

Taking Experience Seriously: A Comment on Professor Zipursky's *Benjamin Cardozo and American Natural Law Theory*

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Commenting on a paper with which one profoundly agrees presents something of a dilemma. If intellectual progress requires anything like the adversarial method, then one feels a certain pressure to criticize. Yet scholarly scruples demand something more than devil's advocacy. That is the dilemma I face in commenting on Benjamin Zipursky's essay, "Benjamin Cardozo and American Natural Law Theory."¹ I am in deep sympathy with the essay's core claim that a tradition of legal thought links Benjamin Cardozo to Lon Fuller and Ronald Dworkin. Indeed, I recently restructured my Jurisprudence class around that tradition.

My solution to the dilemma is to grasp ahold of both of its horns by offering a little criticism and then (I hope) some constructive engagement. I first draw a couple of distinctions that I think are important but which Professor Zipursky's essay glosses over. I then suggest a way of developing further what I have characterized as the essay's core claim. My suggestion is that the tradition to which Professor Zipursky has drawn our attention is older, broader, and more diverse than one might conclude after reading his essay. If that's true, it does not undermine, or even diminish, Professor Zipursky's core claim; to the contrary, it underscores the importance of Cardozo and of Zipursky's account of his place in American legal thought.

I.

Let me begin by very briefly summarizing Professor Zipursky's essay. In the first two Parts, Professor Zipursky gives voice to an anxiety that his confrontation with Cardozo's thought has produced. In *The Nature of the*

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1. Benjamin Zipursky, *Benjamin Cardozo and American Natural Law Theory*, 34 YALE J.L. & HUMANS. 24 (2022).

Judicial Process and elsewhere Cardozo expressed a variety of views about law and adjudication that (a) are likely shared by many lawyers, judges, and law professors today but (b) superficially appear incoherent.² Specifically, Cardozo said things that seemed to reject, at once, the central claims of legal positivism, legal realism, and natural law theory. Professor Zipursky worries that the apparent incoherence or instability of a position that rejects all three of these views is what has attracted people to Justice-Scalia style formalism, which he gives the wonderful moniker, “Washington Legal Positivism.”³

Professor Zipursky then devotes the third and final Part of his essay to defending Cardozo against the charge of incoherence. He does so by arguing that Cardozo is best understood as initiating a tradition of legal thought Professor Zipursky dubs “American Natural Law Theory”—a tradition that also includes Lon Fuller and Ronald Dworkin.⁴ Professor Zipursky recognizes that there are differences among these thinkers. In his later years, for instance, Dworkin seemed to envision a more ambitious role for the judge—and one less constrained by deference to conventional morality—than did Cardozo.⁵ Nevertheless, all three thinkers shared a conviction that American legal practice sometimes requires judges to engage in moral reasoning when deciding cases.⁶ In that way, all three also seemed to reject a clear separation of law from morality. Lest those affinities seem superficial or coincidental, Zipursky observes that the works of these legal theorists reflect the influence of philosophical pragmatism.⁷

So understood, Cardozo, Fuller, and Dworkin can all be seen as part of the same tradition of legal thought. The “analytic core” of that tradition Professor Zipursky says, is “the very same challenging idea that the social life that grounds law is at once factually real and normatively fertile.”⁸ Professor Zipursky concludes by acknowledging that he has not put forth a philosophical argument in defense of this tradition. Instead, he hopes that his effort to identify the shared aims and assumptions of these legal theorists may enable us to “repair the shortcomings in each of their views by bringing to bear the strengths of the others.”⁹

II.

The critical portion of this Comment considers Zipursky’s suggestion that

2. *Id.* at 26.

3. *Id.* at 26.

4. *Id.* at 26.

5. *Id.* at 36.

6. *Id.* at 39.

7. *Id.* at 41-48.

8. *Id.* at 26.

9. *Id.*

because Cardozo seemed to reject several competing schools of thought—legal positivism, legal realism, and natural-law theory—his views were incoherent. As I said, Professor Zipursky ultimately denies the charge of incoherence, but in my view there is a simpler defense: each of those positions may well reflect different kinds of claims about law. Legal realism could plausibly be construed as an *empirical* claim about what factors determines case outcomes in some area of law;¹⁰ legal positivism as a *conceptual* claim about the existence conditions of law;¹¹ and natural law as a *normative* or (perhaps meta-normative) claim about the role law plays in practical reasoning more generally.¹²

Now, as I said, Professor Zipursky himself defends Cardozo from the charge of incoherence, so this point does not challenge his interpretation of Cardozo's lectures. However, it does lead Professor Zipursky, I think, to slightly mischaracterize today's jurisprudential debate. He suggests at the end of Part II, for instance, that the differences between natural-law style anti-positivism and Washington Legal Positivism have become increasingly stark because such anti-positivists as Mark Greenberg and Scott Hershovitz "have aimed to push Dworkin's morally-infused interpretivism further away from positivism and closer to a view that assigns judges a larger role in moral-political reasoning than that favored by Dworkin himself."¹³

I don't think that's quite right. It is true that Greenberg and Hershovitz emphasize the essentially moral character of legal decisionmaking.¹⁴ Hershovitz, especially, is quite explicit in endorsing what Dworkin called, in his last major book, a "one-system" view, which denies the existence of an independent, distinctly *legal* domain of normativity.¹⁵ But there Hershovitz is making a claim about how law bears on the practical reasoning of judges, other officials, and citizens. The "eliminativist" position he adopts is consistent with the claim that morality requires a quite limited role for judges in order to serve important (*moral*) rule-of-law values.¹⁶ In other words, it is a view theoretically consistent with—and so does not necessarily stand in stark opposition to—Washington Legal Positivism.

Nevertheless, Professor Zipursky is right to identify tensions in what Cardozo says about adjudication in *The Nature of the Judicial Process*. Those tensions arise from the variety of different things Cardozo says about

10. BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 16 (2007).

11. H. L. A. HART, *THE CONCEPT OF LAW* 23-44 (3d ed. 2011).

12. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 18-19 (2d ed. 2011).

13. *Id.* at 18.

14. Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1288 (2014); Scott Hershovitz, *The End of Jurisprudence*, 124 *YALE L. J.* 1160 (2015).

15. Hershovitz, *supra* note 14, at 1193-94, 1198; RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 407 (2011).

16. Hershovitz, *supra* note 14, at 1192.

how judges should (and generally do) decide cases. He says that judges should generally consider themselves strictly bound by precedent.¹⁷ But he also says that when there are “gaps” in the law judges have a “duty of weighing considerations of social advantage.”¹⁸ Other times he suggests judges make “judgments in accordance with Reason and justice”;¹⁹ still other times, he suggests judges must try to make law conform to “customary morality.”²⁰

Even these suggestions, as Professor Zipursky observes, conflate descriptive and normative claims.²¹ But the point is that they focus attention on the phenomenon of *adjudication*. Cardozo did not seem particularly concerned with the sort of conceptual questions about the nature of law that tends to preoccupy analytic legal philosophers. He was focused instead on how judges do and should decide cases—on the *judicial process*.

Cardozo’s focus on adjudication is part of the reason why Professor Zipursky’s effort to identify a tradition of legal thought that includes Cardozo, Fuller, and Dworkin matters. Not only do those thinkers at times say similar things about how judges should decide cases; they also all take judicial decisionmaking itself to be the proper focus of attention for philosophical thinking about law.²² In that way, the tradition to which they all belong represents a *methodological* challenge to analytic positivism, not just a substantive one. It offers a different understanding of what *law* is in part by offering a different understanding of what *jurisprudence* is. That is why I felt compelled to restructure completely my Jurisprudence class in order to teach the tradition. It is also why methodological questions have tended to dominate jurisprudential debate over the last few decades.²³

III.

This leads to the second, constructive portion of my Comment, which seeks to build upon Professor Zipursky’s core insights. I’ll take as a starting point Professor Zipursky’s suggestion that the “analytic core” of the tradition under examination is “the very same challenging idea that the social life that grounds law is at once factually real and normatively

17. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

18. *Id.* at 113, 119.

19. *Id.* at 88.

20. *Id.* at 136.

21. Zipursky, *supra* note 1, at 49.

22. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 1 (1986) (beginning his book with this sentence: “It matters how judges decide cases.”). Fuller may be the exception here, but in a way that underscores, rather than undermines, the point. Fuller sought to broaden the inquiry to include other sorts of legal decisionmakers in the hopes of showing how law was, as he once put it, a “decisional science.” Lon L. Fuller, *A Rejoinder to Professor Nagel*, 3 *NAT. L.F.* 83, 93 (1958).

23. For an overview of the main issues, see Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 *AM. J. JURIS.* 17 (2003).

fertile.”²⁴ As I understand it, that idea is “challenging” because it suggests that social practice can at least sometimes serve as a guide for moral judgments. I will argue that if that is true, two things follow: first, the tradition goes back further than Cardozo, for it is an idea essential to the common law. Second, in the modern era, Dworkin represents only one branch of that tradition because he offers only one way—a controversial and problematic way, no less—of cashing out that core, challenging idea.

A.

In support of the first claim, let me briefly discuss just one theorist of the common law who long preceded Cardozo: James Wilson (1742-1798). Wilson was one of only six men to sign both the Declaration of Independence and the Constitution, and he played a huge role in shaping the latter.²⁵ Widely recognized by those in his own time as one of the deepest legal thinkers of his generation, Wilson has for some reason been nearly lost to history.²⁶ That is a shame for many reasons, but here the point is to show that in his unduly neglected *Lectures on Law*, Wilson made quite clear that he, too, thought that the “social life that grounds law is at once factually real and normatively fertile.” He may thus plausibly be credited with inaugurating the common-law tradition to which Cardozo belongs, at least on this side of the Atlantic.

For Wilson, the common law was “the law of experience.”²⁷ He envisioned it as a form of inquiry analogous to the natural sciences. Whereas natural scientists study the material world, “legal scientists” study “man and society.”²⁸ Like the natural sciences, legal science is empirical in the sense that it relies on “experiments” and “observations,” which enable it to show progress over time.²⁹ Wilson did not think that judges could literally “observe” the right answers to the disputes before them, but like all human beings, judges have a “moral sense,” which enables them to discern what the natural law requires in particular circumstances.³⁰ What common law judges are doing, then, is using their moral sense (and other faculties) to detect those social practices that are genuinely voluntary and general and that endure over time—in short, “custom.”³¹ Wilson was confident that common law doctrines qualified as voluntarily adopted custom because those doctrines were consistent with man’s (social) nature. The reason why its status as custom mattered for legal science was that custom was “intrinsic

24. Zipursky, *supra* note 1, at 26.

25. Robert McCloskey, *Introduction*, in *THE WORKS OF JAMES WILSON 2* (1967).

26. *Id.*

27. JAMES WILSON, *LECTURES ON LAW*, IN *THE WORKS OF THE HONOURABLE JAMES WILSON 407* (Bird Wilson ed., 1804).

28. *Id.* at 43.

29. *Id.* at 43–44.

30. *Id.* at 124.

31. *Id.* at 100, 207.

evidence of consent,” and consent was the only legitimate basis of law’s claim to obedience.³²

In other words, for Wilson, custom or “social life” was both “factually real,” and hence a proper subject for science, and also “normatively fertile,” because it reflected man’s innate ability to guide his conduct in conformance with natural law. The fertility of custom as a basis for normative inquiry could be seen in the fruit it bore. The common law “works itself pure” over time, according to Wilson, as a result of different judges deciding cases at different places and times.³³ Its doctrines change as circumstances change, but the principles endure. Thus, Wilson invoked the famous metaphor of the Argonauts’ boat—every plank changed while out at sea, but the boat remained the same.³⁴

If we fast-forward 130 years, we see something quite similar in another set of lectures delivered by another famous judge. Benjamin Cardozo (1870-1938), like Wilson, analogized the common-law method to that of the empirical sciences. It proceeds “inductively,” he explained, through a process of testing and experimentation that takes place over time through the efforts of many judges.³⁵ “In the endless process of testing and retesting,” Cardozo explained, “there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.”³⁶

Of course, there’s an obvious (and obviously important) difference between Wilson and Cardozo. A lot happened between 1791 and 1921.³⁷ Wilson believed in a moral sense that enabled human beings to detect laws of nature laid down by God. Social life (or custom) was governed by, and thus reflected, those natural laws. Writing in the early twentieth century, Cardozo could no longer take the existence of a divine natural order for granted. Cardozo was thus candid in acknowledging the risk that the judge’s moral intuitions might turn out to be irrational prejudices. Wilson’s “moral sense” became, for Cardozo, the “still small voice of the herd.”³⁸ Its function was to indicate to the individual not so much what natural law requires as what society expects of him.³⁹

But for Cardozo, society itself provided a normative guide for the judge—hence his endorsement of the “method of sociology.” In a democracy, the

32. *Id.* at 99.

33. *Id.* at 44.

34. *Id.* at 38.

35. CARDOZO, *supra* note 17, at 23.

36. *Id.* at 179.

37. *See, e.g.*, CHARLES DARWIN, *THE ORIGIN OF THE SPECIES* (1859). *See also*, Massive Industrialization, The Civil War, The Great War, The Death of God, etc.

38. CARDOZO, *supra* note 17, at 175.

39. The author of the article Cardozo cites for that phrase observes that “[c]onscience, the moral sense (as it used to be called), the Freudian ‘censor,’ may all be explained as the still small voice of the group, expressing itself in vague disapproval or poignant remorse.” *See* James Harvey Robinson, *The Still Small Voice of the Herd*, 32 POL. SCI. Q. 312, 318 (1917).

judge's task is not to blaze a new trail but rather to embody and reflect his community's values by interpreting its mores and customs.⁴⁰ Judges both look to case law and custom and rely on their own intuitions of right and wrong, because the two are connected. "Every day," Cardozo insisted, "there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within."⁴¹ In that way, "social life" is both factually real *and* normatively fertile.

Lon Fuller (1902-1978), writing a few decades after Cardozo, offered a variation on the same theme. Fuller, too, sought to offer an account of how and why the common law "worked itself pure" over time.⁴² He described the process as the "collaborative articulation of shared purposes."⁴³ The idea here is that current judges look to the same purposes when deciding cases as did earlier judges, but because those earlier judges confronted different factual disputes, they could not always see what the later judges can see. Fuller's point was that such purposes provide standards for judges to decide cases even in the absence of clear rules. Current judges can thus plausibly be understood as giving voice to what earlier judges were struggling to but could not quite perceive clearly (because they faced different facts).⁴⁴

Much of the jurisprudential debate over Fuller's discussion of human purpose was whether it really did, as he insisted, pose a problem for legal positivism. Some pointed out, for instance, that using purposes as standards for adjudicating cases does not itself imply that such standards are *moral*, which they would have to be to pose a challenge to legal positivism.⁴⁵ But that conceptual dispute was never Fuller's central concern. His larger ambition was to offer a distinctive theory of practical and theoretical reasoning and of the relationship between the two. Specifically, he saw the common-law process of working out shared purposes as simply one instance of what he called "eunomics" or "the science of good order."⁴⁶ Fuller's thought was that one can not only evaluate *means* in light of *ends* (as standard instrumental reasoning assumes); one can also rationally evaluate *ends* in light of the *means* required to achieve them. So, for instance, he drew lessons about what courts should and should not be used

40. CARDOZO, *supra* note 17, at 16. Professor Bagchi's essay in this symposium helpfully elucidates the role conventional morality plays in Cardozo's thought. Aditi Bagchi, *Conflict, Consistency and the Role of Conventional Morality in Judicial Decision-Making*, 34 YALE J.L. HUMANS. 9 (2022).

41. CARDOZO, *supra* note 17, at 174.

42. LON FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940).

43. Fuller, *Rejoinder*, *supra* note 22, at 84.

44. *Id.* at 98 ("[T]hese cases show that communication among men, and a consideration by them of different situations of fact, can enable them to see more truly what they were all trying to do from the beginning.").

45. See, e.g., H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 612-13 (1958).

46. Lon L. Fuller, *American Legal Philosophy at Mid-Century: A Review of Edwin W. Patterson's Jurisprudence, Men and Ideas of the Law*, 6 J. LEGAL ED. 457, 473-81 (1954).

for by analyzing the sociological conditions on which adjudication seems to depend—such as that both parties share, at some level, a common purpose.⁴⁷ In that way, Fuller gave his own spin on how “social life” was at once “factually real” and “normatively fertile.”

In summary, Wilson, Cardozo, and Fuller each offered an understanding of adjudication that reflects what Professor Zipursky calls the “analytic core” of the tradition of American Natural Law Theory. They all thought that social facts—whether dubbed “social life,” custom, or conventional morality—were normatively fertile in the sense of offering judges a legitimate basis for making decisions about what to do and, more specifically, how to decide cases.

These legal thinkers also have another thing in common. They all characterized common-law decision-making as similar in some essential respect to the natural and social sciences. Like those sciences, the common law could make progress as a result of a process of repeated “observations” and “experiments” over time. The common law, in other words, was an empirical science in the sense of being guided by *experience*.⁴⁸ Taking a cue from Professor Zipursky’s reference to “experimentalism,” we might call this the *experimental model* of common-law adjudication.⁴⁹

B.

My second claim is that Dworkin rejects the experimental model but that his alternative to it depends on too narrow a conception of normative argument. To illustrate the point, I offer an example of the kind of argument that Dworkin’s model of reasoning dismisses as irrelevant to legal and moral deliberation. The example stems from something Cardozo says in *The Nature of Judicial of the Process*. In his final lecture, Cardozo gives several examples of common-law doctrines in need of reform in light of the “spirit of realism.”⁵⁰ One such doctrine is the evidentiary rule barring a defendant in a rape prosecution from using past specific “acts of unchastity” on the part of a rape complainant to prove consent.⁵¹ The rule allowed cross-examining lawyers to ask about such acts, but they were bound by the witness’s answers. They could only introduce a character witness to opine generally on the complainant’s reputation for chastity. According to Cardozo, the absurd result of this rule was that a jury was barred from hearing the most probative evidence on an important factual question in

47. Lon L. Fuller, *Forms & Limits of Adjudication* (Henry Hart Papers, Box 35, Folder 8) (on file with the Harvard Law School Library).

48. Cf. Zipursky, *supra* note 1, at 31.

49. Professor Zipursky lists “experimentalism” as one of the four pragmatist ideas that can be seen in Cardozo’s lectures. Zipursky, *supra* note 1, at 43.

50. CARDOZO, *supra* note 17, at 147.

51. *Id.* at 156.

dispute.⁵²

Cardozo's discussion of this issue is somewhat jarring to the modern reader. One can imagine that reader saying to Cardozo something like the following:

The entire premise of your critique is misguided. It assumes that some women are 'chaste,' while others are 'unchaste,' so that courts should seek the best evidence available to determine which kind of woman the complainant really is.⁵³ But that assumption is false. The explanation for why, despite its falsity, it is so commonly accepted—including, apparently, by you—is that it serves a sociological function, though hardly a salutary one. That function is to maintain men's power over women. It does so by enabling men to exploit some women for sexual purposes while maintaining strict control over others and, in the process, perpetuating the idea that a woman's primary value derives from her capacity to satisfy male sexual desire or to serve as wife and mother. Your proposed rule, then, would serve to maintain women's subordinate social position relative to men.⁵⁴ And the fact that you do not see the role it is serving attests to just how entrenched those power relations were in your time. They distorted your most basic intuitions about what kinds of evidence are probative of factual claims at trial when it came to matters relating to sex.

To Dworkin, this sort of argument—which we may dub the *feminist critique* as shorthand—is normatively inert. The reason is that it has the wrong structure. The thrust of the critique is to suggest that Cardozo misunderstood the true explanation of his own argument. Cardozo thought he adopted his view because good arguments about evidentiary reliability support it. In fact, however, he only did so because he was imbedded in relations of domination.⁵⁵ For Dworkin, such arguments do not get off the ground, and he explains why in two different ways in two different places. One explanation is specifically about legal argument, whereas the other is framed as a claim about normative argument in general. But they come to the same result.

First, in *Law's Empire*, Dworkin announces at the outset of his book that he will adopt an "internal point of view" of legal practice.⁵⁶ This describes the practical, normative perspective of the judge, which Dworkin

52. *Id.*

53. See, e.g., *People v. Abbot*, 19 N.Y. 192 (1838) ("And will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?").

54. This argument is loosely inspired by Catherine MacKinnon's argument that sexual harassment is a form of sexual discrimination. See CATHARINE MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1976). See also Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 *YALE L. J.* 1854 (2008).

55. This claim amounts to a charge of false consciousness. See Tommie Shelby, *Ideology, Racism, and Critical Social Theory*, 34 *PHIL. F.* 153, 170 (2003).

56. DWORKIN, *LAW'S EMPIRE*, *supra* note 22, at 14.

distinguishes from the “external” point of view of the historian or sociologist, who asks causal or explanatory questions. History and sociology are only useful to the judge insofar as they provide a minor premise of a syllogism. They are not helpful for offering rival explanations of legal practices or the intuitions underlying them. According to Dworkin, judges “want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have.”⁵⁷ Absent is the possibility that learning how something has shaped one’s consciousness might help one figure out what the law requires by enabling one to see the practices that constitute law more clearly and so assess them more justly.

In his later work, *Justice for Hedgehogs*, Dworkin rejects the moral epistemology on which such a possibility rests.⁵⁸ There he draws a dichotomy between two broad domains of human inquiry, that of facts and that of values. He calls this dichotomy “Hume’s Principle.”⁵⁹ According to Dworkin, this principle establishes the “independence of value,” which entails that morality is “a separate department of knowledge with its own standards of inquiry and justification.”⁶⁰ One implication of the independence of morality is the denial of what Dworkin calls the Causal Impact Hypothesis, which describes the view that there are “moral facts” that are capable of producing in human beings “intuitions” about what is good or bad, right or wrong.⁶¹ Dworkin thus rejects a moral epistemology in which something like Wilson’s “moral sense” enables people to “see” or “intuit” the rightness or wrongness of certain actions in a manner analogous to how natural scientists make observations of natural phenomena.⁶² The result is that, for Dworkin, no facts about why, as a causal matter, someone has come to have a particular moral intuition or “perception” bears on the justification of the moral claim that that intuition purports to support. Such reasoning has a proper role in science, which is a domain of “evidence,” but not morality, which is a domain of “argument.”⁶³

Dworkin’s assertion of the independence of value in *Justice for Hedgehogs* thus has the same upshot as his adoption of an “internal” perspective in *Law’s Empire*. In both cases, claims about what has shaped—or corrupted or distorted—our legal and moral judgments play no rational

57. *Id.* at 13.

58. DWORKIN, JUSTICE, *supra* note 15. Dworkin had previously offered versions of the same basic argument in Chapter 2 of *Law’s Empire* and in Ronald Dworkin, *Objectivity and Truth: You’d Better Believe it*, 25 PHIL. & PUB. AFF. 87 (1996).

59. DWORKIN, JUSTICE, *supra* note 15, at 18.

60. *Id.* at 17.

61. *Id.* at 69, 75.

62. *Id.* at 74.

63. *Id.* at 82. See Dan Priel, *Almost Naturalists: The Jurisprudence of Ronald Dworkin and Stanley Fish*, in THE FISH-DWORKIN DEBATE (forthcoming) (manuscript on file with author) (noting and criticizing this distinction in Dworkin’s work).

role in supporting or undermining such judgments.

Before criticizing Dworkin's approach, I should first clarify its implications and acknowledge its virtues. It does not prevent Dworkin from criticizing Cardozo's proposed evidentiary rule entirely. Dworkin could argue that the rule proposed would fail to treat women as equals or with sufficient dignity, that it would cause them harm, or that it is premised on a weak empirical correlation. Nor would Dworkin deny that the assumptions underlying Cardozo's critique, or his own arguments against that critique, grow out of "social life." He would simply deny that any fact about how or why social life has given rise to such convictions—Cardozo's or his own—bears on the rational support for them. And that means that the feminist critique's claim that oppressive social structures have distorted Cardozo's judgment about what kinds of facts matter when adjudicating claims of sexual violence are irrelevant to any rational assessment of that judgment.

That might be a good thing. A reluctance to engage in sociological speculation, where claims of power, domination, and subordination, are sometimes difficult to verify through conventional empirical methods, is perfectly understandable. Moreover, Professor Zipursky is right when he suggests that Dworkin's anti-metaphysical posture, which underlies that reluctance, has deep roots in the pragmatist tradition.⁶⁴ Whether one labels this view "internalism" as Professor Zipursky does in his essay, or "quietism" as he and I have both characterized it in other work, this approach has the (pragmatist) virtue of focusing attention on the essentially practical and forward-looking nature of moral—and even more so *legal*—argument.⁶⁵ Perhaps for that reason, Dworkin's quietism also fits well traditional forms of legal argumentation. One rarely sees arguments of the genealogical or "debunking" form of the feminist critique in legal briefs or judicial opinions.⁶⁶ On the rare occasions when they do make an appearance, they are dismissed as "ad hominem" or otherwise inappropriate for judicial argument.⁶⁷

Dworkin's quietism, however, does have one noteworthy implication: it is incapable of making sense of the idea of *progress*, in law or morality. Dworkin raises, and more or less concedes, this point in *Justice for*

64. Zipursky, *supra* note 1, at 44.

65. See Benjamin Zipursky, *Legal Coherentism*, 50 SMU L. REV. 1679, 1698–99 (1997); Charles L. Barzun, *Metaphysical Quietism and Functional Explanation in the Law*, 34 LAW & PHIL. 89 (2015). See also DWORKIN, *JUSTICE*, *supra* note 15, at 25 (acknowledging the use of the quietist label to describe his position).

66. Rarely, but not never. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Souter, J., dissenting) (offering an historical explanation of *Hans v. Louisiana* in order to undermine its status as precedent).

67. Ramos v. Louisiana, 140 S. Ct. 1390, 1426 (2020) (Alito, J., dissenting) (referring to the majority's characterization of two states' non-unanimous jury rules as the product of white supremacy as "ad hominem rhetoric"); see also *Seminole Tribe*, 517 U.S. at 68–69 (referring to Justice Souter's explanation of *Hans v. Louisiana* as an "undocumented and highly speculative extralegal explanation of the decision in *Hans*," which does a "disservice to the Court's traditional method of adjudication.").

Hedgehogs.⁶⁸ There, he suggests that, although one may offer an historical account that purports to explain moral progress, no such explanation can confirm (or, presumably, undermine) that conclusion. The reason is that such a conclusion ultimately depends on some independent moral judgment that there has been moral improvement, and such a judgment “is all we could mean by progress.”⁶⁹ It is moral argument all the way down.

Dworkin’s position has a similar consequence when it comes to understanding legal change, and that is what distinguishes Dworkin from the earlier common-law theorists discussed above. To see how, consider the old adage that the common law “works itself pure.” The idea conveyed by this phrase is that the various doctrines of the common law are improved and refined over time. Wilson, Cardozo, and Fuller all endorsed this view of the common law, and they all did so because they embraced what I have called the experimental model. In their view, common-law judges are participating in a collaborative process in which they extend, revise, or abandon doctrines in light of new factual circumstances and events—new “experiments.”⁷⁰ In short, they see judges as *learning from experience* over time.

Compare that understanding to Dworkin’s famous “chain novel” analogy for the common-law process.⁷¹ Chain novels are written by several authors, each of whom is charged with reading the chapters already written and then adding a chapter that makes the novel the best it can be. The author’s task is thus both constrained (by what has already been written) and creative (because that author must write a new chapter). Judges are in the same position. In a given case, the judge’s task is to make the best moral sense of the relevant legal materials, which requires deciding the case in the way that best fits and justifies those materials.⁷²

The chain-novel analogy may be a plausible way of capturing the phenomenology of judging or even the nature of the judge’s duty. But what it does not do is give us any reason to think the law produced by such a process will tend to become “purer”—more refined or improved—over time. To make the same point using Dworkin’s literary analogue, the problem is that Dworkin offers no basis for thinking that the process of writing a chain novel is likely to result in a *good novel*—rather than simply a good “parlor game[] for rainy weekends in English country houses.”⁷³

68. DWORKIN, JUSTICE, *supra* note 15, at 86. Here, Dworkin is responding to an argument made in CRISPIN WRIGHT, OBJECTIVITY AND TRUTH 200 (1992).

69. DWORKIN, JUSTICE, *supra* note 15, at 87.

70. CARDOZO, *supra* note 17, at 187.

71. DWORKIN, LAW’S EMPIRE, *supra* note 22, at 225-276.

72. *Id.* at 255.

73. *Id.* at 229. I take Professor Zipursky to be making a similar point, when he asks rhetorically: “How could anyone think looking at judges as literary interpreters would fortify our sense of their capacities to converge in the objectively right place?” Zipursky, *supra* note 1, at 47. Dworkin himself embraces the “works itself pure” idea, but he interprets it as merely a judicial attitude of optimism, not

But so what? Maybe it's a feature, not a bug, of Dworkin's quietism that it cannot vindicate what is really a vacuous bit of rhetoric put in service of common-law ideology. Who today really thinks the common law "works itself pure," anyway? It's a fair question, but recall that what launched our inquiry into Dworkin's understanding of legal and moral argument was not a claim that the common law was moving merrily along towards more perfect rules. It was just the opposite: the claim was that Cardozo's own effort to "purify" the common law of evidence reflected an obliviousness, probably universal among common-law judges at the time, to the way in which their doctrinal categories (e.g., "character for chastity") reflected and reinforced coercive social practices and did so in a way that produced bad rules of evidence.

It should not be hard to see, though, that these are just two sides of the same coin. The difference between the experimental model and Dworkin's chain-novel model is that for the former, but not the latter, the process is part of what justifies the outcome. So, if something has gone wrong in the experiment—if the instruments employed are not working correctly—then that fact should shake our confidence in the result. And that's what the feminist critique aimed to do by suggesting that the judicial intuitions on which the common-law process depends were corrupted by the (patriarchal) culture in which they developed.⁷⁴

I should clarify that my claim is not that James Wilson, Benjamin Cardozo, or Lon Fuller would in fact have been receptive to the feminist critique. The point is rather that the experimental model of adjudication they adopted is one that is structurally receptive to that critique in a way that Dworkin's model is not. To deny the critique's normative force would require either engaging with it substantively (i.e., arguing that it is wrong on the facts), or denying its admissibility on some other policy ground (e.g., that it's too difficult, will waste time, etc.).

To all of this, one might make the following objection. The experimental model assumes an "Archimedean" perspective, from which one can stand back and make a global judgment that progress has taken place. But no such perspective exists.⁷⁵ And to assert that it does exist would be inconsistent with the philosophical-pragmatist spirit Professor Zipursky has suggested animates this tradition of legal thought.

But the experimental model requires no such thing. All it requires is the

a judgment about the common-law process. DWORKIN, *LAW'S EMPIRE*, supra note 22, at 407.

74. My critique of Dworkin here could be seen as fleshing out a worry Professor Zipursky voiced decades ago that the quietist view may be "too easy" because it deflects threats to the legitimacy of a practice without argument. Zipursky, *Coherentism*, supra note 65, at 1713. See also Charles Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1209–10 (2015) (expressing a similar concern).

75. Dworkin, *Objectivity*, supra note 58, at 88 (characterizing as "Archimedean" theories that "purport to stand outside a whole body of belief, and to judge it as a whole from premises or attitudes that owe nothing to it.").

rejection of what Dworkin calls the “independence of value.” It need only assert that our (factual) judgments about what to believe about the world rationally bear on our (evaluative) judgments about what we should do, and (more controversially) vice-versa: our judgments about what to believe sometimes properly *depend* on our judgments about what to do. Under this view, *all* our judgments are contextual, fallible, and holistically justified, not just our moral ones. So, we may properly revise our moral judgments not only in light of our other moral commitments but also in light of what we learn about how society may be affecting our moral intuitions.⁷⁶ In short, in place of what Dworkin calls “value holism,” the experimental model depends on *fact-value* holism.⁷⁷ That is why, as Professor Zipursky points out, Cardozo’s “method of sociology,” despite the importance it ascribes to social mores for the purpose of adjudication, does not reduce to mere descriptive conventionalism.⁷⁸

That is also why I see Dworkin as representing only one of three branches of the pragmatist, common-law tradition Cardozo was articulating and constructing in his Storrs lectures. Invoking again Professor Zipursky’s identification of the “analytic core” of that tradition, we might describe the different branches this way: Dworkin’s branch focuses on the “normatively fertile” aspect of social life; another branch, exemplified by strains of legal realism and the jurisprudence of Richard Posner, is concerned to stress that social life is “factually real”;⁷⁹ and a third branch wrestles with the way in which the two qualities of social life—its factual reality and normative fertility—are connected.⁸⁰ Only the latter two branches retain the experimental model, though they interpret it in different ways.⁸¹

Professor Zipursky rightly associates this tradition with philosophical pragmatism—and I think that is true of all three of its modern branches—but it is worth recalling that the experimental model of common-law

76. Cf. Paul Raekstad, *The radical realist critique of Rawls: a reconstruction and response*, CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY (2021), DOI: 10.1080/13698230.2021.1891377 (articulating a “form of critical reflexive inquiry that is wide enough . . . to include social and historical forms of investigation into their origins and functions,” which Raekstad calls “very wide reflective equilibrium”). See also David Plunkett, *Conceptual History, Conceptual Ethics, and the Aims of Inquiry: A Framework for Thinking about the Relevance of the History/Genealogy of Concepts to Normative Inquiry*, 3 ERGO 27 (2016) (arguing that genealogical facts are sometimes relevant to normative inquiry).

77. DWORKIN, JUSTICE, *supra* note 15, at 120. See MORTON WHITE, A PHILOSOPHY OF CULTURE: THE SCOPE OF HOLISTIC PRAGMATISM (2002).

78. See Zipursky, *supra* note 1, at 54.

79. See RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY (2003).

80. See Charles Barzun, *Justice Souter’s Common Law*, 104 VA. L. REV. 655 (2018) (arguing that Justice David Souter belongs to this third branch); Charles Barzun, *The Common Law and Critical Theory*, 92 U. COL. L. REV. 1221 (2021) (arguing that Catharine MacKinnon belongs to it). See also Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L. J. 813, 818 (2002).

81. *Id.*

adjudication predates the twentieth century.⁸² Wilson, too, emphasized the interdependence of fact and value, of practical and theoretical reasoning. His conviction grew out of his understanding of human nature. Wilson recognized that human beings were social beings whose desires and inclinations were shaped by society and whose understanding of the world was inevitably affected by such desires.⁸³ Thus, although he had great confidence in man's capacity to make both scientific and social progress, he insisted that each depended on the other: social progress required making scientific discoveries about the nature of man and society, but such discoveries themselves required securing the right kinds of social conditions—of freedom, equality, and peace.⁸⁴ The core purpose of the common law, was, for Wilson, to facilitate this reciprocal dynamic by discovering, fostering, and maintaining the social conditions necessary for progress.

This, then, brings us back to Cardozo and his place in American legal thought. This Comment has sought to endorse the central role Professor Zipursky ascribes to him in articulating the ambitions of a distinctive jurisprudential tradition. Professor Zipursky persuasively shows that Cardozo rejected traditional forms of legal positivism, realism, and natural law because he was committed to the idea that the “social life that grounds law is at once factually real and normatively fertile.” In Cardozo's view, the judge's task was to seek the “ideal side” of positive law.⁸⁵ Dworkin and Fuller can both be plausibly seen as working out that same underlying idea. If that is right, though, then to me those thinkers are better understood as part of a common-law tradition that is more diverse and older than Professor Zipursky's essay may be read to suggest. Dworkin offers only one interpretation of that tradition—and one that in some ways fails to take seriously what seems to me key to the tradition's original appeal: namely, the thought that law involves *learning from experience*. That idea has historical roots that go back to the founding generation. And that fact at least raises the possibility that it not only animates a distinctive tradition of American legal thought; perhaps it is even “our law.”⁸⁶

82. Zipursky, *supra* note 1, at 42-48; CARDOZO, *supra* note 17, at 102 (“[T]he juristic philosophy of the common law is at bottom the philosophy of pragmatism.”). Charles L. Barzun, *Three Forms of Legal Pragmatism*, 95 WASH. L. REV. 1003 (2018).

83. WILSON, *supra* note 27, at 229-319.

84. WILSON, *supra* note 27, at 142-43 (“Where liberty prevails, the arts and sciences lift up their heads and flourish. Where the arts and sciences flourish, political improvements will likewise be made. All will receive from each, and each will receive from all, mutual support and assistance.”).

85. Zipursky, *supra* note 1, at 33; CARDOZO, *supra* note 17, at 133.

86. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 849-52 (2015).