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Some Challenges For Legal Pragmatism: A Closer Look At Pragmatic Legal Reasoning

Andrew J Morris

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SOME CHALLENGES FOR LEGAL PRAGMATISM:

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Legal pragmatism focuses its attention on the content of the law: on delivering the best substantive decision in every litigated case. Criticism of pragmatism shares this focus. As a result, the extensive literature does not yet address an important dimension of pragmatism: its treatment of legal form. Pragmatism disregards legal form almost entirely, yet it offers nothing to take form’s place. In this article, I contend that examining pragmatism’s treatment of legal form is, in fact, an excellent device for understanding pragmatism.¹ I will show that pragmatism’s indifference to legal form constitutes a sharp break with conventional accounts of judging. I also will explain why pragmatism should try to justify that break, and I will identify some central points that pragmatism should address.

This matter of legal form arises because legal pragmatists reject the view that there are distinctively legal ways of resolving disputes. Their attention is on policy rather than principle. They give legal questions the answers that they see as best “all things considered,” without regard to some of the legal influences that ordinarily affect judges.² Formal reasons are the law’s manifestation of principle. Among the most visible of these omitted influences is legal form, especially formal reasons for decisions. A formal reason is one that the legal system creates and that only the legal system recognizes. For example, case law – precedent – provides reasons that are formal in the sense that their force lies in the fact that the legal system gives them special

¹ Professor Summers identified the issue of pragmatism’s indifference to form, but did not develop it in detail. Reviewing Judge Posner’s THE PROBLEMS OF JURISPRUDENCE (1990) [hereinafter POSNER, THE PROBLEMS OF JURISPRUDENCE], Summers stated that Posner “rarely addresses frontally any of the general varieties of legal formality to be found in the law, nor does he systematically consider the rationales for their existence. Indeed, he does not even recognize legal formality in the law for what it is.” Robert S. Summers, Judge Posner’s Jurisprudence, 89 Mich. L. Rev. 1302, 1306 (1991).

² For all “things considered,” see RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY at 64 (2005) [hereinafter POSNER, LAW, PRAGMATISM AND DEMOCRACY]; see also William A. Shutkin, Pragmatism and the Promise of Adjudication, 18 Vermont L. Rev. 57, 75 (1993) (explaining that pragmatists decide cases according to “the most reasonable doctrine”). For a short introduction to legal pragmatism, see Thomas C. Grey, Freestanding Legal Pragmatism 255-58, 268-70 in THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW AND CULTURE 255-58, 268-70 (Morris Dickstein, ed. 1998); see also E.W. THOMAS, THE JUDICIAL PROCESS; REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES, 307-315 (2005).
status. That is, their force lies in their form. Because of this special status, the judge is obligated to give special force to case law, even if the judge disagrees with its substance. The judge cannot consider “all things” on an equal footing with each other, as a non-legal decision-maker would. He or she must treat the case law as special. Pragmatist judges, however, see things differently. They acknowledge no obligation to give case law any force at all, and grant it force only if its substance is attractive. They grant no force to legal form.

The difference between these two views of form is fundamental. Taken seriously, pragmatism’s disregard for legal form changes the nature of judging, the justification for judicial decisions, and the balance of power in the legal system. That is why a review of pragmatism’s relationship with legal form is an important step in understanding pragmatism and its implications.

Introduction and Conclusions

Two competing efforts to explain adjudication run through American legal history. One emphasizes form and principle, the other, substance and policy. Pragmatism is a powerful contender in this explanatory contest. It stands squarely on the side of substance and policy, where it continues the assault on form begun in earnest by the legal realists. Over the last two

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decades, the literature of pragmatism has grown to a steady stream that shows no sign of letting up. Although it remains unclear whether pragmatism is a full-blown mode of judging or merely an elaborate critique, pragmatism needs to justify its sharp demotion of legal form. This requires pragmatism to develop a response to the extensive literature that examines the functions of legal form.

In this article, I work through the implications of pragmatism’s treatment of legal form. I begin by reviewing some of the functions served by legal form, with a focus on the role of

References


For discussion of the “pragmatist revival,” see Thomas C. Grey, What Good Is Legal Pragmatism, in Pragmatism Law and Society 9 (1991) [hereinafter Grey, What Good Is Legal Pragmatism]. The stream is even larger if one includes schools that sometimes ally themselves with pragmatists, such as feminists. Margaret Radin discusses this relationship in The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699 (1990). Even discounting for the use of “pragmatic” as an uptown substitute for “practical,” the volume is large. A search of law review articles published from 1965 through 1985 turned up five titles referring to some form of pragmatism. The same search for the years 1986 to 2005 produced 484 hits. (Westlaw search conducted January 9, 2006.) Much of this difference may be due to the absence of earlier journals from the database, but the 96-fold increase illustrates the magnitude of the increase.

Pragmatism remains somewhat protean, without a “well-defined theses.” Steven Walt, Some Problems of Pragmatic Jurisprudence, 70 Tex. L. Rev. 317, 318 (1991). Indeed, the same writer contends that “[i]t is unclear what makes a theory pragmatic.” Id. at 317. Even pragmatism’s most prominent champion, Judge Richard Posner, concedes that pragmatism remains “spongy.” Posner, Problematics of Moral and Legal Theory, supra note 4, at 240. Critics can be harsher, tagging pragmatists’ work as “slippery and evasive.” Jeremy Waldron, Egot-Bloated Hove, 94 Nw. U. L. Rev. 597, 600 (2000). I try to resolve some of this ambiguity by identifying core features of pragmatism that are common to various pragmatist writers and that hang together as an identifiable and distinct approach to adjudication.

Some scholars who find significant insights in pragmatism consider it no more than a critique. See, e.g., Grey, What Good Is Legal Pragmatism, supra note 5, at 9 (“The main job of pragmatist theory is critique of more ambitious (nonpragmatist) theories.”).

Some examples of this literature include the overview and detailed treatments of legal form by P.S. Atiyah and Robert S. Summers, see, e.g., Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions [hereinafter Atiyah and Summers, Form and Substance] at 2 (1991), as well as extensive analysis of various properties of legal form in Joseph Raz, The Authority of Law (1979 rep’d 1990) [hereinafter Raz, The Authority of Law], and Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life (1991) [hereinafter Schauer, Playing by the Rules].
formal reasons for decisions. I then sketch an overview of pragmatist judging. This overview
draws on some stock criticisms of pragmatism but emphasizes pragmatism’s disregard of form;
this emphasis provides a basis for a review of some of pragmatism’s central features. To that
end, I work through several points of comparison between pragmatism and conventional
judging.\textsuperscript{9} This exercise generates a list of topics that pragmatists should address to justify their
treatment of form and, more broadly, their proposed departure from conventional judging. I
identify the primary concerns raised by each point of comparison but do not fully develop each
point, something that would require far more extensive discussion. Throughout this discussion, I
use the example of an influential opinion by Judge Posner, who doubles as pragmatism’s most
prominent champion and a judge on the United States Court of Appeals for the Seventh Circuit.
I identify elements of this decision that are distinctively pragmatist, then review the
consequences of that pragmatism.

This discussion leads to several related conclusions. They are connected in several ways;
the most conspicuous thread that runs through them is a rejection of the judge’s obligation to
give force to formal reasons. The first conclusion relates to the central point of pragmatism: its
promise of improved legal reasoning. Pragmatism promises to reduce or eliminate the bluntness
of form-oriented reasoning. I conclude, however, that pragmatism does significantly less in this
regard than most writers assume. I conclude that pragmatist judges, freed from the constraints of
legal form, continue to employ generalizations much like those that are reflected in legal forms.
One apparent explanation for this continued use of generalizations is the existence of practical
limits on the ability of judges to find facts and engage in complex reasoning. Another

\textsuperscript{9} For a helpful introduction to delineating and describing subject matter by identifying practical point and focal
meaning, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 3-22 (1980).
explanation is the freedom of judges, when essentially freed from concrete precedents, to reason from abstractions.

This conclusion – that the benefits of pragmatism are less than the literature assumes – makes the costs of pragmatism loom larger. These costs result, in one way or another, from pragmatism’s unwillingness to take any considerations off the judicial table. The first cost is an increase in true judicial errors, the result of the increased complexity of pragmatist decisions. This cuts against pragmatism’s goal of getting more cases just right. It also decreases predictability.

The second is an increase in decision costs. This increase does not merely require more resources; it also cuts against pragmatism’s substantive goals of increased contextuality. It helps explain the tendency of judges to continue to employ generalizations, even when freed from the constraints of legal form.

The third cost is diminished predictability. I conclude that pragmatism cannot maintain a workable level of predictability as long as it rejects the view that judges have an obligation to give force to formal reasons. Without that obligation, there is no ex ante basis to predict what a court will do. Predictability also is reduced by the increase in true judicial errors.

The fourth cost is the loss of the traditional basis for the authority of judicial decisions. Pragmatism severs adjudication’s normative connection with existing law, thus severing adjudication’s connection with legitimacy. At the same time, it effects a considerable reallocation of power in favor of the courts. Pragmatism needs a theory that legitimizes these changes.
### Some Trade-Offs Between Pragmatist And Principled Reasoning

<table>
<thead>
<tr>
<th>Contextuality/getting the right answer all things considered</th>
<th>Form/principle</th>
<th>Pragmatism/policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accepts imperfect decisions in some cases</td>
<td>Inclines toward all-things considered reasoning that is more sensitive to context. This is where pragmatists see the benefits of pragmatist reasoning in the form of substantively better decisions.</td>
<td></td>
</tr>
<tr>
<td>True judicial errors</td>
<td>Generally lower rate than under pragmatist reasoning. These occur primarily in cases where application of the language of the rule does not advance the rule’s underlying purpose. The risk of empirical error also is present</td>
<td>Generally higher rate, because of greater complexity and the need for more facts (higher error rate)</td>
</tr>
<tr>
<td>Decision costs</td>
<td>Generally better (less expensive)</td>
<td>Generally weaker (more expensive)</td>
</tr>
<tr>
<td>Continuity and Predictability</td>
<td>Generally better (higher)</td>
<td>Generally weaker (lower) Pragmatists consider predictability in what they consider appropriate contexts, but I question whether that is conceptually possible in the absence of regard for legal form</td>
</tr>
<tr>
<td>Justification of the judicial role</td>
<td>Generally easier (because it rests more easily on one or more of various conventional justifications for adjudication)</td>
<td>Generally more difficult (because it is not addressed by conventional justifications and on conventional theory of allocation of power among branches)</td>
</tr>
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</table>
I. LEGAL PRAGMATISM’S TREATMENT OF LEGAL FORM

A. Some Functions Of Legal Form

In this article, I discuss legal form to the extent that it generates formal reasons for judicial decisions. A formal reason is a distinctively legal reason. It is created by the legal system and, therefore, is relevant only within that system. A formal reason can be contrasted with the many reasons that are relevant to decision-makers in life outside of the legal system.

Formal reasons differ in at least three ways from reasons considered by non-legal decision-makers: in when they have force, in the basis of their force, and in the structure of their force vis-à-vis other reasons. First, a formal reason has no force at all in the eyes of the non-legal decision-maker. (It may help the non-legal decision-maker to predict what future courts will do, but that does not constitute legal force. See the discussion in Part II.B.4, below.) It follows that “all-things-considered” decision-making, the term that pragmatists use for non-legal decision-making, is a misnomer. It is more accurately labeled “all-things-considered – except-for-formal-reasons” decision-making. For convenience, I will continue to use the shorter name, but the “except-for-formal-reasons” qualification is significant to understanding pragmatism.

The second difference between formal and other reasons is the basis of their force. In decision-making outside of the law, reasons have force based on the attractiveness of their content. They are “substantive” reasons. Formal reasons, however, have force because of their

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10 For a discussion of the varieties of legal formality, see Atiyah and Summers, Form and Substance, supra note 8, at 11-21 (identifying “authoritative formality,” “content formality,” “interpretive formality,” and “mandatory formality”). For additional development of the varieties of legal form, and their significance, see Robert S. Summers, How Law Is Formal And Why It Matters, 82 Cornell L. Rev. 1165 (1997).

11 Professors Atiyah and Summers describe a formal reason as “a legally authoritative reason on which judges and others are empowered or required to base a decision or action.” See, e.g., Atiyah and Summers, Form and Substance, supra note 8, at 2. The formal attributes of rules include “degree of completeness of the rule, the degree to which it is definitive, the degree of its generality” and “the extent of formality of expression.” Robert S. Summers, The Formal Character of Law, 51 Cambridge L. J. 242, 246 (1992). For a more extensive discussion of expressions of formality in a legal system, see Atiyah and Summers, Form and Substance, supra note 8, at 11-21.
legal status, independent of the substantive outcome that they support. This connects to the third difference. Formal reasons do not compete with substantive reasons on equal terms; instead, they defeat substantive reasons by outranking them – in almost all instances, excluding them outright. Therefore the structure of the formal reason is “exclusionary,” in the sense that it “usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason.” Because formal reasons help determine what reasons are relevant to the judge, as well as the relationships among those reasons, they give legal decision-making a structure that is different in kind from that of non-legal decision-making.

This structuring function is closely related to other functions served by formal reasons. In particular, they allocate decision-making power. They do this because they are generated by sources in the legal system other than the current judge, yet the judge must respect them. They help set the scope of the judge’s power. Frederick Schauer identifies power-allocation as “the essence of rule-based decision making” – of decision-making structured by legal form.

Indeed, formal reasons serve as the nexus between the case at hand and the rest of the law. It is only through formal reasons that the many elements of the legal system – such as legislative acts and earlier judicial decisions – affect judges who decide cases, and through them

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12 This property of legally formal reasons sometimes is described as “content-independence.” See, e.g., Joseph Raz, Reasons for Action, Decisions and Norms, in PRACTICAL REASONING 137 (Joseph Raz ed., 1978). For discussions of the character of formal reasons, particularly legal rules, as having force independent of their content, see also SCHAUER, PLAYING BY THE RULES, supra note 8, at 53-134.

13 See ATIYAH AND SUMMERS, FORM AND SUBSTANCE, supra note 8, at 2. The strongest form of this status is captured by Joseph Raz’s influential discussion of “exclusionary reasons.” This is a reason that, because of its formal status in the legal system, excludes other considerations, even if those excluded considerations should trump the exclusionary one in an all-things-considered decision. See Joseph Raz, Practical Reason and Norms 15-48 (2d ed. 1990). Some theories of law, such as Ronald Dworkin’s, assign rules the property of weight and consider their content in determining that weight, rather than assigning rules absolute priority and identifying them based on pedigree. Even Dworkin’s theory, however, assigns rules a distinctive force because of their formal status, which he calls their “fit.” See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, ch. 2 (Model of Rules I), ch. 3 (Model of Rules II) and ch. 4 (“Hard Cases”) (1977).

14 SCHAUER, PLAYING BY THE RULES, supra note 8, at 231-32.
affect ordinary citizens. This function depends squarely on the acknowledgement that the formal reasons have a claim on the judge, in the sense that the judge is obligated to give them force based on their legal status. As will become apparent in the following discussion, all-things-considered decision-making, such as legal pragmatism, cannot take formal reasons into account unless it acknowledges this obligation.15 And as I explain below, pragmatism makes no such acknowledgement.

The functions of formal reasons are visible in the paradigm of legal form: the rule. A judge applying a legal rule is obligated to give some force to the reason that caused the rule-maker to use the device of a rule to advance a substantive purpose.16 Professor Schauer usefully labels these reasons “rule-generating justifications.”17 They include “certainty, reliance and predictability,”18 as well as the now-familiar allocation of power across the legal system.19 Each of these justifications has instrumental and normative dimensions.

These justifications connect formal reasons with political legitimacy.20 The justifications are closely associated with the notion of the rule of law and, therefore, with ordered liberty.21

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15 See the discussion in part I.B.
16 For a detailed account of the structure of reasoning involving formal reasons, see Joseph Raz, Reasons for Action, Decisions and Norms, in PRACTICAL REASONING, supra note 12.
17 SCHAUER, PLAYING BY THE RULES, supra note 8, at 95. Atiyah and Summers refer to rule-generating justifications as “second-level rationales for legal formality,” see ATIYAH AND SUMMERS, FORM AND SUBSTANCE, supra note 8, at 23-28, labeling the relevant “policy goals” the “first level” justification for a rule, and the device of advancing those goals through a rule the “second level” justification, and explaining that the “second level rationales for formal legality exert justificatory force of their own.” Schauer labels the “policy goals” the “background justification.” SCHAUER, PLAYING BY THE RULES, supra note 8, at 53.
18 SCHAUER, PLAYING BY THE RULES, supra note 8, at 95. For a similar summary, see ATIYAH AND SUMMERS, FORM AND SUBSTANCE, supra note 8, at 23-28.
19 Frederick Schauer describes this latter role as the assignment of jurisdiction to different actors. SCHAUER, PLAYING BY THE RULES, supra note 8, at 158-71.
20 For an introductory discussion of this connection, see RAZ, THE AUTHORITY OF LAW, supra note 8, at chapter 1. Discussing possible justifications for rules, Joseph Raz articulates the related idea of the “service conception of authority,” under which rules serve a mediating function between actors and the reasons based on which they should act by capturing those reasons in the form of a rule. See Joseph Raz, “Authority, Law, and Morality” in RAZ, ETHICS
They tend to limit the judicial warrant, enhance citizen autonomy, and, in the view of some writers, protect human rights.  

Acknowledging that formal reasons perform these functions does not begin to entail “the vice of formalism.” Different theories of law differ over the degree of form appropriate to various contexts, but some measure of form is a fundamental element of every known legal system. Form is what distinguishes a legal system from *ad hoc* problem-solving. Regard for form distinguishes a judge, in Felix Frankfurter’s famous phrase, from a “kadi dispensing justice under a tree according to considerations of individual expediency.” As Kathleen Sullivan has noted, it is only in “a non-legal society [that] one might apply . . . background policies or

21 Of course, the meaning and significance of the “rule of law” is much-contested. Probably the most influential discussion is Albert V. Dicey’s *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (referring to regularity rather than arbitrariness, to equality before the law, and to the importance of constitutional limitations on power). For discussions of the rule of law and the concepts it commonly includes, see, *e.g.*, RAZ, *THE AUTHORITY OF LAW*, supra note 8, 210-229; FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72-87 (1944); JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971). For alternative interpretations of the rule of law, see citations at note 52, infra.


23 CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 24 (1996). Sunstein does not himself mistake the existence of legal form for formalism, but goes on to describe an “honorable species of formalism.” *Id*. In a generally pragmatist article, Catharine Pierce Wells rebutted the reflexive dismissal of formalism and the thought of Dean Langdell, with a combustible mixed metaphor, chiding that “Langdell . . . has served as a strawperson and lightning rod for attacks against the possibility of rational foundations.” Catharine Pierce Wells, *Situated Decision-making*, 63 S. Cal. L. Rev. 1727, 1729-37 (1990).

principles directly to a fact situation,” without “using the intermediary of legal directives – of legal form.”

Certain properties of formal reasons are particularly relevant to a discussion of legal pragmatism. In particular, the force of form depends on a complex, dynamic interplay between generalization and specificity. For example, legal rules are generalized statements, in the important sense that they identify facts in a way that covers a range of cases. They can be stated at many levels of generality, from highly general to highly specific.

The interplay between generality and specificity is visible not only in rules themselves, but also where a dispute lies outside an existing rule. In such cases, courts commonly extend an existing precedent to the new set of facts, primarily through the use of analogy. To do this, a court identifies features in the case at hand that are like those in a precedent. This involves specificity, because the court typically describes the two cases at a fairly specific level – at the lowest level of generalization that permits the drawing of similarities. It also involves generality, because the court needs a general principle to explain the connection between the two cases. Through this process, form influences courts to extend existing law in a constrained way:

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25 Sullivan, supra note 22, at 22, 58.


27 Schauer, Playing by the Rules, supra note 8, at 18. In the words of Frederick Schauer, “[r]ules speak to types and not to particulars.” Id. (emphasis in original).


29 For defenses of analogy as part of a practice of determinate legal reasoning, see Cass Sunstein, One Case At A Time: Judicial Minimalism On The Supreme Court at 42-45 (1999 [hereinafter Sunstein, One Case At A Time]; Melvin Aron Eisenberg, The Nature of the Common Law 83-95 (1988); Raz, The Authority of Law, supra note 8, at 201-06; Neil MacCormick, Legal Reasoning And Legal Theory 120-21, 155-63 (1978).
tethered both to the specific circumstances of the precedent and to a generalized principle that is discernible in the existing case law.30

The generalization that is inherent in legal form does lead to certain costs. The same features that limit the power of the judge also prevent that judge from making the best all-things-considered decision in the case at hand. One example is the familiar phenomenon of over-inclusiveness.31 Because of the force of legal form, the generalizations contained in a rule operate independently of the rule’s underlying purpose. In most cases, that language advances the rule’s purpose.32 Inevitably, though, in some cases the rule’s language applies where the rule’s underlying purpose does not.33 An example is the famous regulation “no vehicle may be taken into a park,” where a rule meant to exclude noisy or dangerous vehicles also, by its terms, excludes wheelchairs and baby strollers.34 When this happens, the effect of legal form is a decision that is wrong in the sense that it does not advance the law’s underlying purpose.35 This is a matter of imperfect fit between the language of a rule and real life.

30 For a helpful analysis of reasoning by analogy and its continuity with the application of precedent, see RAZ, THE AUTHORITY OF LAW, supra note 8, at 201-209 (1986). On generating common-law rules at the point of application, see, e.g., RAZ, THE AUTHORITY OF LAW, supra note 8, at 180-209; SCHAUER, PLAYING BY THE RULES, supra note 8, at 77-134.

31 For a concise explanation of the over and under-inclusiveness of rules, see SCHAUER, PLAYING BY THE RULES, supra note 8, at 31-34, 47-52, and TWINING AND MEIERS, HOW TO DO THINGS WITH RULES, supra note 26, at 260-63, 304-09.

32 Frederick Schauer labels the rule’s purpose its “background justification.” SCHAUER, PLAYING BY THE RULES, supra note 8, at 53, and Atiyah and Summers call it the “first-level justification.” See supra note 2. For discussion of these features of rules in terms of the reason behind a rule and how it can diverge from the language used in stating the rule, see TWINING AND MEIERS, HOW TO DO THINGS WITH RULES, supra note 26, at 40-44, 211-216.

33 For descriptions of this phenomenon, see SCHAUER, PLAYING BY THE RULES, supra note 8, at 31-33; Robert S. Summers, The Formal Character of Law, 51 Cambridge L.J. 242, 248 (1992) (the “rationales for legal formality . . . are frequently not fully congruent with [the substantive] policy” that is underlies the rule). For a discussion of some causes of over and under-inclusiveness and of cases in which the judge draws on the language of the rule to infer the point of the rule, see Andrew J. Morris, Practical Reasoning and Contract as Promise, 55 Cambridge L. J. 147, 159-61 (1997).


35 On second best outcomes, see SCHAUER, PLAYING BY THE RULES, supra note 8, at 152-158, and TWINING AND MEIERS, HOW TO DO THINGS WITH RULES, supra note 26, at 221-27.
These wrong decisions are a cost of operating in a system with a certain level of legal formality. Conventional views of adjudication accept these costs in some cases in exchange for the benefits of legal form in all cases. Judicial pragmatism can be understood as an effort to avoid these costs.

B. Pragmatism’s Demotion Of Legal Form

Pragmatists try to avoid these costs by acceding much less force to existing law, including its formal features. As Judge Posner summarizes pragmatism: “there isn’t too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered.” Of course, numerous scholars, including Posner, say much more. Their work reveals a number of features that hang together as a distinctive view of adjudication.

As suggested by Posner’s reference to “the most reasonable decision,” probably the central point of pragmatism is to produce the best substantive outcome in the specific context of each individual case. In pursuit of this best outcome, pragmatists refuse to exclude any

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36 Accounts of pragmatism tend to be both descriptive and normative, sometimes without distinguishing between the two approaches. See, e.g., Posner, the Problems of Jurisprudence, supra note 1, at 26-25; Posner, Law, Pragmatism and Democracy, supra note 2, at 85-86, 96.

37 Posner, Law, Pragmatism and Democracy, supra note 2, at 64.

38 Posner, Law, Pragmatism and Democracy, supra note 2, at 64, 85-86, 96. See also Posner, the Problems of Jurisprudence, supra note 1, at 26-25; Shutkin, supra note 2, at 57, 74-77 (providing an overview of pragmatist adjudication); Catharine Pierce Wells, Why Pragmatism Works For Me, supra note 4, at 356-58 (describing pragmatism’s emphasis on empiricism, context and perspective); Daniel Farber, Legal Pragmatism and The Constitution, 72 Minn. L. Rev. 1331, 1336-4 (1988) (providing a general overview of pragmatism); Daniel Farber, Re[inventing Brandeis: Legal Pragmatism for the Twenty-First Century, 1995 U. of Ill. L. Rev. 163 (1995) (providing an introduction to pragmatism).

39 For one short summary of these features, see Shutkin, supra note 2, at 57, 74-77; see also Thomas G. Grey, Freestanding Legal Pragmatism, supra note 2, at 21, 24-29 (summarizing pragmatic adjudication). Steven D. Smith organizes pragmatist thought into two main strands: “pragmatism as forward-looking instrumentalism, and pragmatism as a hostility to abstract theory, formalism and foundationalism.” Steven D. Smith, The Pursuit of Pragmatism, 100 Yale L. J. 409, 411 (1990).

40 Discussing pragmatism and contextuality, see, e.g., Grey, What Good Is Legal Pragmatism, supra note 5, at 15; Shutkin, supra note 2, at 66-76; Catharine Pierce Wells, Situated Decision-making, supra note 23, at 1729-37 (1990) (contrasting “structured decision-making” and “contextual decision-making” and noting that every legal decision involves elements of both).
consideration that may be relevant. They reject legal form’s central idea: that judges are
obligated to give formal reasons force because of their status, and that formal reasons can
exclude other reasons from consideration.\footnote{See, e.g., Thomas, supra note 2, at 139-163.}
In the pragmatist view, the “conventional materials of adjudication have no absolute priority over other sources of information concerning the likely
consequences of deciding a case one way or another.”\footnote{POSNER, LAW, PRAGMATISM AND DEMOCRACY, supra note 2, at 82.}
Pragmatists’ rejection of formal reasons or principles, therefore, extends well beyond a rejection of hard formalism. In fact, to the
committed pragmatist, “[t]here’s no such thing as legal reasoning”\footnote{E.g., POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 459; POSNER, LAW, PRAGMATISM AND DEMOCRACY, supra note 2, at 60, 73-75. Thus, for example, Posner specifically rejects analogical reasoning, contending that it “is not actually a method of reasoning.” POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 105-108.}
because “the very idea that legal reasoning is a distinctive practice capable of producing relatively determinate answers” is
“mere nostalgia for lost certitudes.”\footnote{POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 37-38. To Posner, “[d]emonstrating that a
decision is correct often is impossible.” Id. at 459. Pragmatism deemphasizes traditional legal tools and techniques. In
particular, it tends to see opinions that purport to answer legal questions by applying rules as simply hiding the
discretion that judges employ, for example when they extract a rule from a set of precedents, or when they decide
which facts in the record are relevant to their decision. See discussion at id. at 46-49. On this point, pragmatism
closely resembles legal realism and its successors.}
Because of this view, pragmatists tend to cast almost any regard for legal form as tantamount to strong formalism: as deciding cases based on relations
among concepts with insufficient regard for the world of fact.\footnote{POSNER, LAW, PRAGMATISM AND DEMOCRACY, supra note 2, at 59, 64. See also Shutkin, supra note 2, at 66-70 (generally addressing legal form as “formalism”); Thomas, supra note 2, at 54-74 (attacking the “curse” of
formalism and using the example of “Timur the Barbarian”).} They reject the view that judges
are obliged to give “existing legal materials” force because of their status rather than because of
their substance, and that other inputs can be excluded from consideration.
In short, preexisting law loses its traditional authoritative status. Pragmatists rest the authority of judicial decisions squarely on their content, without requiring a link to another source inside the legal system. Where traditional judges “tend to value precedent as authority,” the pragmatist considers precedent relevant only to the extent it is useful. Precedent still can have considerable force, for example because of the practical need for continuity and coordination, or because they reflect the wisdom of multiple decision-makers across time. But reported cases become only one of many inputs of equal rank. Shorn of their status as sources of formal reasons, precedents are stirred into an all-things-considered mix. This is consistent with the pragmatist view that analogy cannot usefully constrain, or even justify, judicial decisions. It also is consistent with pragmatism’s enthusiasm for empirical materials and the social sciences.

By giving facts and consequences priority over pre-existing legal materials, pragmatism tries to shift judicial decision-making as far as possible in the direction of particularity. Instead

46 POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 108. For Posner’s strongly content-based account of legal authority, see id. at 78-83, 90.

47 This reasoning process is very similar to that involved in the administrative law concept of “Skidmore deference,” under which an agency’s interpretation of the law “is eligible to claim respect according to its persuasiveness.” United States v. Mead Corp., 533 U.S. 218, 221, 227-39 (2001). As Justice Scalia discussed in the dissent, it is hard to see how this constitutes any deference at all. 533 U.S. at 239-41, 250-56.

48 POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 108. A result of this view of precedent is a decrease in the force of legal rights, inclining away from the traditional treatment of rights as legal concepts having especially strong force and toward a case-by-case weighing of policy considerations. See discussion in Farber, supra note 38, at 1342-49, 1378 (explaining the weighing of interests involved in addressing constitutional rights).

49 See Thomas, supra note 2, at 144-151; POSNER, LAW, PRAGMATISM AND DEMOCRACY, supra note 2, at 60-61.

50 Pragmatists consider precedents “as a testing instance: as a reason to act, rather than as information potentially useful in deciding how to act.” POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 108.

51 See, e.g., id. at 86-98.

52 See, e.g., id. at 211 (stating that judges “obtain much of their knowledge of how the world works from materials that are systematically unreliable sources of information”). Not surprisingly, pragmatism rejects legal constraints on evidence as “rigid canons of what shall count as proof.” Shutkin, supra note 2, at 77 (quotation marks and footnote omitted; quoting WILLIAM JAMES, PRAGMATISM, IN THE WORKS OF WILLIAM JAMES 44 (F. Burkhardt ed., 1975)).
of valuing generalization as a necessary element of law, the pragmatist sees it as more of a vice. Pragmatism also suggests skepticism that generalizations can, or should, constrain particular judgments.\textsuperscript{53} It follows that pragmatism also shows a general skepticism about conventional rule-of-law concerns.\textsuperscript{54}

My reading of the pragmatist literature reveals no direct discussion of how pragmatism, having sharply demoted legal form, purports to replace it. To be sure, pragmatist writing sometimes refers to goals similar to those advanced by legal form. For example, Judge Posner explains that the pragmatist judge considers, not only the best substantive outcome in the case at hand, but also the outcome’s “systemic” consequences.\textsuperscript{55} Judge Posner discusses these “systemic consequences”\textsuperscript{56} using a vocabulary traditionally associated with justifications for legal form: “simplifying inquiry, minimizing judicial discretion, increasing the transparency of law, and making legal obligations more definite,”\textsuperscript{57} as well as “continuity, coherence, generality, impartiality, and predictability in the definition and administration of legal rights and duties.”\textsuperscript{58} Posner even refers to these considerations as the ideas “summed up in the expression ‘the rule of law.’”\textsuperscript{59} By including these considerations in the all-things-considered mix, Posner insists,

\begin{footnotes}
\item Posner, The Problems of Jurisprudence, supra note 1, at 42-60.
\item See, e.g., Thomas, supra note 2 at 150-51, 225-31. Pragmatism’s skepticism toward the traditional view of the rule of law hangs together with its skepticism toward legal reasoning, and with its blurring of the conceptual line between legislation and adjudication. In this way, pragmatism’s view of the rule of law echoes that of the realists and their successors. See, e.g., discussion in Elizabeth Mensch, The History of Mainstream Legal Thought, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 35-36 (David Kairys ed., 3d ed., 1998). In a similar vein, for a pragmatist-style attempt to recast the rule of law without dependence on what the author casts as formalist conceptions of rules, see Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U.L. Rev. 781, 798-807 (1989).
\item Posner, Law, Pragmatism and Democracy, supra note 2, at 59-65.
\item Id. at 59, 60.
\item Id. at 60.
\item Id. at 60-61.
\item Id. at 60-61.
\end{footnotes}
pragmatists give these “systemic” concerns “due regard.” Other writers make similar assertions. Daniel Farber, for example, contends that pragmatists look backward as well as forward; that is, they fit their decisions to precedent and to expectations. They do so, he contends, when that course is pragmatically appropriate.

These pragmatist considerations do not, however, begin to fill the role conventionally filled by legal form. Pragmatists use this familiar vocabulary in a very different sense, so that it would be a semantic error to accept these pragmatist considerations as substitutes for traditional legal form. (This example does, however, show why pragmatism’s use of language creates confusion and makes pragmatism hard to pin down.) If pragmatism has any claim to distinctiveness – as pragmatists insist it does – its sensitivity to “systemic concerns” serves a function entirely different from the extensive, and intricate, functions conventionally performed by legal form.

For example, although pragmatism takes “systemic consequences” into account to some unspecified degree, it is “[o]nly in exceptional circumstances” that pragmatism gives them “controlling weight.” That is why, for example, although pragmatist judges sometimes follow precedent, they do so only for practical reasons. Critically, pragmatist judges consider

60 Id. at 61.
61 E.g., Shutkin, supra note 2, at 75; Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787, 798-800 (1989).
62 Farber, supra note 38, at 1344-46.
63 Id.
64 Although pragmatists assign “great social value” to the rule of law, at the same time they warn of the risk of “blind conformity to preexisting norms.” POSNER, LAW, PRAGMATISM AND DEMOCRACY, supra note 2, at 61, 94. In fact, Posner associates conventional rule-of-law concerns with “a renunciation of all judicial, flexibility, creativity and adaptivity.” Id. at 61.
65 See supra note 48.
66 Id. at 95. I explain in the discussion of predictability, in part I.C.4. below, why pragmatism cannot follow precedent only selectively.
themselves “unchecked by any felt duty to secure consistency in principle with what other officials have done in the past.”67 And although pragmatists generally would practice “obedience to the legislature,” they would do so primarily because disobeying the legislature would be “destabilizing.”68 As Posner takes “pains to emphasize,” even when a pragmatist reaches the same result a conventional judge would reach, “the root of the decision is still pragmatic.”69 (I question whether pragmatism has any basis for advancing settled expectations if it gives no normative force to legal form. I argue that, without form, pragmatism’s invocation of expectations is circular. See part II.C, below.)

This rejection of a judicial obligation to give special force to existing law distinguishes pragmatism from legal systems that give force to legal form – even systems with low levels of formality. An example of such a system is one inclined heavily toward standards and away from rules. Even this low level of formality would not make the system a pragmatic one, because the system still accepts that judges have an obligation to give special force to formal reasons.

This difference highlights several distinctions between pragmatism, on the one hand, and on the other, systems that empty legal standards or guidance of similarly low formality.70 The decision-making reasons provided by standards have normative force across cases, because

67 Posner quotes this view of pragmatism from Ronald Dworkin, but says that “it will do as a working definition of pragmatic adjudication.” POSNER, PROBLEMATICS OF MORAL AND LEGAL THEORY, supra note 4, at 241 (quoting RONALD DWORKIN, LAW’S EMPIRE 95, 161 (1986) [hereinafter LAW’S EMPIRE]). Also rejecting a duty to secure consistency in principle, see Thomas, supra note 2 at 139-63.

68 POSNER, LAW, PRAGMATISM AND DEMOCRACY, supra note 2, at 71.

69 Id. at 82. Similarly, Posner also writes that pragmatism “requires judges ordinarily to treat text and precedents as the most important materials of judicial decision” but this is only because “they are the materials on which the community necessarily places its principal reliance.” Id. at 63.

70 For background on the usage of the words “rule” and “standard,” see Pierre J. Schlag, Rules and Standards, 33 U.C.L.A. 379, 382 n.16 (1985).
standards are expressed in an authoritative form. Pragmatist reasons have no such force. Also, standards often point toward limited sets of norms, and even identify considerations that are tailored to specific legal locales. When they do, the applying court need not look to fundamental principles to reach a decision. By contrast, pragmatism leaves judges free to select new norms, without limitation to the specific legal locale. It gives far more freedom to start with abstraction and build upward. Finally, a standard can evolve into a rule that carries the normative force of a formal reason. Pragmatist reasoning cannot.

Pragmatism’s refusal to give force to formal reasons suggests that pragmatism cannot reject the normative force of rules, while also trying to employ rules in selected instances. Once pragmatism rejects the normative force of formal reasons, selected efforts to generate rules cannot be effective. This is because there is no basis for judges in later cases to treat the pragmatist statements, which may look like conventional rules, as rules. When presented with such a pragmatist statement, the good pragmatist judge still would review, in full, all the substantive considerations behind the apparent rule, to see whether following that rule would lead to the most reasonable decision. There can be, therefore, no such thing as a pragmatist rule.

For extended discussions of the continuum between rules and standards, see Sullivan, supra note 22; Schlag, supra note 68, passim.

Even if a standard “collapse[s] decision-making back into direct application of the background principle or policy to a fact situation,” it has a channeling effect as long as the “background principle or policy” reflect a limited set of norms. Sullivan, supra note 22, at 58. And as noted above, consecutive applications of the standard have a cumulative channeling effect.


It is a commonplace that permitting wider range for judicial selection of norms sits in tension with ever-increasing pluralism.

Posner suggests that “legal formalism can be a sound pragmatic strategy by analogy to rule utilitarianism.” POSNER, LAW, PRAGMATISM AND DEMOCRACY, supra note 2, at 64. See also id. at 60 (“There are bound to be formalist pockets in a pragmatic system of adjudication, notably decision by rules rather than reasons.”) Discussion of rule utilitarianism is beyond the scope of this article, but even a strong form of rule utilitarianism would not impose an obligation on the decisionmaker to give force to a rule independent of the rule’s content, solely because of the rule’s status as a rule.
II. THE IMPLICATIONS OF PRAGMATISM’S TREATMENT OF LEGAL FORM

I now turn to the implications of pragmatism’s treatment of legal form. I will address five topics that implicate important functions served by legal form and, therefore, provide useful points of contrast between conventional and pragmatist judging. These are: (1) degree of generality in reasoning; (2) incidence of judicial errors; (3) level of decision costs; (4) degree of predictability; and (5) the allocation of power in the legal system and the related question of judicial legitimacy. Although a rich literature discusses each of these topics, none has received much attention in the context of pragmatism.

A. A Sample Pragmatist Decision: Cenco v. Seidman & Seidman

1. The decision

I will place this discussion in a more concrete context by considering Cenco v. Seidman and Seidman, an influential decision written by Judge Posner in his role as judge on the United States Court of Appeals for the Seventh Circuit. Cenco addresses the subject of imputation. Under long-established principles, the knowledge and conduct of an agent are imputed to the principal. As a result, the law generally holds corporations responsible for fraud conducted by their employees. Imputation can render the corporation liable to persons whom its employees

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76 686 F.2d 449 (1982). Cenco, issued March 26, 1982, was one of Posner’s first opinions after he took the bench. The first opinion that he authored was Dower v. United States, 668 F.2d 264 (1981), issued three months earlier, on December 23, 1981.

77 RESTATEMENT (SECOND) OF AGENCY § 272 (1957). Applying the same principle, elementary corporations law generally charges a corporation with all knowledge of its agents. See WILLIAM MEADE FLETCHER, 3 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §787 at 120, ch. XXIII (perm. ed. rev. vol. 1994) (“A corporation cannot see or know anything except by the eyes or intelligence of its officers”; its knowledge is “the imputed knowledge of some corporate agent”) (citations to cases omitted).

78 Imputation prevents a corporation from benefiting from the acts of its employees while limiting its liability for their actions. See discussion in FDIC v Ernst & Young, 967 F.2d 166, 170-71 (5th Cir. 1992). It also protects third parties who reasonably believed the agent or employee conduct to be authorized by the principal or corporation. See RESTATEMENT (SECOND) OF AGENCY § 282 (1958).
defraud. It also can bar actions by the corporation against third parties who should have helped prevent fraud.\textsuperscript{79}

Management conduct is not imputed to the corporation if the agent committed the fraud while acting “adversely to the principal.”\textsuperscript{80} This “adverse-interest” exception has great practical significance. Cases repeatedly arise in which a corporation’s managers engaged in a hidden fraud. Often these cases involve the corporation’s relationship with a third party professional, such as a law firm, an auditing firm, or an underwriter. Even if the managers lied to the third party professionals, the third-parties can be liable to the corporation for failing to detect the fraud if the adverse-interest exception applies so that the fraud is not imputed to the company.

As of the early 1980s, a number of courts had addressed imputation in the context of corporate fraud and claims against third party professionals.\textsuperscript{81} The cases generally applied precedents that stated imputation principles and the adverse-interest exception.\textsuperscript{82} This approach to imputation changed in 1982, when the United States Court of Appeals for the Seventh Circuit issued its opinion in \textit{Cenco v. Seidman & Seidman}.\textsuperscript{83}

\begin{footnotes}
\item[79] It can enable the third parties to raise defenses including comparative negligence, lack of proximate cause, estoppel or waiver, or statutes of limitations, as well as to bring their own claims against the corporation. See discussion in \textit{Cenco}, 686 F.2d at 453. For example, if the company is charged with the knowledge and conduct of its employees, then it did not rely on its auditor (since the company is charged with knowledge that its own financial statements were wrong) and it is responsible for the lies that its employees told to the auditors. Therefore imputation can give third-party professionals a defense of no reliance and no causation. Imputation also can determine whether the auditor was entitled to rely on the statements made by the audit client’s employees.

\item[80] \textsc{Restatement (Second) of Agency} § 282(1) (1977). The most complete statement of the adverse interest exception is in \textsc{Restatement (Second) of Agency} § 282 ("Agent Acting Adversely to Principal").


\item[82] See citations in preceding footnote.

\item[83] A Westlaw search shows that \textit{Cenco}’s discussion of imputation has been cited in more than 40 opinions and a similar number of law journal articles. (Westlaw search conducted January 5, 2007.)
\end{footnotes}
The *Cenco* dispute began when senior management at Cenco Incorporated fraudulently overstated the value of the company’s inventory, inflating Cenco’s stock price. The fraud came to light and Cenco’s stock price dropped. Cenco’s new management brought claims against the company’s auditor, Seidman & Seidman for failing to detect the fraud. In its defense, Seidman & Seidman asserted that the conduct of Cenco’s own management should be imputed to the company, so that Cenco would be responsible for the fraud.

The main issue before the Seventh Circuit was “whether [the auditor] was entitled to use the wrongdoing of Cenco’s managers as a defense” against Cenco’s claims or whether, instead, the adverse-interest exception applied. The exception would have relieved Cenco of responsibility for its own managers. The court ruled that it had been permissible for the jury to impute the managers’ wrongdoing to Cenco – that is, to reject Cenco’s assertion of the adverse-interest exception. The court did not, however, simply apply the adverse-interest rule. Instead, it evaluated an assortment of empirical and normative questions, giving us a robust example of judicial pragmatism.

2. **The court’s pragmatist reasoning**

The court framed the issue as follows: in “what circumstances, if any, fraud by corporate employees is a defense in a suit by the corporation against its auditors for failure to prevent the fraud.” The court then looked for controlling authority. It cited one Illinois case, which

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84 Cenco asserted claims for breach of contract, professional negligence and fraud. 686 F2d at 452-53.
85 As the *Cenco* court pointed out, if the management wrongdoing were imputed to Cenco, it defeated Cenco’s contract claim because of interference in the contract, Cenco’s tort claim because of contributory negligence, and its fraud claim because of lack of reliance. *Id.* at 454-55.
86 *Id.* at 454.
87 *Id.* at 454.
88 *Id.* at 453-54.
89 *Id.* at 454.
established that there was no rule categorically requiring imputation to the employer. 91

According to the Cenco court, this established that management could avoid imputation under some circumstances. As to what those circumstances were, the court declared that “Illinois cases on auditor’s liability provide no guidance.” It stated that “the question has never been the subject of a reported case” and concluded that it was writing “on a “clean slate.”” 92

This was an important step in writing a pragmatist decision. The court did not disregard squarely-controlling precedent, as pragmatist scholars suggest can be appropriate, but it achieved the same effect. It declared that the law had run out – that there was “a clean slate” – much sooner than would have a court that wanted to give more effect to surrounding case law. 93

Certainly the parties did not think the law had run out, as they showed by writing lengthy briefs that made extensive arguments based on case law. 94 These briefs cited a variety of cases from Illinois and other jurisdictions, as well as the Restatement of Agency, and provided extensive discussions of case law applying these principles to the context of audits. 95 The court, however,

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90 Away from the bench, Judge Posner has written that it is “a legal convention” for courts to acknowledge as “correct” a “decision foursquare in accord with a recent decision by the highest court of the jurisdiction” but this is, he contends, a “weak convention.” POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 80.
91 686 F.2d at 454 (citing Cereal Byproducts v. Hall, 132 N.E.2d 27 (1956)).
92 686 F.2d at 454. The court did not address any other imputation cases, except to distinguish one century-old English case on the ground that it involved a manager that had stolen “from, not for the company.” Id. at 454.
93 For example, a then-recent case from the Southern District of New York had addressed the question whether “the knowledge and conduct of [company management] must be legally imputed to [the company], so that [the company] will be deemed to have known of all the alleged indiscretions of its inside management.” In re Investors’ Funding, 523 F. Supp. at 540.
94 Not surprisingly, they disagreed about whether there was authority that was directly controlling. Seidman insisted there was and Cenco that there was not. Both parties, however, insisted that the answer lay in the legal rules and the case law arguably applicable to the question. See Br. of Appellant Cenco Inc. at 27, 30 (“This appeal presents a question of law never previously confronted by an American court” although there was “one squarely applicable common law decision” from England in 1887; going on to discuss analogous case law) and the Seidman brief at 26 (“many courts have dealt with the subject”). Briefs are on file with the author.
95 See Br. of Appellant Cenco Inc. at 40-51; brief of Appellee Seidman & Seidman at 25-40 (on file with author). For discussion of audit-related case law, see Cenco brief at 31-44; Seidman brief at 25-40.
did not even consider Illinois law that might have provided some guidance. It also disregarded cited cases from other jurisdictions.

Having identified what it considered a complete gap in the case law, the court proceeded to fill it. The court looked to principles that were highly abstract: “the underlying objectives of tort liability.” Based on a general reference to “how the Illinois courts might decide the present case,” it identified these objectives as “compensation” and “deterrence.” It then reviewed a long list of facts. Few of these facts would have been relevant to a straightforward application of the adverse interest rule.

Looking first at “compensation,” the court considered who would benefit from recovery by Cenco. The court did not articulate a point to the compensation analysis. Nor did it look to case law for any recognized “right” to compensation. Instead it considered the fairness, in a rough-and-ready sense, of various possible outcomes. In doing so, it ignored the corporate form and directly considered the compensation effect on Cenco’s shareholders.

96 686 F.2d at 455.

97 The court divided those shareholders into three groups. The first was “people who bought stock in Cenco before the fraud began,” a group that contained “the corrupt officers themselves” as well as other stockholders who played no direct role in the fraud. 686 F.2d at 455. The second group was “people who bought during the fraud period,” comprising those who already had “sold at a loss” and those who continued to hold their shares, also “at a loss.” 686 F.2d at 455. The final group was “shareholders who [had] bought after the fraud was unmasked.” Id.

Members of the first group, the court reasoned, did not deserve compensation because they were wrongdoers themselves or were those who had “elected the board of directors that managed Cenco during the fraud.” Id. Members of the second group did not deserve compensation either, at least from the auditor. Id. The reasons were somewhat complicated. In particular, these shareholders already had brought their own direct claims against both Cenco and Seidman & Seidman, and had received compensation from both. The court stated that they had received $3.5 million from Seidman and $11 million from Cenco. Id. at 451, 459. Thus the court took into account the size of the judgment relative to total debt of the company (so it could determine whether shareholders would benefit from the claim), as well as the outcome of other litigation. Again, none of this was previously found in imputation law. As to the third group, the court reasoned that its members deserved no compensation at all, because they had purchased their Cenco stock after the fraud had come to light and the share price had fallen. (The court did not consider the fact that these shareholders might have paid more for their stock in order to acquire Cenco’s claims against the auditor.)
Based on this review, the court concluded that compensation considerations pointed away from permitting shareholders to collect from the auditor. “[B]ecause of shareholder turnover there is always a potential mismatch between the recovery of damages by a corporation and the compensation of the shareholders actually injured by the wrong.” 98  This case, the court concluded, was “a more dramatic mismatch than usual.” 99

The court then turned to deterrence. Still without citing authority, it identified several facts as relevant. The court stated that, as a general matter, “[i]n a publicly held corporation such as Cenco most shareholders do not have a large enough stake to want to apply an active role in hiring and supervising managers.” 100  On the other hand, it continued, permitting a publicly held company to avoid the cost of its own officers’ fraud would reduce shareholder “incentives to hire honest managers and monitor their behavior.” 101  As in every large company, “the shareholders [had] delegated this role to a board of directors, which in this case failed in its responsibility.” 102  This cut in favor of imputation, thus preventing Cenco Incorporated from “shift[ing] the cost of the fraud from itself . . . to the independent auditor who failed to detect the fraud.” 103

The court also noted that this fraud was unusually pervasive and complex. “In addition, the scale of the fraud – the number and high rank of the managers involved – both complicated the task of discovery for Seidman and makes the failure of oversight by Cenco’s shareholders and board of directors harder to condone.” 104

98 Id. at 455.
99 Id. at 455.
100 Id.
101 Id.
102 Id. at 455-56.
103 Id. at 455.
104 Id. at 456.
After completing its analysis of the “underlying objectives of tort liability,” the court turned back to precedent. In effect applying the adverse-interest rule, it stated that the fraud would be imputed to the corporation if fraud had “benefited” the corporation, and would not be imputed if it had “harm[ed]” the corporation.¹⁰⁵ It noted that, in this case, the officers had “com[mit]ed] fraud for the benefit of the corporation,” so its shareholders should bear responsibility.¹⁰⁶

One might argue that Cenco is not pragmatist because it acknowledges the authority of squarely controlling law, as any United States Court of Appeals must do. But this argument ignores the set of reasoning techniques that, taken together, bear a strong and unmistakably pragmatist family resemblance. The court looked past clearly established rules that could have resolved the case, even if by close analogy rather than formal syllogism. Instead, it engaged in a wide-ranging analysis that moved swiftly to first principles of tort law and then to a slew of general and specific factual assertions, and did so without looking again at the legal status of the inputs it chose. The analysis involved numerous additional facts and normative judgments. Taken together, these elements amount to as pragmatic a decision as one is likely to find issued by any court.

**Benefits And Costs Of The Cenco Court’s Pragmatist Reasoning**

<table>
<thead>
<tr>
<th>Contextuality/getting the right answer all things considered</th>
<th>Form/principle</th>
<th>Pragmatism/policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apply the adverse interest rule, and address facts that the rule considers relevant.</td>
<td>Identify abstract “objectives” of tort law in general, then select facts relevant to those objectives.</td>
<td></td>
</tr>
<tr>
<td>True judicial errors</td>
<td>Lower probability of error, because of fewer (and simpler)</td>
<td>Higher probability of error, because of more empirical</td>
</tr>
</tbody>
</table>

¹⁰⁵ *Id.* The court then interpreted “benefit” to turn on the intent of the wrongdoers. *Id.*

¹⁰⁶ *Id.*
empirical assertions and less complex reasoning. | assertions and more complex reasoning.
---|---
Decision costs | Requires only the application of the adverse interest rule. This leads to the same outcome the court reached through its more complex reasoning. | The court considered a much larger set of facts. This required the court to determine it had an empirical basis for each fact, and to conduct more complex reasoning.
Continuity and Predictability | Higher. Actors can depend on application of adverse-interest rule. | Lower. This is illustrated by subsequent cases.
Justification of the judicial role | Rests more easily on conventional justifications for the judicial role. | Needs a new justification for empowering the court to select abstract “objectives,” then make the normative and empirical assertions involved in the opinion.

B. The Trade-Offs Presented By Pragmatist Reasoning

1. Blunt versus contextual reasoning: Trying to reach better decisions all-things-considered

The move from more form-oriented to more pragmatic decision-making involves a series of trade-offs. The benefit side of the trade-off should be an improvement in legal reasoning. This is achieved, pragmatists hope, by replacing form-oriented reasoning, which can be a blunt instrument, with all-things considered reasoning, which can be more sensitive to context.

The question of sensitivity to context immediately points us to a conceptual gap in pragmatism. To evaluate how closely a decision’s reasoning fits a specific context, we need a substantive norm to give meaning to “context.”107 A judge cannot, of course, take literally every

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107 This is a variation of the argument, much discussed in the literature, that pragmatism is contentless and must import its content from other theories. For short statements of this argument and a pragmatist response see Richard Epstein, *The Perils of Posnerian Pragmatism*, 71 U. of Chi. L. Rev. 639, 640-51 (2004) (setting out the criticism), and the response from Richard Posner, *Legal Pragmatism Defended*, 71 U. of Chi. L. Rev. 683, 683 (2004) [hereinafter Posner, *Legal Pragmatism Defended*] (calling the argument that pragmatism is “contentless” a “standard charge”).
fact of a dispute into account. Description presupposes evaluation, and evaluation presupposes some criterion. Therefore, identifying which facts are relevant – the facts to which the pragmatist judge wishes to be sensitive – requires “some principle of selection.” Pragmatism does not provide this principle. Perhaps pragmatists would plug this gap with an appeal to reasonableness, or to a specific external theory, but so far they have not done so. Until pragmatism resolves this problem, it cannot fully advance its central goal of situated, context-sensitive decision-making.

We can, however, put aside the emptiness of the word “context” and observe pragmatism’s effect on the texture of legal reasoning. In particular, we can observe whether, compared with conventional reasoning, a pragmatist tends more to refined, case-specific facts and reasoning and less to coarser, more generalized facts and reasoning. This will give us a sense of whether pragmatism does, in fact, reduce the number of errors of imperfect fit. We also can observe whether pragmatism delivers an improvement in empirical grounding.

A review of Cenco suggests that pragmatism does not produce reasoning that is significantly less general, nor does it necessarily result in improved empirical grounding. Because of the absence of a standard for context-sensitivity, the best that we can do here is observe the style of the court’s reasoning. In particular, we can observe whether the court considered additional facts that would have been suppressed by the adverse-interest rule, and whether, in some sense, the court’s pragmatism gave its assertions a stronger empirical grounding.

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108 See an explanation of this point in Finnis, supra note 9, at 4. Finnis explains the dependence of description on evaluation. Id. at 3-4, 16-17.

109 This point is not original. For example, Schauer makes this point in Playing by the Rules, supra note 8, at 86-87.

110 In the view of pragmatist writers, the concept of “reasonableness” gives pragmatism sufficient content. See, e.g., Posner, Legal Pragmatism Defended, supra note 74, at 639.
Pragmatic “objectives” are more general than formal rules. The Cenco court’s first step was toward, not away from, abstraction. The court decided there was no Illinois case precisely on point, and it chose not to draw on abundant and closely neighboring case law. Instead it invoked the “underlying objectives” of tort law as a whole. These “objectives” are highly abstract. This approach therefore contrasts with the form-oriented reasoning that the Cenco court chose to forgo. Formal reasons available to the court included the adverse-interest rule, which is less abstract than “compensation” and “deterrence,” and reported cases which apply that rule to specific contexts. This shows that form-oriented reasoning can be less abstract than a pragmatic appeal to fundamental principles. It also can be incremental, because it tends toward resolving disputes through application of the nearest precedents. Through this attention to precedent, including the creation of new precedents through the use of analogy, the more form-oriented reasoning tethers decision-making to a relatively low level of generality.

Pragmatism lacks the channeling and structuring function of rules. By contrast, pragmatism does little to structure, channel or otherwise constrain judicial reasoning. It provides no guide to the level of generality at which the court should address a problem, and it frees the pragmatist judge to jump directly to a high level of abstraction. Like the type of philosopher whose usefulness pragmatists tend to reject, the pragmatist can be quick (quicker than the common-law judge) to employ highly abstract concepts to decide concrete cases.

111 686 F.2d at 455.
112 This puts aside the contentlessness of the word “context.”
113 The court’s reference to the fundamentals of tort law as the source for its norms indicates, not pragmatism’s connection with existing law, but the opposite. Such a generalized reference to tort law does little to limit the norms a available to the court. By most accounts, the foundations of tort law contain a rich conceptual storehouse. Although the Cenco court looked there and saw an instrumentalist, largely economic view of tort law (the view with which Posner is famously associated, see, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW CH. 6 (“TORT LAW”) (5TH ED. 1998)), the court just as easily could have looked there and found other concepts. Some more conspicuous examples include combinations of corrective justice, duty and fault, risks and harms, even rights and causation.
*Cenco considers facts beyond those relevant to the adverse-interest rule.* On the other hand, this freedom from formal constraints enabled the *Cenco* court to consider a number of facts beyond those needed to apply the adverse-interest rule. This creates an initial impression of increased fact-specificity. For example, the court drew on three different considerations (compensation, deterrence, and whether the agent conduct was adverse to the principal) rather than one, permitting more sensitivity to context than straight application of the adverse-interest rule. This approach gave the court some flexibility and freed it to articulate a decision that addressed relevant underlying goals.

On closer look, however, the effect on generality is mixed. The court did, in effect, restate the adverse-interest rule to a lower level of generality: from an articulation that applied to all principal-agent relationships to one that applied only where the principals are public corporations. But the discussion remained quite general. It remained dependent on statements that are applicable to whole classes of cases – on generalizations about large corporations – rather than on the specifics of this case. This continued use of generality apparently made it difficult to advance the related goal of improved empirical grounding. The court simply did not identify empirical support for a number of its generalizations.

An example is the analysis of compensation. It rests on division of the shareholders into three groups, a division that is present in every large public company.\(^{114}\) Also true of every large public company is [the] assertion that the wrongdoer shareholders might benefit if shareholders as a group were permitted to recover from the auditor.\(^{115}\) The court did not consider facts

\(^{114}\) *Id.* at 455.

\(^{115}\) *Id.*
specific to this set of wrongdoers, such as the amount of their recovery netted against their liability for any claims against them based on the fraud.  

There are other examples as well, such as the court’s statements that certain Cenco shareholders already had recovered damages from the auditor and from the company itself. Although the court noted these facts, it did not fit them into its analysis. Nothing in the record indicated that the recoveries from other litigation gave these shareholders full compensation for their losses, much less that additional compensation in the case at hand would overcompensate them. The court itself acknowledged that it was making an unsupported assumption: “This is not to say they would be overcompensated.” The record simply does not contain this fact.

Achieving deterrence depends on generalization. The court’s discussion of deterrence is similarly general. The court asserted that, as a general matter, deterrence is served by holding public company shareholders and directors responsible for losses caused by employee fraud, at least when the fraud “caused widespread harm to outsiders.” As the court explained, “[i]f the owners of the corrupt enterprise are allowed to shift the costs of its wrongdoing entirely to the auditor, their incentives to hire honest managers and monitor their behavior will be reduced.” This is an empirical assertion, and a highly contested one as well: Shareholder plaintiffs asserting claims against auditors certainly would respond that it is more effective to hold auditors

116 To determine whether the assertion is correct, one must know whether the wrongdoers were required to pay out any benefit they received through litigation relating to the fraud. The corporation has claims against the wrongdoers based on that wrongdoing, and almost certainly the wrongdoers can be forced to forfeit any gain from their wrongdoing, at least to the extent the wrongdoing injured the company. The wrongdoers can be sued by the company, possibly its shareholders, and other victims of the fraud. On this record, however, it is not known whether the shareholders – or Cenco Incorporated – had brought such claims.

117 686 F.2d at 455.

118 Id.

119 Id. at 455-56.

120 Id. at 455.
responsible for detecting fraud.\textsuperscript{121} Yet the court cited no empirical support for its assertion.\textsuperscript{122} The context-sensitive answer arguably requires more details about the fraud, to shed light on which party could have better prevented it in this case.

Increasing the context-sensitivity of the deterrence discussion would, however, point to a different challenge for pragmatism. By its nature, deterrence depends on generalization. It is not clear, therefore, how a pragmatist would increase context-sensitivity in a case where the goal is deterrence. It seems, however, that the type of generalization employed in \textit{Cenco} is a weak basis for deterrence. These generalizations were not cast into the form of a new rule, and therefore could not provide the deterrence benefits of generalizations found in more formal reasoning.

\textit{Cenco shows that courts generalize for other reasons as well.} \textit{Cenco}’s dependence on generalization indicates that the influence of legal form is not the only reason courts abstract away from the specific facts and consequences of the case at hand. Another reason is simple human limitations. \textit{Cenco} suggests that, even when judges are freed from the constraints of legal form, practical considerations still cause them to use decision-making heuristics or rules of thumb, and these techniques tend to approximate the generalizations that pragmatists wanted to avoid in the first place. The persistence of these techniques in this pragmatist opinion suggests


\textsuperscript{122} For example of an empirical approach to the deterrent effect of gatekeeper liability under the federal securities laws, see Barbara Ann Banoff, \textit{Gatekeeper Liability Under Section 11 of the Securities Act of 1933: So Why Isn’t The Grass Growing In Wall Street?}, 55 Admin Law Rev 267, 270 (2003).
the existence of practical limits on the ability of any court to engage in particularistic, situated decision-making.

These techniques appear to be responses to the high costs of information, and therefore can be understood as efforts to reduce decision costs. This establishes a link between the persistence of decision costs in any judging exercise and the limited ability of judges to engage in contextual judging. The incentive to employ these techniques probably is increased by pragmatism’s appetite for facts, and by the complex reasoning that these numerous facts require. This further suggests that pragmatism’s appetite for facts cuts against its goal of particularized reasoning. It also suggests that scholars may overstate the ability of pragmatic judging to achieve particularized decision-making.

_Cenco appears to assume a material degree of legal coherence._ In fact, addressing existing law at this abstract level runs counter to the very spirit of pragmatism. The contention that a court can identify unifying fundamental principles of “tort law” assumes a significant degree of coherence across the law. (Even if one chooses to reject the existence of legal concepts, as pragmatists do, this approach still assumes that simple fundamental principles exist that make sense of all of tort law.) This assumption is inconsistent with pragmatism’s emphasis on increased contextuality. Tort law applies to an enormous range of human conduct. It can be decidedly technical, reflecting experiences with specific legal locales.\textsuperscript{123} That is why some arguments for legal formality point to rules that are rooted in specific legal locales, reflecting the specific experience that generated the rule, and reflecting the combination of specificity and generality that rules can reflect.\textsuperscript{124} For a court to resolve a case based on principles that are


\textsuperscript{124} See, e.g., Justice Scalia’s argument for applying a rule at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified, and identifying a rule “specifically relating
sufficiently general to fit all of tort law, it must ignore the concepts that the law has developed for the context of the specific activity at issue. This seems the antithesis of the pragmatist spirit.

2. The rate of true judicial errors

The conclusion that pragmatism delivers less benefit than expected brings us to pragmatism’s costs. One is the increased opportunity for true judicial errors. These are errors that involve a mistake by a judge rather than the bluntness of a legal rule. True errors occur when a judge gets the case wrong in this sense: by failing to reach the optimal outcome, measured in terms of the relevant background justification, where the judge would have gotten it right by simply applying a relevant legal rule.\footnote{125}

Pragmatist judging increases the probability of true errors in at least two related ways. The risk of empirical error increases both because the court has to address a greater number of facts and because the nature of some of the additional facts may strain the court’s fact-finding ability.\footnote{126} Pragmatic judging also increases the risk of reasoning error, because it requires more complex reasoning to fit the greater number of facts and the court-selected norms into a coherent justification for a decision.\footnote{127}


\footnote{125} A somewhat similar kind of error does exist in a rule-making regime, in that a judge might simply make a mistake in applying the rule. Because rule-based reasoning tends to be less complex than all-things-considered judging, however, the incidence of such errors should be lower. (This kind of error does not arise if one accepts the legal realist contention that there is no such thing as the straightforward application of a rule because of the substantial opportunity for manipulation in even the simplest decision. Pragmatists contend that rules should not constrain, but it is not clear whether contend that rules can constrain.) See the discussion of decision-maker error in \textsc{Schauer, Playing by the Rules}, \textit{supra} note 8, at 149-57.

\footnote{126} For the discussion of the limitations of judges as generalists, by another member of the United States Court of Appeals for the Seventh Circuit, see Frank H. Easterbrook, \textit{What’s So Special About Judges}, 61 U. Col. L. Rev. 773, 779-80 (1990).

\footnote{127} This puts aside, of course, the possibility that the pragmatist judge chooses a norm entirely external to the legal rule. In such a case, the judge can commit error by reaching a decision that does not advance that norm.
This increased risk of true error cuts against pragmatism’s own goals of improved substantive outcomes. The true errors in finding facts specifically cut against the goal of empirically sounder decisions. It is hard to generalize about this trade-off in the abstract, but the review of *Cenco v. Seidman & Seidman* gives us a sense that the increased probability of true error is far from trivial.

The starting point is that the *Cenco* court could have resolved the case by applying the adverse-interest rule. Applying a rule would have increased the incidence of error due to imperfect fit: that the language of the rule, applied to the facts of the case, might have led to a result that did not advance the rule’s purpose. The court in *Cenco* did not address the possibility of this kind of error. Nonetheless, it chose not to limit itself to the factors recognized by the rule. It addressed a considerably larger set of facts, and more complex ones, than the adverse-interest rule considered.

In exchange for this freedom from the rule, however, the court accepted a higher probability of true judicial error. First, the risk of empirical error increased both because the court had to address a greater number of facts and because the nature of some of the additional facts strained the court’s fact-finding ability. For example, *Cenco* contains assertions about the incentives created by different possible liability schemes. Yet Posner himself, in his scholarship, has expressed skepticism about the ability of judges to find facts very much like these, including “how markets work, the incentives that particular transactions create . . . and the deterrent effects of different punishments.” For these kinds of facts, Posner wrote, judges

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128 686 F. 2d at 455-56.
129 *Posner, Law, Pragmatism and Democracy*, supra note 2, at 75-76. Similarly, Posner wrote in *The Problems of Jurisprudence* that judges “obtain much of their knowledge of how the world works from materials that are systematically unreliable sources of information.” *Posner, The Problems of Jurisprudence*, supra note 1, at 211.
“often . . . fall back on hunch, intuition, and personal experiences that may be misleading.”

This tendency confirms the increased risk of true judicial error, especially for the ordinary judge. While *Cenco* was authored by Judge Posner, whom even an adversary described as “the wonder of the legal world,” most decisions are made by more ordinary judges. And even in *Cenco* we do not find an articulated bases for these factual assertions. The increased risk of empirical error appears to be another way that pragmatism’s practical demands – here, for more facts – undercut pragmatism’s goals – here, for decisions with better grounding in the real world.

Second, *Cenco*’s pragmatist approach also increased the risk of reasoning error. It required the court to select norms, then to identify some appropriate mix of those norms, and to conduct those steps without even the guidance of analogous case law. The court’s selection of multiple normative goals (compensation, deterrence, and adverse-interest factors) required reasoning that was geometrically more complex than that required to apply the adverse interest rule. For example, *Cenco* attempted to identify some optimal combination of compensation and deterrence, as those goals applied to this case. This required separate analyses of the compensation and deterrence effects of possible decisions, followed by consideration of the optimal combination of the two effects, as applied to this case. On some theories, compensation and deterrence are incommensurable goals, in that they cannot be quantified and toted up on a single scale. They might even point to opposite conclusions. To give a full account of its reasoning, a court would have had to explain each objective, articulate how a decision would advance or hinder each, articulate the relationship between the two objectives, and explain its

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130 Posner, Law, Pragmatism and Democracy, *supra* note 2, at 75-76.

choice of the most desirable mix. 132 The court also would have had to reconcile its compensation/deterrence analysis with its inquiry into whether the fraud was intended to help or harm the company. 133

In sum, the incidence of true errors probably would increase under a pragmatist regime because each judge, working without the formal guidance of existing law, must construct an opinion virtually from scratch. 134 What Judge Posner called a “clean slate” can be equally portrayed as trackless terrain, which the judge must negotiate without the conventional legal signposts of lines of authority, doctrinal stops, and factual analogy. This increase in true errors raises the question of whether the trade-offs chosen by pragmatism – trying to reduce the bluntness of more formal reasoning by accepting additional true judicial errors – was warranted.

3. Decision costs

A commonly-noted benefit of formality in reasoning is reduced decision costs. Formality fosters this reduction by “remov[ing] factors from consideration,” enabling judges to decide cases on the basis of a comparatively small number of easily identified factors.” 135 This frees the judge from having to “examine[] every facet of the [case] with the same degree of care he would have employed had there been no rules.” 136

132 This is similar to the application of a balancing test, though a very open-ended one because its components are stated at a very high level of generality. The balancing test is another point where the reasoning methods of pragmatism can overlap with those of traditional judging. For a detailed discussions of balancing tests, see, e.g., T. Alexander Aleinikoff, Constitutional Law in an Age of Balancing, 96 Yale L. J. 943 (1987) (describing balancing as assigning values to specific interests at stake and giving each interest its due in the result); see also id. at 958-965 (placing balancing tests in the context of the growth of pragmatic adjudication).

133 686 F.2d at 455.

134 Whether or not the pragmatist judge writes an opinion that expressly addresses all possibly relevant considerations (something courts rarely do), that judge still must conduct the mental exercise of averting to every such consideration and understanding its relationship to the decision.

135 SCHAUER, PLAYING BY THE RULES, supra note 8, at 146-47.

136 Id. at 146.
As judging shifts down the continuum from higher to lower formality, decisions become more expensive. Formality is absent from pragmatism’s all-things-considered approach, which declines to remove any factors from consideration. (Again, pragmatism is more extreme in this respect than standard-based reasoning.)

Here it is helpful to consider the two dimensions by which some writers describe judicial decisions. One dimension is “depth,” which refers to the extent to which a judicial opinion moves from concrete facts to higher levels of abstraction in order to build a theoretical justification for a decision. The other is “breadth,” which is the familiar reference to the degree to which an opinion uses language that is narrow, and thus decides only the case at hand, or is broad, and therefore encompasses future cases as well.

This vocabulary helps us identify the effect of the levels of formality on the texture of judicial reasoning, and in turn on the levels of decision costs. Higher adjudicative formality appears to correlate with shallower decisions, while lower adjudicative formality requires deeper ones. Shallower decisions have a variety of implications. We expect them to be less tailored to context, but we also expect them to be cheaper. This takes us back to the concern that motivates pragmatism: If judges make decisions that are shallower in the sense that they consist of more formal application of existing legal materials, the judges are less likely to consider the particulars of each case. By contrast, pragmatists contend, a pragmatist decision will better resolve the instant case by considering more facts and justifying its outcome in terms of those specific facts.

137 Judge Posner is well aware that this kind of decision-making is more costly, but he does not address the magnitude, and all of the causes, of the increase. See, e.g. POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 45. See also Thomas, supra note 2 at 153.

138 These two dimensions have been thoroughly developed by Cass Sunstein. See, e.g., SUNSTEIN, ONE CASE AT A TIME, supra note 29. See generally Frederick Schauer, Justice Stevens and the Size of Constitutional Decisions, 27 Rutgers L. J. 543 (1996).

139 SUNSTEIN, ONE CASE AT A TIME, supra note 29, at 10-13.
Such decisions are deeper, and will tend to revisit theoretical foundations much more often. As a result, they are more costly.

The dimension of breadth is harder to assess in the context of pragmatism, because breadth assumes that a decision carries force across time. Decisions in a pragmatist system carry much-diminished force across time, so that the additional work the pragmatist judge does to construct deeply-theorized opinions provides reduced payoff in the future. The next court must incur the same costs – which already are higher because of pragmatism – all over again.

Pragmatists are, of course, aware that legal rules simplify decision-making and “economize on judges’ time.” In effect, this is another trade-off that pragmatists strike differently from conventional judges. Pragmatists believe that the increase in decision costs is worth it, because the very means by which rules reduce decision costs is by preventing judges from considering facts that could lead to the best substantive decision in each case.

_Cenco_ gives us a sense of the magnitude of this increase. The _Cenco_ court considered a much wider range of facts than would have been needed to apply the adverse-interest rule. Even though the court relied on heuristics for a number of these facts, its approach still required it to craft an opinion of considerable depth, starting at the foundations of tort law. The opinion would have been even more complex had the court fully undertaken the task of articulating the relationship among compensation, deterrence and adverse-interest considerations.

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140 We can generalize about pragmatist decisions, which we would expect to be extremely narrow. It is, however, difficult to generalize about decisions that reflect a regard for legal form, as they can be broad or narrow. Sunstein expects more formal decisions to be narrower, see SUNSTEIN, ONE CASE AT A TIME, supra note 29, at 70, although advocates of a stronger regard for form, such as Justice Antonin Scalia, would contend that broader decisions are just as likely and better serve underlying commitments to the rule of law. See Antonin Scalia, *The Rule of Law As The Law Of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

141 POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 53.
We might expect that “a deep account will in all likelihood have applications to cases other than the ones before the [c]ourt,”¹⁴² but that is not the case for pragmatist decisions. To the extent that later courts share Cenco’s pragmatist view of precedent, the opinion will not resolve future cases. To the contrary, it will multiply future costs. Not only will it widen the scope of lawsuits, it will extend their lives, because it will decrease the frequency of disposition on motions and the possibility of settlement.¹⁴³ The result can be the worst of both worlds: on the one hand, the generality and suboptimality found in system of a higher level of formality, and on the other, the higher decision costs found in a system with little legal formality.

4. Predictability and continuity

The correlation between form and predictability also is familiar.¹⁴⁴ The higher the level of form in a legal system, the more the judging process tends to be replicable by practicing lawyers, and the better judicial decisions tend to match the expectations of ordinary citizens.¹⁴⁵ A higher level of formality serves the practical end of reducing the costs of identifying and

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¹⁴² SUNSTEIN, ONE CASE AT A TIME, supra note 29, at 18. See also id. at 17 (noting the possibility of cases that are deep but narrow).

¹⁴³ This is borne out by subsequent case law. Cases that cite Cenco as a source of a verbal rule (applying the adverse-interest rule to corporate frauds) do not display the complexity of pragmatist reasoning, while cases that adopt Cenco’s pragmatist style display the same pragmatist features discussed here. See discussion in part II.B.4, infra.

¹⁴⁴ Posner acknowledges that rules tend to facilitate planning more than standards, which reflect a lower degree of formality. See POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 1, at 50; see also SCHAUER, PLAYING BY THE RULES, supra note 8, at 137-45.

¹⁴⁵ It is fundamental that the brighter a legal line, the better it gives notice to those whom the law expects to conform their conduct based on that line. The brighter line also avoid chilling conduct that is close to the border but still socially desirable.

On the substantial costs of legal uncertainty, see, e.g., John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance With Legal Costs, 70 Va. L. Rev. 965, 965 (1984) (discussing “some ways in which uncertainty about the application of legal standards can give parties economic incentives to ‘overcomply’ or ‘undercomply’”).
complying with the law.\textsuperscript{146} It also enhances citizen autonomy and, for this reason, generally is treated as a value in its own right.\textsuperscript{147}

It is a given that a reduction in form causes a reduction in predictability. Because pragmatism rejects formal reasons altogether, this reduction can be substantial. By eliminating the force of precedent, pragmatism leaves more elements of decision-making open for reconsideration in every case. Its emphasis on factual specificity reduces the extent to which any case provides a basis for generalizing about future cases. Here again, pragmatism tries to strike a different balance of legal virtues from conventional judging. It chooses to decrease predictability and doctrinal continuity in an effort to increase the probability of getting each decision just right.\textsuperscript{148}

It may seem obvious that pragmatism decreases predictability, but leading pragmatists dispute the point. They contend that pragmatism can address predictability concerns, and do so in just the right amount, by respecting precedent to the degree required for optimal predictability.\textsuperscript{149} This contention is reflected in the “systemic” concerns to which Posner would give “due regard,” and in Farber’s view that pragmatists can “look back” in just the right

\textsuperscript{146} The benefits of predictability and doctrinal stability may vary with context; some spheres of activity involve planning based on existing legal doctrines more than others. The United States Supreme Court made a variation of this point when it rejected a test for attorney-client privilege that contains multiple variables, stating that, “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” \textit{Upjohn Co. v. United States}, 449 U.S. 383, 393 (1981).

\textsuperscript{147} A conspicuous example of this view is the expression of the value, as goods in themselves, of stability and continuity in the opinion of Justices O’Connor, Kennedy and Souter in \textit{Planned Parenthood v. Casey}, 505 U.S. 833, 854-64 (1992).

\textsuperscript{148} At least some pragmatists writers acknowledge the value of continuity with the past, but they assign it low weight. See, e.g., Farber, \textit{supra} note 38, at 1344-46.

\textsuperscript{149} According to Posner, precedents “are the materials on which the community necessarily places its principal reliance in trying to figure out what the ‘law’ is, that is, what judges will do with a legal dispute if it arises.” \textit{POSNER, LAW, PRAGMATISM AND DEMOCRACY, supra} note 2, at 63.
amount. This is critical to a defense of pragmatism, because it suggests that pragmatists can
disregard formal reasons without any corresponding cost.

This contention, however, seems wrong. First, it appears impracticable. A pragmatist
scheme cannot reject the existence of a duty to respect precedent, then make selective exceptions
– respecting precedent – when doing so appears warranted to advance predictability. This
suggestion simply pushes the problem back one step. Citizens have no way to know if they can
have reasonable expectations – to know when they can “place principal reliance” on existing
legal “materials” – unless the legal system tells them so. And the legal system can tell them so
only by acknowledging a judicial obligation to give special force to precedent. This is, in fact,
the familiar objection to the predictivist theory of law. Judges cannot predict how they
themselves will decide cases.

Second, even if pragmatism could achieve predictability in this way, it still would not
capture predictability’s traditional significance. Pragmatists relegate predictability to purely
utilitarian status, again reflecting their adoption of the “predictivist” view of law. This misses
predictability’s normative dimension. Traditionally, predictability and continuity have been
considered important in their own right, mostly because of a connection with autonomy,
individual agency and similar foundational concepts of liberal thought. That is why
predictability is among the values associated with the rule of law.

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150 Id. at 61.
151 In this respect, pragmatism is another variation of Holmes’s prediction theory of law. See, e.g., Oliver
Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 458-61 (1897). Like pragmatism, that theory was
vulnerable to the criticism that it failed to account for the normative basis for legal prediction.
152 This argument lends support to Ronald Dworkin’s criticism that pragmatism misdescribes judicial opinions as
“pretending” that legal concepts have force, what Dworkin labels an “as is” strategy. LAW’S EMPIRE at 154-55. On
this reading, pragmatism treats law as a kind of Myth of Ur.
153 Another often-claimed benefit of rule-oriented judging is enhanced fairness across cases. Pragmatists would
dispute this claim, contending that, to the extent that rules lead to second-best substantive decisions, they cause
*Cenco* illustrates the tension between pragmatism and predictability. Under the adverse-interest rule, the affected parties – auditors, corporations, shareholders, and creditors – know that the corporation bears responsibility for the fraud, with the exception of cases in which the fraud is wholly against the corporation. This exception group is reasonably identifiable in advance, likely comprising embezzlements by lower-level employees and therefore cases with smaller damages figures.154 Under *Cenco*, however, the complexity of the analysis makes it impossible to predict whether a fraud by corporation employees will be imputed to the corporation. As a result, the company’s officers and shareholders do not know what balance to strike between performing their own monitoring and relying on the third-party professionals. The third-party professionals do not know what level of resources to expend on attempting to detect fraud.

This is particularly problematic for the *Cenco* decision, because one of *Cenco*’s main goals is advancing deterrence. Indeed, Cenco identifies deterrence as one of two fundamental principles that lie at the heart of tort law. By its nature, deterrence depends on predictability, and predictability depends on generalizations cast in a form that has force in future cases.155 But *Cenco*’s pragmatism virtually eliminates any identifiable effect on planning and conduct. Nor did *Cenco* advance deterrence through the generalizations that it employed in its review of judges to treat like cases differently. Therefore, the pragmatist argument goes, it is more particularistic reasoning that advances fairness, because it can take into account the relevant likenesses and differences between cases.

This argument runs into the debate about whether pragmatism has any content. The pragmatist argument that has force only if the particularist decisionmaker has a standard against which to determine whether cases are alike.154 Whether fraud is adverse to the company is irrelevant to the auditor, whether as a matter of deterrence or in terms of the auditor’s culpability. Nonetheless, it is possible that the adverse-interest rule would have some deterrent effect if it were applied as a rule that generates predictable outcomes. In that case, it would give the parties a basis from which to bargain and therefore to assign responsibility at the outset of their relationship.

155 Illustrating the presumed connection between deterrence and general statements about the classes of conduct who are the subject of the deterrence, see, *e.g.*, *Roper v. Simmons*, 543 U.S. 551, 563, 571-72 (2005); *id.* at 621-22 (Scalia, J. dissenting).
relevant facts. Because these generalizations have no legal force in future cases, it is doubtful that they could have any deterrent effect.

Pragmatist decision-making further undermines predictability because of the increase it causes in true judicial errors. These true errors undermine predictability in a way that errors of imperfect fit – the kind of error that is more likely in a form-oriented regime – do not. One of the very reasons that the rule-oriented regime accepts imperfect fit is to purchase predictability, because the existence of the generalized rule helps people to know the law in advance. True judicial errors cannot have the same effect on planning, however, because we cannot predict when or where those errors will occur, and therefore cannot account for them in planning.

Additional evidence of pragmatism’s effect on predictability comes from the path of imputation law since Cenco. It now is much harder than it was a couple of decades ago to predict whether a fraud will be imputed to a corporation. Opinions that have approximated the pragmatist approach of Cenco are relatively lengthy and complex, and frustrate efforts to predict their outcome. That is why, as one knowledgeable scholar wrote in a discussion of Cenco and

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156 In the vocabulary suggested by Frederick Schauer, generalities that are expressed with a high level of formality are “entrenched.” SCHAUER, PLAYING BY THE RULES, supra note 8, at 38-111. In the rule-oriented regime, with its respect for pedigree, an existing generalization applies to later cases unless a good reason, recognized by the regime, exists to replace it. By contrast, in the pragmatist regime, the next judge in the next case is free to reject the generalization and assert a new one.

157 In a pragmatist regime, any decision, including a wrong decision, has a reduced effect on later cases, because no case has an authority-based effect on later cases. On the other hand, for the same reason, pragmatism should reduce the costs of error in any one case.

158 It is possible to treat Cenco non-pragmatically, as the source of an adverse-interest rule refined to address public companies. That approach does not require the lengthy analysis conducted in Cenco or lead to the same unpredictability of outcome. See, e.g., In re Wedtech Securities Litig., 138 B.R. 5, 9 (S.D.N.Y. 1992) (citing Cenco solely as an expression of the traditional adverse-interest rule). Addressing Cenco as providing a rule for the application of the adverse-interest rule to corporate frauds, see, e.g., Michael L. Rugen, The Cenco or Imputation Defenses: Defeating the “Stop Me Before I Kill Again” Claim, in ACCOUNTANTS LIABILITY at 247 (Practicing Law Institute 1995).

159 A prominent example is In re Jack Greenberg, 240 B.R. 486 (1999), another case addressing imputation of a management fraud in the context of claims asserted against the auditor. The court relied heavily on Cenco’s pragmatist approach, e.g., 240 B.R. at 502-18, which it sometimes recast as “equity.” 240 B.R. at 502-07. The imputation analysis involved a long list of facts and required eighteen double-colummed pages of the reporter to
its progeny, imputation case law "reveals little common ground and strongly suggests the need for a more workable framework to address imputation and adverse interest issues."\(^{160}\) He concluded that the decisions since \textit{Cenco} "hardly provide a useful road map for deciding future cases. What is most striking about these opinions is that, while they often reach different results, nearly all acknowledge \textit{Cenco} and [the subsequent Seventh Circuit decision] \textit{Schacht v. Brown},\(^{161}\) as the leading authorities."\(^{162}\) Although he did not suggest that the pragmatic reasoning in \textit{Cenco} was a source of the uncertainty, the uncertainty in the cases does correspond closely with the degree to which they adopt the full \textit{Cenco} analysis.\(^{163}\)

5. **The allocation of power and the basis of judicial legitimacy**

Whether or not pragmatism can work in practice, it faces the question of justification. Formal reasons are relevant here, because in conventional judging they perform the intertwined functions of legitimizing and containing judicial authority.\(^{164}\) They serve a legitimizing function by maintaining a connection between adjudication and political authority.\(^{165}\) They serve a constraining function by working to establish the boundaries of that judicial authority.


\(^{162}\) \textit{Dore, supra} note 173, at 162.

\(^{163}\) See, e.g., \textit{Greenberg}, 240 B.R. 486.

\(^{164}\) The power-allocating function of rules is a central theme of \textit{Playing by the Rules}. See, e.g., \textit{Schauer, Playing by the Rules}, \textit{supra} note 8, at 98-9, 158-62.

Pragmatism upsets this scheme. By dissolving the link between adjudication and political authority, it weakens adjudication’s connection with legitimacy.166 At the same time, it relaxes the constraints on judicial power, eliminating a primary means for distinguishing the roles of the courts from those of other actors. This effects a substantial increase in the power of the courts and, in most instances, of individual judges. Power shifts from legislatures to courts. Within the courts, power shifts from higher courts to lower courts, and from earlier courts to later courts.167

Pragmatists are aware that pragmatist adjudication needs a new theory of legitimacy, and they offer some possibilities. For example, Daniel Farber suggests that judicial legitimacy lies in “internaliz[ing] . . . existing law.”168 Farber adds, however, that this approach does not acknowledge existing law as a “constraint,” but only “as part of [the judge’s] own way of thinking.”169 This approach does not, therefore, appear to require a connection between adjudication and existing law. In the absence of that connection, it cannot legitimize judicial decisions.170 E.W. Thomas takes a different tack, focusing more on the flaws in the representative character of elected officials.171

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166 The nature and source of the authority of law is extensively contested. Nonetheless, virtually every account of legal authority involves at least some formal connection between judicial decisions and previously existing law. Pragmatism, however, does not provide that link because it does not attribute any identifiable effect to legal form.

167 Posner contends that pragmatists include the “rational division of labor” in their evaluation of systemic considerations. LAW, PRAGMATISM AND DEMOCRACY at 69-70. It is not clear, however, whether he refers to this in the limited sense of efficiency or in the broader sense of the allocation of law-making power throughout a legal system.

168 Farber, supra note 38, at 1345-46.

169 Id.

170 Farber’s discussion of judicial legitimacy expressly responds to Ronald Dworkin’s attack on pragmatism in LAW’S EMPIRE, at 151. See Farber, supra note 38, at 1344.

171 Thomas, supra note 2, at 79-84.
The most extensive discussion comes, again, from Posner. He makes no effort to connect adjudication with the usual source of legitimacy, declaring that the pragmatist “feels no need to align his judicial theory with” traditional concepts of representative democracy.\textsuperscript{172} Instead, he relies on the combined effect of various political forces. These include “the stick of reprimand or impeachment” and “Congress’s control over the budget,” as well as “public opinion” and even “dependence on the executive branch to enforce its judgments.”\textsuperscript{173}

This theory still does not fill the legitimacy gap. These forces, without more, cannot constrain – and therefore legitimize – adjudication. Because the theory depends on criticism of the judge by others in the political system, it still needs a substantive standard for that criticism. That standard must place \textit{ex ante} limits on the judge’s role.\textsuperscript{174} This theory is, therefore, vulnerable to the same criticism as the prediction account of law: that it merely pushes the problem back one step, leaving an infinite regress that can be stopped only with a substantive theory. Pragmatism still needs a basis for the legitimacy of the much-expanded judicial role that it envisions.

The \textit{Cenco} court gave minimal attention to the source of its authority in this case. It concluded that there was no guiding case law that warranted even a citation.\textsuperscript{175} The only connection it did draw between its conclusion and existing law was exceedingly slender – a lone reference to what “Illinois courts” would do.\textsuperscript{176} Of course, this technique increased the court’s

\begin{footnotesize}
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\item[172] Posner identifies this traditional concept of democracy in terms he labels “Concept I democracy.” \textsc{Posner, Law, Pragmatism and Democracy, supra} note 2, at 14, 106-07, 130-31, 208-09.
\item[173] \textit{Id.} at 209-210.
\item[174] Posner’s theory appears to rest legitimacy on the content of judicial decisions, so that decisions are legitimate if these various political forces – Congress, the President, public opinion – accept their content. Under that theory, legal form plays no role in legitimacy. This disregard for legal form leads to the various questions raised throughout this article, and it requires a theory of legitimacy that is overtly based on content.
\item[175] The court cited cases only to distinguish them. \textit{686 F.2d} at 454.
\item[176] \textit{Id.}
\end{enumerate}
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own power relative to previous courts. It also increased the court’s power relative to the Illinois legislature, which bases decisions about whether legislative change was necessary. The *Cenco* approach also suggests increased power for lower courts relative to higher courts, and for future courts relative to earlier courts. In sum, *Cenco* provides evidence supporting the view that pragmatist adjudication fits poorly with conventional, source-oriented theories of judicial legitimacy. It provides further evidence that pragmatism needs a new theory of judicial legitimacy.

**Conclusion**

A complete case for pragmatism must come to terms with the varied and complex functions served by the formal features of legal systems. The pragmatist argument to date is that pragmatism can provide for these functions by giving “due regard” to “systemic considerations.” This argument does not, however, acknowledge the many functions of formal reasons; much less does it explain how pragmatism, having rejected formal reasons, sees that these functions are taken care of. To develop this explanation, the argument for pragmatism needs additional, and concrete, steps that address the issues raised in this article. Pragmatism should develop the notion of contextuality, and explain how pragmatism would improve it. It should explain how it can improve on the bluntness of form-oriented reasoning while accounting realistically for the practical, human limitations of judges. Pragmatism then must explain why that improvement is worth the cost. The costs that I have identified include an inevitable increase in true judicial errors, an increase in decision costs, and a decrease in predictability. Pragmatism also needs to articulate a basis for the legitimacy of its distinctive conception of adjudication. In sum, if pragmatism is to be more than an intriguing discourse, it needs to develop a response to the extensive and complex literature that explains the functions of legal form.