set out to debunk.

A. If You Can't Beat Them, Join Them

Steeped in the mindset of pluralist political science in the late 1950s, Schubert was bound to cast a critical eye on the increasingly emboldened judiciary that he observed. This is not because he was ideologically unfriendly to the Warren Court; the opposite is likely true. Yet, the substantive egalitarianism that the Warren Court promoted is hard to reconcile with the pluralist view of judges as the neutral enforcers and reinforcers of "the rules of the game." In other words, the classic accounts of pluralism assumed such a narrow purview of legitimate judicial decision making that careful attention to courts seemed destined to discern behavior that went beyond it—particularly if that behavior infused law with substantive conceptions of morality. Political scientists analyzing judicial behavior through the pluralist lens thus apprehended the Court as increasingly illegitimate.

As Raymond Seidelman and Edward Harpham diagnose, Truman's notion of "the rules of the game" hearkens to Alexis de Tocqueville's democratic morality, "but with one vital distinction": Tocqueville identified "substantive manners and morals" as the foundation of American democracy, but Truman "conceptualized the rules of the game in largely procedural terms" (1985, 182). Recurring to Truman's account, we can see Seidelman and Harpham's point borne out in Truman's characterization of "the rules of the game" as norms of "fair play," exemplified by the "expected behaviors" of public officeholders (1951, 512, 513). These behavioral norms, Truman explains, relate to "the value generally attached to the dignity of the individual human being," which might be "loosely expressed in terms of 'fair dealing' or more explicitly verbalized in formulations such as the Bill of Rights" (512).

The point is not to denigrate the significance of the evenhanded administration of legal procedures to the dignity of the individual. Nor is it to naysay the particular guarantees of the

Bill of Rights, including the rights to speech, worship, assembly, and a fair trial, and the prohibition against warrantless state incursions on personal dwellings and effects. These procedural protections are crucial. However, it is also crucial to acknowledge that such an essentially procedural conception of justice excludes and sometimes even disserves broader concerns of substantive justice. As many have argued, treating parties that are disparately situated, economically or socially, in exactly the same way, tends to exacerbate preexisting inequalities, much as a flat tax is effectively regressive. Thus, the point is that by conceiving of "the dignity of the individual human being" in terms of evenhanded application of "the rules of the game," and in wholly identifying the pluralist guardian-judge with that task, Truman offers an impoverished rendering of the judicial role.

As Seidelman & Harpham aptly charge: "In a sense, the only democratic virtue about which Truman was concerned was instrumental loyalty to procedures" (1985, 182). While apt for Truman, this complaint is perhaps even more readily lodged against Dahl. "Considered as a political system, democracy is a set of basic procedures for arriving at decisions," Dahl writes (1956, 295). "The operation of these procedures presupposes … certain patterns of behavior." As we have seen, for Dahl, "at its best, the Court operates to confer legitimacy … upon [these] basic patterns of behavior" (1956, 295). Even as Dahl envisions a less constricted role for judges than Truman, he thus strikes the same chord, offering a vision of procedural justice—which today we might think of as formal equality, or equality of opportunity—as the heart of the Court's mission, irrespective of substantive equality or equity concerns. This is all the more notable because Dahl expressly acknowledges that "the Court cannot act strictly as a legal institution." Rather, "[i]t must … choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be

found in or deduced from precedent, statute, and Constitution" (281). However, for Dahl, in this inevitable capacity, the Court inevitably goes beyond its highest calling as the defender of "the validity and propriety" of "certain patterns of behavior" that undergird democracy (295).

In this light, we can see how the reigning pluralist paradigm was unsatisfying to political scientists holding an empirical lens up to courts, and we can better understand their response. Seminal pluralist accounts cast judges as neutral umpires, enforcing uncontroversial procedural rules. The Court that judicial behavioralists observed and analyzed, however, increasingly mediated substantive issues of equality and representation that were neither uncontroversial nor easily apprehensible in terms of procedural fairness. Faced with this incongruity, scholars of judicial behavior like Schubert rejected the pluralist account of judges. However, they were either unwilling or unable to reach beyond the broader pluralist worldview, which made available only two logics for understanding political behavior: the particularized pursuit of self-interest or the evenhanded administration of procedural fairness. Enforcement of essentially procedural justice seemed evidently inaccurate as a description of what judges were doing. Schubert thus extended the logic of self-interest to judges, comprehending them as projecting their "private motives on public objects" and "provid[ing] a rationalization in terms of the public interest" (Schubert 1965, 12).

B. Every Action Has a Reaction

If pluralism shaped judicial behavioralists' conceptions of judicial legitimacy, leading them to skeptically reinterpret the study of judicial decision making as the study of how self-interested behavior drives the judicial process, the consequences of this latter mindset were even more pronounced. In fact, one might even call them preordained, for once private motives are seen lurking behind every judicial decision, a rulebound judicial ideal becomes an imperative.

Even if such an ideal is theoretically unreasonable, and even if it is relatively ineffective at preventing judges from promoting their preferences in practice, given a federal court system in which judges are subject neither to electoral accountability nor term limits, "the legal model" is one of precious few judicial restraints in the arsenal of pluralist democracy. Indeed, within the irreducibly self-interested reconfiguration of pluralism, the prescriptive norm of "the legal model" presents itself as the strongest judicial check one can hope for, serving both to put judges on notice of their circumscribed discretion and to give others a ready standard to criticize them against.

Strangely enough, this logic is traceable in a piece in which Schubert recommends reconfiguring the federal courts to approximate the "open administrative society" of the bureaucracy, "as distinguished from the relatively closed society of the courts," by which he basically means packing the courts with a variety of special interest advocates that judges would be enjoined to consult (1958a, 24-25). As Schubert explains, "the public interest is, in effect, a probability statement": the more judicial decision-making processes are structured so as to consult "all relevant sources of data, points of view, and affected interests," the more likely they are "to achieve a maximal accommodation of the affected individual and group interests" (23). Holding judges to account to as many stakeholders as possible, each clamoring for representation of their own interests, Schubert's proposal for reforming the judiciary turns the self-interest-driven logic of pluralism into a constraint on wily judges. The proposal is not necessarily without merit; it may well make the judicial process fairer and more responsive, at least to those interests who can secure mandatory representation in court. Nonetheless, it stridently contradicts understandings of the judicial role as upholding principles that bind society, principles whose

governance is itself a matter of the public interest, not a matter compelled by an aggregation of particularized wills.

Related and more important, the basic pluralist assumptions of Schubert's court packing plan are readily repurposed as the "the legal model," which might be seen as a surrogate for this vision of pluralizing the judiciary. Seeking to subordinate the suspect judicial will to a myriad self-interested stakeholders, Schubert's plan attempts to salvage judicial stewardship of the public interest in a paradigm that renders both public stewardship and a truly public interest inconceivable. Indeed, Schubert proposes his pluralizing plan in a piece entitled "The Theory of 'The Public Interest' in Judicial Decision-Making," in which the scare quotes are no accident. Having concluded that there are virtually no substantive ways in which judges might promote the public interest, as they are bound to arrogate power to themselves to promote their own interests and ideologies, he turns to the mechanistic constraint of mandatory consultation with multiple stakeholders (1958a, 21). In effect, this is how the legal model works. In place of a multitude of competing stakeholders, however, it constrains wily judges as best it can with the mandate of mechanical rule following.

If "the legal model" is a stand-in for Schubert's proposal for pluralizing the judiciary, both can be understood as thin versions of Truman's judge, who virtually embodies "the rules of the game." Admittedly, Schubert claimed to reject Truman's "spectral" vision of judges charged with upholding widely held social norms. However, it is hard to understand the mechanistic constraints that Schubert imposes on judges, meted out in the public interest—or at least in the interest of maximizing the probability of something like the public interest—as anything but gestures toward consensual standards of judicial accountability and stewardship. Although "the legal model" is largely devoid of substance, it recognizes that judges are entrusted with a higher

mission than carrying out their personal preferences, and connects this mission with the good of the public as a whole. In this way, "the legal model" serves as the public-interested counterpart to Schubert's self-interested account of judicial behavior, much as Truman's "rules of the game" and Dahl's "underlying consensus" creep in as the necessary supplements to their logic of particularized, self-interested pluralism. Nonetheless, if these are meager supplements to a pale and lopsided vision of democracy, "the legal model" can hardly be seen as doing justice to the task of the judge.

C. Lawyers are from Venus, Political Scientists are from Mars, and Pluralists are from the Best of All Possible Worlds: A Coda

In the 1990s, critics of Segal and Spaeth's attitudinal model and its counterpart, "the legal model," likened the latter to the rulebound view of judging that the legal realists once ridiculed (Smith 1994, 8-9; Gillman 2001, 470-71). The critique was apt, but the similarity was puzzling. How did political scientists come to recuperate much the rulebound judicial ideal that the legal realists of the 1920s-1930s vehemently attacked, and which the legal academy largely rejected for a more dynamic conception of the judicial role? This puzzle was made all the more puzzling by the fact that political scientists from Schubert (1958a, 18) to Segal and Spaeth (1993, 65) have heralded their own accounts of judicial behavior as extending the insights of the legal realists. More recent, strategic judicial decision-making scholarship also claims to provide a "realistic model of judicial behavior" building on the realists' insights, although employing more sophisticated analytical techniques (Epstein et al. 2013, 3-5). Before turning, in the final section of this paper, to the legacy of legal realism in its own right, it is thus worth briefly considering judicial behavioralists' penchant for invoking the legal realists.

Perhaps unsurprisingly, Schubert was on the leading edge of this trend, characterizing the realists as "skeptics and sophisticates who have put behind them childish myths" about law and

judging, and positioning his own work as an extension of theirs (1958a, 5, 18). There is certainly some truth to Schubert's connection: the legal realists are famous for holding a critical, empirical lens up to the judicial process and focusing on what judges did rather than what they said. A 1931 piece that came to be seen as a manifesto for the realist movement typifies this approach, calling for the treatment of judicial opinions according to "the theory of rationalization," that is, as "arguments made by the judges (after the decision has been reached), intended to make the decision seem … legally right … legally inevitable." However, the truth of the matter, as the realist standard bearer Karl Llewellyn explains, is that "in any case doubtful enough to make litigation respectable the available authoritative premises … are at least two and the two are mutually contradictory as applied to the case in hand" (1931, 151).

For Llewellyn, much as for Schubert, the "supposed certainty in decision" arising "merely from the presence of accepted rules" was a myth (Llewellyn 1931, 152). This might be stated more broadly: the legal realists were convinced that traditional legal rules did not yield clear answers in most cases and that judicial discretion had to fill in the gaps. Some realists even thought that the gaps were big enough to swallow the rules. For instance, the iconoclastic legal realist Jerome Frank described legal rules as "incidental" to judicial decisions (1930, 136). Another leading realist, Felix Cohen, skewered abstract legal concepts like natural rights and corporate "persons" as "transcendental nonsense," calling instead for making important legal decisions according to a "functional approach" in which "[a]ny word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it" (1935, 823).

As Cohen's call suggests, however, exposing the hollowness of legal abstractions was not the end of the legal realist critique but a means *to* the end of it. "[T]he legal realists saw their

'realism' about the indeterminacy of law as a benign means of emancipating judges from mindless formalism and altering them to take responsibility for the social consequences of their unfettered discretion" (Oakley 1993, 513; *see also* Kennedy 1976). More pointedly, the legal realists sought to move judges to respond compassionately to the plight of those suffering under a laissez faire economic order that the judiciary helped lock in place by rigidly adhering to outdated legal doctrines, particularly those that stymied government regulatory efforts and struck down social welfare legislation. As the Depression advanced, the realists became increasingly convinced that a more responsive approach to law and legal decision making was necessary (Purcell 1973, 93). In the realist manifesto, Llewellyn accordingly advocates the "conception of law in flux … of judicial creation of law," and the "conception of law as a means to social ends and not as an end in itself." He further asserts that any particular part of the law "needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both" (1931, 150), flagging as particularly suspect legal rules and doctrines that supposedly require economically regressive outcomes.

The pluralist mindset in American political science was both years and figurative miles away from this progressive ethos. As I have suggested, Cold War-era political scientists like Truman and Dahl envisioned the American status quo, while imperfect, as the best of all possible worlds. On Edward Purcell's account, this was not because they were particularly intolerant or conservative; indeed, one of their primary goals was to show that democracy "was a workable and sound political ideal" (1973, 261). Yet, in so doing, "they were forced to show that a successful democratic government actually existed, and hence to identify the ideal with the existent." As such, "the American given," seen as "pluralistic and therefore good … tended to

create a fundamentally complacent attitude … and to gloss over the glaring discrepancies of wealth and power that existed in American society."

While midcentury American political scientists can be characterized as merging the "is" with the "ought," the legal realists pushed in the opposite direction. Indeed, in the realist manifesto, Karl Llewellyn famously called for the "*temporary* divorce of Is and Ought for purposes of study," explaining, "[m]ore particularly, this involves during the study of what courts are doing the effort to disregard the question of what they ought to do" (1931, 150). Nonetheless, Llewellyn went out of his way to point out that the separation was temporary: "To men who begin with a suspicion that change is needed, a permanent divorce would be impossible." After diagnosing the state of law and judging as they were, the realists hoped to remake them as they ought to be: more responsive and more humane. This reformist ethos is wholly lacking in the work of political scientists like Glendon Schubert. Given the roots of the political science study of judicial behavior in the pluralist paradigm, this is unsurprising. So too, perhaps it should be unsurprising that while both the legal realists and political scientists like Schubert sought to expose the indeterminacy of legal rules, the former came away counseling progressive judicial action in tune with human needs, while the latter commended a rigidified judicial ideal that decoupled law from substantive matters of justice.

V. The Pragmatist Life of the Law

In this final section, I trace the origins of a very different, dynamic and purposive approach to judicial decision making, which captivated American law professors in just the midcentury timeframe that "the legal model" took hold among American political scientists studying courts. Here, I limit my focus to the development of this dynamic and purposive approach to judging, as it emerged in the preceding era, out of the legal realist movement. As I

argue, legal realism in general, and the legal realist critique of legal formalism—and the elitist agenda that formalism defended—in particular, were long intertwined with American democratic pragmatism. As I briefly sketch, this approach grew to maturity in the midcentury approach to legal decision making known as Legal Process Theory, which was both an heir of democratic pragmatism and its fullest jurisprudential expression. Thus, while midcentury political scientists' embrace of pluralism commended a "top-down" view of the legal order, casting law as a set of procedural rules to be enforced and reinforced by judicial elites, midcentury political scientists' embrace of pragmatism suggested a "bottom-up" view of law and judicial decision making taking its shape from the people's experiences and purposes, while leaving space for their development and expression through democratic processes.

A. Intertwined Origins

In 1942, not long after legal realism had run its course and changed the course of the American legal academy, the intellectual historian Max H. Fisch suggested that the widely recognized progenitor of legal realism, Oliver Wendell Holmes, had also invented American pragmatism. Holmes' well-known claim that the "life of the law has not been logic: it has been experience" (1881) has an apparent affinity with the pragmatist tenet that practical experience, and not abstract logic, arbitrates the worth—or as it is sometimes said, the truth value—of ideas. Yet, Fisch's account begins well before Holmes was penning epigrams, when he was still a young lawyer. Holmes received a letter from a friend, who would become a renowned pragmatist philosopher, proposing that they establish a group to discuss "the very tallest and broadest questions" (Fisch 1942, 88, quoting James 1868). The result was the Metaphysical Club, which met from 1869 to 1872: the time period in which Fisch (94) isolates Holmes' formulation of his famous prediction theory of law.

Holmes' prediction theory equates law with any motivation that a lawyer can count on to induce a judicial decision going one way or another, "be it constitution, statute, custom, or precedent" (Holmes 1872, 725). He exempts "the blandishments of the emperor's wife" only because these do not seem apt to sway judicial decisions *reliably*. In defining law by its utility to practicing lawyers in building their cases and advising their clients, Holmes' prediction theory is distinctly pragmatic. Law is not, as Holmes would later put it, "a brooding omnipresence in the sky" (*Southern Pacific Co. v. Jensen*, 1917); it is how it works, and hence what lawyers can reliably predict it will do. "Whatever may be thought of the merits of this prediction theory, it is, I believe, the only systematic application of pragmatism that has yet been made," Fisch asserts (1942, 87). It is certainly the "only application of the doctrine [of pragmatism] put into print during the [Metaphysical] Club's lifetime." Thus, for Fisch, "we may safely infer … that pragmatism was a generalization of the prediction theory of law" (92, 94).

Fisch's account hinges on demonstrating that Holmes formulated the prediction theory decades before he is generally thought to have (*see* Holmes 1897), placing Holmes' formulation shortly before the earliest known articulation of pragmatism as a philosophical doctrine, which is generally credited to the scientist and mathematician Charles Sanders Peirce, at the last meeting of the Metaphysical Club in 1872 (*see* Peirce 1906). William James, who first wrote to Holmes proposing that they start the Club, is another towering figure in the history of pragmatism. Indeed, James became the far more famous pragmatist than Peirce. Nonetheless, James still credits Peirce with what he identifies as the foundational principle of pragmatism: the idea, as he describes it, that "the soul and meaning of thought … [lies] in the production of habits of action … [such that if] there were any part of a thought that made no difference in the thought's

practical consequences, then that part would be no proper element of the thought's significance" (James 1898, 258-59).

While Fisch's account remains controversial (Kellogg 1984; *cf.* Grey 1987), for present purposes, the important point is not that Holmes was (or was not) the first proponent of pragmatism, but rather that legal minds and methods were bound up with the pragmatist outlook from early on. Indeed, on Fisch's own telling, the "most significant fact" about the Metaphysical Club "is that of its six most active members three were lawyers" (1942, 88). One was Holmes, another was a law student doing some editing work for Holmes, and the third was Nicholas St. John Green, a Harvard Law School professor whom Holmes evidently admired, and whom Fisch cites as one of the "natural leaders of the group by virtue of philosophic maturity." Thus, while Pierce's experimentalist mindset is often seen as the crucial font of pragmatism, "the methods of the practising lawyer had quite as much to do with it," Fisch insists (88-90). Moreover, at times, he even seems to suggest that among lawyers, Green's influence was paramount (89 n. 11, 92; *see also* 1954).

This conclusion also finds unexpected support in Louis Menand's more recent, narrative account of the origins of American pragmatism in *The Metaphysical Club* (2001). Menand carves out a significant role for Holmes in developing pragmatist thought, placing him on par with the American pragmatist trinity of Peirce, James, and their disciple, the philosopher, John Dewey. The harsh realities of the Civil War in which Holmes fought and nearly died stripped him of his faith in moral absolutes and general principles, Menand explains (2001, 23-61). Wary of fixity and certitude as a judge, Holmes believed that most of all, courts should not thwart social experimentation (61-69). His resultant jurisprudential tendencies—rejecting abstract rights and principles in favor of focusing on law's social utility—are distinctly pragmatic (342-

46; 409-411; 421-433). So too, they took shape under the influence of Nicholas St. John Green, while the two were in the Metaphysical Club. Nonetheless, Menand presents Green as an even greater influence on the scientist and mathematician Peirce. Grappling with the paradigm shift entailed by Darwin's theory of evolution when the club met, Pierce had come to understand that even scientific laws like gravity and causation cannot be fixed and absolute; if the door is always open for chance variations to take hold, they too must be relative and probabilistic (Menand 2001, 222-23). However, this left Peirce with an even greater conundrum: what does it mean for something to be true in a world without fixed points of reference? Peirce got an influential hint, Menand says, from Green.

B. Back when Pragmatism and Realism were Green

In fact, Green's article, "Proximate and Remote Cause" (1870), published shortly after the Metaphysical Club commenced, seems to have set off lightbulbs for both Peirce and Holmes. Legally, proximate cause signals liability: one is generally liable for the damages that he proximately causes, but not for the effects of more remote causes that he sets in motion. Green begins on a wider plain, however, surveying the causal philosophies of Francis Bacon, Aristotle, and the scholastics, whose clear and precise distinction between proximate and remote causation he especially admires (Green 1870, 1-10). Nonetheless, there is only one view of causation of service "for any practical purpose," Green insists: "the antecedent which is within the scope of that purpose is singled out and called the cause, to the neglect of the antecedents which are of no importance to the matter in hand" (11). Thus, if a blind man drowns while his attendant fails to keep watch, for a lawyer, the cause of death was negligence (12). For a doctor, the cause of death was water filling the lungs. For a comparative anatomist, it was the man's possession of

lungs rather than gills. For every "purpose with which we investigate we shall find a different circumstance, which we shall then intelligibly and properly call the cause" (12).

In a lawsuit, we seek to establish causation in order to determine the rights and liabilities of the parties (Green 1870, 13). The terms "proximate cause" and "remote cause" are thus highly misleading, Green says: they suggest that we are after causation in the metaphysical sense of the philosophers who developed and debated these terms. Moreover, while purporting to offer a causal account that is objectively "true," these terms conceal the fact that different legal doctrines classify proximate causes in different ways (14). For instance, in the law of negligence, the defendant proximately causes the damages that his reasonable foresight could have avoided (15). In the law of many other torts, however, the damages that are called "proximate" are determined by the egregiousness of the defendant's overt conduct. In the same vein, while a breach of contract is treated as proximately causing the damages that the contracting parties themselves reasonably expected, in other contract disputes, such over the coverage of insurance contracts, industry standards govern proximate and remote causation (15-16).

For Green, if we want to improve our legal reasoning, we must recognize that the categories of proximate and remote cause are distractions from the true touchstone of legal causation, which is practical experience. Overall, the "law makes us responsible for those effects of our voluntary acts which might reasonably have been foreseen, or which are of a kind analogous to effects which might thus have been foreseen," Green explains (1870, 16). Yet, in general, there is "no other way of determining whether certain events, or whether events analogous to them in kind, were or might have been anticipated or foreseen, than by an appeal to experience." Thus, as Green impresses, "[w]e determine whether given causes and effects are

proximate or remote, in the legal sense of those words, from our own experience of cause and effect" (16). And thus, for Green, sound legal doctrine must consciously attend to the lessons of practical experience.

For Fisch (1942, 89 n.11), these insights seems to have inspired Holmes' prediction theory of law. For Menand (2001, 224-230), Green's generally purposive approach to causation thrilled Peirce, and he wove together his and Green's ideas to argue that knowledge is irreducibly social and truth is a function of the practical consequences of our ideas: much what James (1898, 258) would call "the principle of Peirce, the principle of pragmatism." Yet, Green's article is also a potent piece of pragmatism in its own right. Legal terms and doctrines do not correspond to an abstract, objective reality, Green argues. Rather, they are defined by our experiences, which give rise to the purposes for which law exists. Accordingly, if law fails to serve our purposes, it no longer deserves to be law. In making these points, Green's article is also a potent progenitor of the celebrated legal realist movement of the 1920s-1930s, albeit half a century before that movement would emerge, and decades before Holmes would pen the works from which the legal realists would take inspiration.

The legal realists of the 1920s-1930s faced a Supreme Court bent on formulaic adherence to retrograde legal doctrines, best exemplified by "liberty of contract," which the Court used to strike down dozens of state laws establishing minimum wages and maximum working hours, on the grounds that they deprived the parties on both sides of labor contracts of their rights to bargain freely (*see, e.g., Lochner v. New York*, 1905). Much as Green demonstrated that the idea of "proximate cause" in the law was not objective, but purposive and experience-based, the legal realists attacked the Court's doctrinaire view of "liberty of contract" as an attempt to naturalize one legal formula as the objective truth about liberty. Yet, this was a "liberty" that spelled

economic coercion for the great majority of toiling workers with virtually no bargaining power, the realists pointed out (Duxbury 1995, 105-106). Moreover, as coercion is itself an essential part of the "free market," neither that term nor "liberty of contract" describe natural phenomena; rather, they are social constructs, part of an ideology (106). The realists thus dubbed the Court's approach "*laissez-faire* formalism" (132): behind a veneer of abstract logic, it hid the purposes of the capitalist class and the corporate bar.

The rise of legal realism is said to have "marked the demise … of a pervasive legal-economic myth": "the free economic agent situated in a realm of pure choice" (Duxbury 1995, 106). It was a myth that capitalized on the way in which liberty has often been construed like causation, as an objective reality existing apart from the complexity of human purposes and experiences. It was a myth that Green had moved to expose in 1870, but legal elites did not want it exposed. Indeed, under the new deanship of Christopher Columbus Langdell, the Harvard Law School curriculum veered so sharply toward legal formalism that in 1873, Green quit in protest. A full-blown attack on legal formalism would have to await the legal realists.

C. Democratic Pragmatism and a New Lease on Law

Pragmatism is a philosophy centered on problem solving. From the beginning, pragmatism and legal realism went hand-in-hand. But the realists had a problem that pragmatism, at least as it had been developed so far, did not seem to resolve. How should judges judge? The realists had a good idea of the formalist way in which judges should not judge, but identifying a coherent, positive approach to the law proved more difficult. Holmes had identified law by its utility to practicing lawyers, who needed to predict what judges would do. This is why Fisch suspected that Holmes had developed his prediction theory long before the well-known piece in which he describes it (Holmes 1897), which he wrote after 15 years on the bench. As a

judge, however, Holmes tended to suggest that judges were not actually the best judges—that as a matter of course, they should defer to the people and their elected representatives.

This fit with Holmes' pragmatic approach, which privileged legislation—assumed to express the wisdom of popular experience—over judicial pronouncement. Thus, Holmes dissented from the Court's most notorious "liberty of contract" decision, *Lochner v. New York* (1905), explaining, "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion." "General propositions," he continued (like "liberty of contract"), "do not decide concrete cases." If the people wanted to pass protective labor legislation, Holmes thought the Court had no business stopping them. But Holmes' deferential approach was not always so enlightened. Upholding a state law permitting forced sterilization of the "feebleminded," he opined: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough" (*Buck v. Bell*, 1927). On one hand, it seems likely that Holmes' well-known belief in eugenics colored his callous rhetoric in this case. On the other, it is likely that Holmes would have made the same decision, regardless. That is, contrary to his assertion in *Lochner*, a general proposition did seem to decide most concrete cases for Holmes, and that proposition was that unelected judges should defer to the dominant forces in society.

In critiquing the Court's *laissez-faire* formalism, the legal realists sided with Holmes. Yet, they identified law not by deference to the dominant forces in society, but by its utility—and not by its utility to practicing lawyers, but its utility to average people. This is the nub of the realists' argument against "liberty of contract": the masses of workers forced to work long hours for low pay were not experiencing "liberty of contract" as freedom, hence it was not a valid legal ground for striking down laws. By making working people's experiences the defining

experiences of liberty, the realists poked holes in the "liberty of contract" doctrine and exposed the Court's supposedly objective reasoning about liberty as highly subjective.

In so doing, however, the realists also opened the door to the suspicion that judicial decision making was, by and large, just politics by other means. This was a bomb the realists could not defuse. Holmes had tried to avoid setting it off by deferring to the political process, which had its downsides, as Carrie Buck, whose forcible sterilization Holmes had allowed to proceed in *Buck v. Bell*, knew too well. By tying the validity of law to its popular social utility, the realists suggested an advance over Holmes' deferential approach, which effectively deemed legislation socially useful because it had been passed—however it had been passed, and at a time when only a minority of citizens had the right to vote. But how should judges gauge social usefulness? And why—and when—could they do so on behalf of the people, while displacing the voices of their elected representatives?

The realists did not have good answers. In the realist classic, *Law and the Modern Mind*, Jerome Frank recommended that judges should grow up. "To the child the father is the Infallible Judge, the Maker of definite rules of conduct" (Frank 1930, 19). The quest for certainty in the law is the misbegotten quest for a father substitute, Frank explained. Rather than vainly seeking certainty, judges should take a hard look at themselves, critically examine their biases, and try to develop as fair and forthright—as "adult"—a perspective as they could. Frank's embrace of Freudian psychology was somewhat extreme even among the realists. But he was in the mainstream when it came to the prediction theory. Thus, Karl Llewellyn effectively spoke for the group (and quoted Holmes) when he announced that the "real rules" of law are those "conceived in terms of behavior": they are "what the courts will do in a given case, and nothing more pretentious" (Llewellyn 1930, 448). In the end, this turned out to be not so different from

Frank's suggestion that the way forward for judges was to get clear about their extant biases. As Llewellyn writes, the "real rules" are "on the level of isness and not of oughtness; they seek earnestly to go no whit … beyond the remedy actually available" (448). In other words, once we get clear about how law is actually working, biases and all, then we can turn to the "ought": "the inquiry into the purpose of what courts are doing, the criticism in terms of searching out purposes and criticizing means" (Llewellyn 1930, 449).

By most accounts, the realists never reached, or at least never agreed upon, the "ought." Nonetheless, they reoriented the legal academy toward understanding legitimate judicial decision making in terms of the purposes and popular effects of laws, as well the broader purposes of American law and society. By the mid-1950s, a sophisticated version of this approach, known as Legal Process Theory, dominated the legal academy, taking its name from the influential law school textbook, *The Legal Process* (Hart & Sacks 1994 [tent ed. 1958]). As the authors of this text, law professors Henry Hart and Albert Sacks, set out, while legislators respond to popular preferences, judges derive their legitimacy from stewarding deeper shared principles, generally expressed in written law, but at base, growing out of society's shared purposes. Because these purposes are dynamic and value-laden, Hart and Sacks reject rigid rule following as an ill-suited model for judicial decision making. Nonetheless, they do not give judges license to vote their preferences. To the contrary, they connect judicial legitimacy to the fact that judges reason from values to which society at large already owes its allegiance, and they insist that judges make these connections clear in their opinions. An important corollary is that judges must acknowledge when widely shared values capable of resolving disputes do not exist, and when they do not, judges must defer to democratically elected decision makers. Moreover, even if

shared values do seem to exist, judges must consider whether courts can effectively advance them, and if not, they must again practice judicial restraint.

Although an in-depth account is beyond the scope of this paper, it is worth noting that the advances of this jurisprudential approach manifest the powerful influence of the democratic pragmatist thought of the most modern of pragmatism's founders, John Dewey. For Dewey, democracy is a social ideal, drawing on the generative power of the people's experiences and necessitating the participation of all members of society in shaping collective norms (1939). Much as Dewey understands individuals as deeply social and elevates democratic participation, Hart and Sacks commend law as a social ordering process constituted by ordinary people's interactions and disputes, few of which require "top-down" resolution by judges. Indeed, they identify litigation as a breakdown of law, although it presents an important opportunity for repair. Since law flows from popular will, however, judges must seek to supplement, not supplant, the broader legal process. They do this by attending to their distinctive area of institutional competence—discerning and advancing the shared principles that bind society—while staying their hand when these principles do not exist or when they are not dispositive, as when decisions turn on pressing policy matters or areas of administrative expertise. If this view sounds far-fetched today, it is nonetheless one that contemporary political scientists should take seriously, for it offers a normative conception of the role of the judiciary in a constitutional democracy that promises to strengthen both judicial legitimacy and democratic decision making.

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