The Pragmatist School in Analytic Jurisprudence
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Almost twenty years ago, a genuinely new school of thought emerged in the field of jurisprudential methodology. It is a *pragmatist* school. Roughly, the pragmatists contend that, when inquiring about the nature of law, we should evaluate potential answers based on practical criteria. For many legal philosophers, this contention seems both unclear and unhinged. That appearance is lamentable. The pragmatist approach to jurisprudential methodology has received insufficient attention for at least two reasons. First, the pragmatists do not conceive of themselves as comprising a school; in fact, these proponents have different names for their common position, which makes it hard to see the commonalities. Second, the most famous statement of the pragmatist view has received withering criticism, criticism that has not been sufficiently answered, a fact that may lead opponents of pragmatism, as well as potential supporters, to doubt that a viable view of this kind can be held. This Essay aims to serve as a corrective.

My project here is to demonstrate that the pragmatist school offers a powerful, unified program to be taken seriously. To that end, I begin in §1 with background on analytic jurisprudence and the state of contemporary debate about its proper methodology. With that background set forth, §2 explains the central contention of the pragmatist school, identifies several of its key movers, and devotes some space to nomenclature issues. In §3, I further characterize the view by distinguishing it from ethical positivism, a view with which it is sometimes confused. After this, the Essay turns from exposition to an offensive. As I understand the state of the debate, the burden of proof currently lies on pragmatism, for its most well-known proponent, Liam Murphy, has been pilloried by numerous legal philosophers. In §4, I examine and rebuff these criticisms of the pragmatist approach. In §5, I re-raise important critiques that pragmatists have lodged against their rivals, critiques that have yet to be answered. The Essay ends with §6, which summarizes the major conclusions and outlines new work for pragmatists to pursue.

1. Background

To understand the central claim of the pragmatists, a little background may prove helpful. Analytic jurisprudence[1] is the field of philosophical inquiry seeking to answer a cluster of related questions. The cluster includes questions about a) what makes a norm a legal norm, b) what makes some pattern of behavior a legal system, c) what is the content of our "law" concept law, and so on. While these are slightly different questions, many legal philosophers do treat them as interchangeable. For ease of exposition, I refer to the cluster as the "What is law?" question or *the jurisprudential question*.

Natural law theory and legal positivism are two leading partial answers to the jurisprudential question. Both views tend to offer necessary conditions for something to be law or to be a legal system. On rare occasion, thinkers opt for the more ambitious task, to offer necessary and sufficient

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[1] Some like to call this *general jurisprudence*. I use *analytic jurisprudence* here, since that name stresses the continuity between this theoretical activity and other ventures of philosophical analysis in which thinkers ask, "what is *x*?" Analytic jurisprudence is rightly seen as similar to, for instance, the analysis-of-knowledge inquiry in epistemology. The two fields just concern different analysanda. Another reason I prefer *analytic jurisprudence* is because *general jurisprudence* might reasonably be thought to include questions beyond the analysis project. As Plunkett and Shapiro (2017) note, general jurisprudence might also include questions like "How do we know that a first-order claim about law is true?"

conditions.[2] More often though, debates center on necessary conditions, and for that reason, the debate only concerns a partial answer to the jurisprudential question. Classically, natural lawyers claim that some norm is a legal norm only if following the norm would be morally appropriate. Classically, legal positivists deny that necessity claim; they contend instead that some norm can be a legal norm even if following it would be morally inappropriate. (There is some question about whether anyone really held what I call the *classical natural law view*,[3] but this simple view suffices for our purposes.) While focus on the law's connection with morality dominates discussion, those who seek to answer the jurisprudential question also debate other matters such as whether secret laws can truly be law,[4] whether laws are rules or commands,[5] and what, if anything, distinguishes law from interactions between a mafia and its clientele.[6]

While the primary focus of analytical jurisprudence has been answering the jurisprudential question, debates have emerged in the past thirty years about *how* to answer the question. In the jurisprudential methodology literature, two positions have become the focus: methodological positivism and methodological anti-positivism. The methodological anti-positivists contend that one needs to engage in moral inquiry in order to answer the jurisprudential question. To put the point even more plainly, the methodological anti-positivist argues that one cannot begin to describe law's nature, i.e. to provide the accurate conditions that something must satisfy to be law, without first answering substantive moral questions (Finnis, 1980). Methodological positivists deny this; they contend that one *can* track what law is without any recourse to moral theory.[7]

I conclude this background section by noting shared ground between methodological positivists and methodological anti-positivists. Both sides assume that an answer to the jurisprudential question is correct if and only if the answer accurately tracks what law is. Call this shared assumption *the representationalist assumption* and call work that operates under this assumption *representationalist jurisprudence*. The pragmatist view that I elucidate throughout the rest of the paper challenges the representationalist assumption and offers a different way to conduct analytic jurisprudence.

2. Meet the Pragmatists

In this section, I highlight the core commitment that all pragmatist jurisprudents share, then I identify key pragmatists and review some details of their positions. Finally, for the sake of added clarity, I focus on why I call the school *pragmatist*, rather than something else.

2.1 The Position

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[2] For example, Hart (1994) stated, "There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria ability must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials."

[3] Finnis (1980) discusses this point in detail.

[4] Fuller (1969) denies that secret laws are laws in the fullest sense.

[5] Classically, Austin (1998 [1832]) claimed that laws are commands. Hart (1994) contests this and claims laws are rules.

[6] Importantly, Kramer (2003) resists the common claim, made by many legal philosophers, that a mafia cannot be a legal regime.

[7] Famous methodological positivists include Julie Dickson (2004), who argues that deciding the jurisprudential question requires non-moral evaluative analysis, as well as Brian Leiter and Jules Coleman.

The pragmatist approach to analytical jurisprudence is united in rejecting the representationalist assumption. Recall that representationalists claim that an answer to the jurisprudential question is correct only if it tracks what law (or our concept thereof) really is. Pragmatists, on the other hand, contend that an answer to the jurisprudential question can be correct even if the answer, the theory of law offered, does not accurately track what law is. Pragmatists deny the representationalist assumption because they contend that an answer to the jurisprudential question can be correct insofar as it meets certain practical criteria. To give a toy example of this, a pragmatist might claim that an answer to the jurisprudential question is the right one if believing that answer would maximize utility.

On the narrowest understanding of the pragmatist approach to analytical jurisprudence, or *pragmatist jurisprudence*, it refers to just one thesis: that an answer to the jurisprudential question can be correct if it meets certain practical criteria. Many pragmatist jurisprudents go further though. Many argue that pragmatist jurisprudence should replace representationalist jurisprudence. The replacement thesis has two parts: some critique of representationalist jurisprudence and some reason why we should still seek to answer the jurisprudential question once we have abandoned accuracy-related criteria of success. I discuss these two parts of the replacement thesis below.

2.2 The Adherents

A school is not a school without a group of adherents. The work of this subsection, then, is to list those adherents and to make the case that each holds the pragmatist view summarized above. If this Essay accomplishes nothing else, it will have still made a helpful contribution to the recent history of ideas in jurisprudence.[8]

2.2.1 Murphy the Progenitor

The first thinker in the school is Liam Murphy. Murphy might even be called the progenitor of pragmatist jurisprudence, for his work, first published in 2001, is one the earliest clear statements of a pragmatist approach to analytic jurisprudence. There is room to argue that Ronald Dworkin is also a proponent of pragmatist jurisprudence and accordingly that he is a progenitor.[9] However, raucous debate among expositors of Dworkin seems to belie the claim that his was a *clear* statement of a pragmatist approach. In any event, Murphy did offer a clear statement in two papers, one from 2001, the other from 2005. Murphy (2001, 2005) explicitly argued that we should answer the jurisprudential question based on which answer, if widely accepted, would have the best political consequences. Fittingly, he refers to his project as a "practical-political approach." This view fits clearly into the pragmatist mold, as cast above.

At this stage, I will not explore the reasons why Murphy thought we should take the pragmatist approach as opposed to the more familiar representationalist approach, common to both methodological positivists and methodological anti-positivists. Instead, I want to rehearse an argument that Murphy (2005) offered which illustrates how his methodological view leads to an

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[8] To be clear, there are others I do not mention for reasons of space. For instance, Nason (2013) defends a pragmatist approach to jurisprudence.

[9] Stoljar (2012) sees Dworkin as a fellow traveler on the pragmatist course. However, Dickson (2004) denies this. To offer my own armchair sociology, I think that the majority of jurisprudence scholars see Dworkin as part of team methodological anti-positivism, not as a pragmatist.

answer to the jurisprudential question. This should help to make the pragmatist project a little more tangible.

First, let us set up a dispute. This is a debate within legal positivism about whether legal norms can directly incorporate moral norms. Recall that all legal positivists agree than a norm *can be* a legal norm even if it fails to comply with morality. The intramural debate is about whether a given legal system can have as one of its legal norms that some legal subjects comply with morality. For instance, the Eighth Amendment to the United States Constitution forbids cruel punishments. On a now-standard thick ethical terms analysis, a term like *cruel* has both descriptive and moral content. On its face, then, the Eighth Amendment appears to forbid legal officials from engaging in a form of immorality. Does that Amendment truly forbid cruel punishments? If so, to understand the content of the Eighth Amendment requires moral inquiry into what counts as cruel. Inclusive legal positivists agree that some legal norms do directly incorporate moral norms in this way. Exclusive legal positivists disagree. About the Eighth Amendment, the exclusive legal positivist would say that the Amendment does not forbid cruel punishments; instead, it forbids punishments that certain legal officials deem to be cruel. Murphy had a view about which side is right, and his pragmatist method points the way.

For Murphy, a theory about the nature of law *T* is correct iff widespread acceptance of *T* has better political consequences than widespread acceptance of the negation of *T*. Murphy (2005) claimed, perhaps tendentiously, that widespread acceptance of exclusive legal positivism has better political consequences than widespread acceptance of inclusive legal positivism. What are these alleged consequences? Well, Murphy claimed that those who accept that the laws incorporate moral norms are likely to acquiesce to law, even when the laws are unjust. Or at least, those who hold this view are more likely to acquiesce than those who deny that laws incorporate moral norms. Such acquiescence, Murphy (2005) contended, is politically dangerous.[10]

There is room for debate about whether any of these factual or value claims is correct, but leave this aside for now. In rehearsing this argument, we gain a better understanding of how a pragmatist approach works. Each pragmatist proposes some particular pragmatic principle as the criterion by which to judge first-order jurisprudential claims, and then the principle, combined with an assessment of the facts and the relevant values, produces an answer to the jurisprudential question, or some component thereof.

2.2.2 Stoljar and Ameliorative Analysis

A second member of the pragmatist school is Natalie Stoljar. In two papers published in 2012 and 2013, Stoljar sketched a view on which we should accept an answer to the jurisprudential question insofar as doing so helps us to achieve a practical end. Stoljar calls this *ameliorative analysis*, borrowing from Sally Haslanger (2012a, 2012b). This also fits the pragmatist mold.

Since Stoljar essentially adopts Haslanger and applies her metaphilosophical framework to jurisprudence, we will better understand Stoljar's methodology with more details on the Haslanger picture. Haslanger develops her metaphilosophical approach not thinking about law, but about race

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[10] Having reached the end of this summary of Murphy, it is worth pointing out that he has abandoned this view as hopeless (Murphy 2008). He claimed that the kind of convergence necessary to reap the benefits of 'choosing a theory of law' is unlikely.

and gender. Haslanger also distinguishes between three ways we might go about settling on the correct answer to a question in philosophical analysis. When trying to answer a "what is x?" question, Haslanger thinks that the right answer could be determined by one of three things. First, one might think that an answer is correct if it tracks the shared idea that competent language users have when thinking about the name for *x*. Haslanger calls inquiry that proceeds in this manner *conceptual analysis*. Conceptual analysis, for Haslanger, concerns what is 'in our heads,' so to speak. Second, one might think that an answer to the "what is *x*?" question is right if it tracks *x*, regardless of how anybody thinks or speaks of *x*. Haslanger calls inquiry that proceeds in this manner *descriptive analysis*. Third and most relevant for our purposes, one might think that an answer is correct if accepting that answer helps an agent to further a legitimate practical end. This, again, is ameliorative analysis.

With this full sketch in place, we can make two comments about Stoljar and raise a question. First, though she borrows heavily from Haslanger, Stoljar, not Haslanger, is part of our pragmatist school. Haslanger has not indicated that she would apply her ameliorative approach to the jurisprudential question. Second, Stoljar's methodology is, strictly speaking, pluralist, not solely pragmatist. She thinks we might combine the various sorts of analysis that Haslanger outlines. Third is my question. Because Stoljar is adopting another person's view, there is inevitably a question of how much she takes on. Consider an interesting aspect of Haslanger's ameliorative analysis: in order to practice ameliorative analysis, one must further a *legitimate* practical end. Clearly, Haslanger includes this proviso because one who settles on a conception of, say, race in order to further a repugnant end has not *ameliorated* anything. My question is whether Stoljar retains this proviso. If she does, one must say that, for her, there are pragmatic approaches that are not truly ameliorative analyses.

2.2.3 Bayón and the Turn to Doctrine

Juan Carlos Bayón is a third member of the pragmatist school. Bayón (2013) explicitly defends a Murphy-style view, with one modification. While Murphy's pragmatic criterion concerns the general political consequences of widespread acceptance of the theory in question, Bayón's criterion is more limited. Bayón (2013) urges that we accept a jurisprudential theory if its embedding in legal doctrine within a particular jurisdiction would be optimific.

For Bayón, officials' answer to the jurisprudential question can have consequences for legal doctrine, so, on his preferred methodology, we should decide the jurisprudential question by considering possible ramifications on legal doctrine. While some legal scholars (Shapiro, 2011, 25) know that "the answer to what the law is *in any particular case* depends crucially on the answer to what law is *in general*," other legal scholars are more skeptical.[11] They find it hard to see how abstract theorizing about the nature of law can have any effect on everyday legal doctrine. Given such doubts, I develop an example below, inspired by American law. Spinning out this example will be helpful in explaining Bayón's intriguing suggestion and showing that it is actionable.

Under American constitutional law (U.S. Const. art. III, § 2, cl. 1), federal judges may hear certain ordinary tort cases when, *inter alia*, the disputants are from different states.[12] Suppose there is a

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[11] Shapiro (2011, 22) quotes the celebrate judge and scholar Richard Posner endorsing the view that the jurisprudential question cannot affect legal doctrine.

[12] "The judicial Power shall extend to all Cases, in Law and Equity . . . between Citizens of different States." This is the only true proposition of law in this example. The rest is hypothetical.

defamation suit. Freddy from Florida has been sitting at home, writing salacious, false things online about Katie from Kansas. In particular, Freddy has been suggesting that Katie is very sexually promiscuous. Suppose further that there are no libel statutes; rather, from time immemorial in the Anglo-American tradition, one has been able to bring suit for false reputation-damaging claims. When the case comes before the federal judge, should Katie have to prove damage to her reputation in addition to falsity or is falsity sufficient? Well, suppose that when such cases are decided in Kansas, with its more conservative mores, judges say that false statements about a woman's promiscuity are *per se* defamatory. However, in Florida, where all sorts of things happen, judges say that no claims are *per se* defamatory; one has to prove the specific harm to one's reputation wrought by the false statement. How should the federal judge rule, if Katie presents no specific evidence of the harms to her reputation? Interestingly, one's answer to the jurisprudential question may provide help.

What are the judges doing in Kansas and in Florida? Here are two suggestions: 1) they are both deciding cases under *the* law of defamation, which is determined by what morality requires, such that one set of judges simply gets things wrong on this score or 2) Kansas judges have made the Kansan law of defamation while the Florida judges have made the importantly different Floridian law of defamation, such that neither side is wrong, since this is not a cognitive exercise. Holding these different views about what the judges do roughly corresponds to holding a more natural law theory versus a more positivist theory about the nature of law. Such views all on their own will not decide the federal judge's question, but they will, if combined with the following legal premise: federal judges have no authority to make tort law on defamation matters. For the natural lawyer, the federal judge should decide the matter as she thinks morality requires; the restriction on federal judges making law does not perturb the natural lawyer, since judges do not make law anyway. For the positivist, the situation is more complicated since the federal judge cannot directly decide the case by what she thinks morality requires. That would be making tort law, which she is expressly forbidden to do. The positivist, thus, is led down the path of making some procedural law about what to do when a defamation case comes before the federal courts.

As many American lawyers will know, while my example and setup are fictional, the doctrinal question of how to handle 'diversity cases,' cases that may be argued in federal court because the litigants are from different states, is real. And, in the real doctrinal matter, divergent answers to the jurisprudential question did lead to different results. In the 19th Century, when natural law reasoning held greater sway, federal judges, as a group, were free to decide these common law cases as they thought morality required (*Swift v. Tyson*, 1842). (Obviously, each individual judge felt bound by precedent, but the group, which made the precedent, was doing something different.) As positivism gained ground, the United States Supreme Court would eventually claim (*Erie Railroad Co. v. Tompkins*, 1938) that federal judges could no longer do this, and the Court developed a procedural rule for deciding such matters. The rule would be that the federal judge had to rely on the "judge-made" law from one of the jurisdictions where the litigants had residence.

Returning to Bayón, he thinks that we should first determine which jurisprudential theory will lead to which doctrinal developments, then we should assess which doctrinal developments are optimific, and, lastly, we should select the jurisprudential theory that leads to the optimific results. Clearly, such calculations are difficult, but conceptually speaking, Bayón's proposal is actionable because answers to the jurisprudential question do affect doctrine, which does have consequences for well-being.

2.2.4 Donelson and Interpretation

Perhaps unsurprisingly, I too am another member of the pragmatist school. In a recent paper (Donelson 2020), I defended a view much closer to Stoljar than to Murphy or Bayón. While Murphy and Bayón spend time developing specific pragmatist principles by which to assess potential answers to the jurisprudential question, Stoljar and I were more interested to vindicate the pragmatist approach generally.

In a nutshell, I argue that we do not have the epistemic resources to decide whether law is an abstract kind whose details are discoverable by a priori analysis alone or is a social kind whose details are discoverable by empirical analysis. Without an answer to this question, we cannot be sure of the proper way to proceed in answering the jurisprudential question under the representationalist assumption. Since we are in this epistemic situation, I suggest it would be better to conduct *and* interpret first-order jurisprudential discourse in a pragmatist way.

In claiming that we should interpret first-order jurisprudential discourse in a pragmatist way, my view closely resembles that of David Plunkett (2016), who also argues that some jurisprudential discourse is rightly understood as governed by practical criteria. Because Plunkett offers his view as correctly reflecting what claims legal philosophers *actually make*, it is less clear whether this yet places him in the pragmatist camp, which is fundamentally a view about how legal philosophers' claims *should be assessed.* To some, it might seem obvious that Plunkett is part of the camp, as he is one of the foremost defenders of "conceptual ethics," an explicitly normative project of figuring out which concepts we ought to use (Burgess & Plunkett, 2013). In explaining this project, Plunkett and co-author Burgess (2013) suggest that practical (as opposed to accuracy-related) considerations might be among the proper criteria for some concepts.[13] It is not a stretch to move from that view to the view that jurisprudential claims, which refer to the concept law, might be rightly assessed by the same sorts of practical criteria used for assessing whether to use that concept in a certain way. Nevertheless, on the other hand, Plunkett does not seem to make that claim. Plunkett also certainly thinks that representationalist jurisprudence is possible, for he has argued (Plunkett & Sundell, 2014) that legal positivism more accurately reflects the true nature of law. Conceding that representationalist jurisprudence might be able to proceed does not disqualify someone from being a pragmatist, as Stoljar concedes the same. But unlike Stoljar, Plunkett never seems to argue that we *need* to engage in pragmatist jurisprudence, just that some people do so (unwittingly).

2.3 What's in a Name?

One of the reasons why the pragmatist view has failed to garner the attention it deserves is that it lacks a consistent label. Liam Murphy, a progenitor of pragmatist jurisprudence, referred to his work as a practical-political approach. Stoljar (2012) has written of her project as one of ameliorative analysis.[14] Bayón (2013, 13) has used various names for his work, sometimes using Murphy's term, sometimes talking of the "engineering" project or the "legislative" project. In this and other works, I have dubbed it a "pragmatist" project. This panoply of names is a recipe for misunderstanding.

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[13] "The familiarity of our actual, current conceptual schemes could be confused for inevitability or even virtue. But once we start articulating arguments for the status quo, other possibilities present themselves. We begin to see that alternative concepts might be better – for the purposes of carving reality at its joints, promoting social justice, or whatever else." (Burgess and Plunkett 2013, 1097).

[14] Stoljar (2012) has also called her view an instance of "wishful thinking." While I like reclaiming epithets, I think this one is unfortunate and misleading. See, *infra* §4, for discussion of why pragmatist jurisprudence involves no wishful thinking, as that latter claim is commonly understood.

None of these names is more correct than the others, but a case can be offered for the *pragmatist* moniker.

First, to say that the approach is *pragmatist* suggests a wide set of potential practical criteria by which to test various answers to the jurisprudential question. More simply, *pragmatism* is more of an umbrella term than some of the other labels. Murphy's term, *practical-political approach*, suggests that the criteria have to concern political outcomes and could not concern something more personal, private, or smaller-scale. In this way of putting things, then, Murphy's practical-political approach is just one species of pragmatist jurisprudence. Bayón, insofar as he borrows Murphy's term but further delimits the criteria, is also rightly classed as offering just one species of pragmatist jurisprudence. The same may be said of Stoljar's ameliorative analysis, depending on her answer to my question about legitimacy. If her view distinguishes between legitimate pragmatic approaches, which are *bona fide* ameliorative analysis, and illegitimate pragmatic approaches, which are not ameliorative analysis, then ameliorative analysis is just one species of pragmatist jurisprudence.

A second reason to prefer *pragmatism* as a label for the school is that it stresses the continuities between this school and American pragmatism, the metaphilosophical movement begun in 19th Century America by Charles Sanders Peirce and William James. Some of Bayón's terms, the *engineering project* and the *legislative project*, are both sufficiently broad, but they do not convey the connection to American pragmatism. The early pragmatists, especially James, urged that the propositions that we should accept are those whose acceptance will help to satisfy our ends.[15] This is just the same as saying that our patterns of acceptance should be engineered or legislated in response to our practical ends. All things equal, the name for the school should reflect its important historical antecedents because this will render the school immediately recognizable to others. Jurisprudence already abounds in lots of odd terminology (e.g. methodological anti-positivism), and frankly, it presents a barrier to entry. I also think, all else equal, we should use the time-honored term because dressing up an old doctrine in new garb looks like ignorance or plagiarism.

No doubt, it might be argued that all else is not equal. The name *pragmatism* carries some baggage. In general, *pragmatism* has been associated with theories of truth and theories of meaning which are orthogonal to questions about the methodology of jurisprudence.[16] Also, when speaking specifically about *legal pragmatism*, that term has come to signify all sorts of things, some of which is incoherent.[17] Finally, legal philosopher may understand *legal pragmatism* in the sense indicated by Ronald Dworkin. According to Dworkin (1986) in *Law's Empire*, legal pragmatism is a theory of legal decision-making. On that theory, precedent has limited value; instead, each case is to be decided by a utility-maximizing norm.[18] The kind of pragmatism propounded in this Essay bears no relation to that, or any other, theory of adjudication.

Spending so much time on the name of the school may seem unimportant. I hope to have offered some reasons why it is not. Arguably, not having a single name by which to identify an intellectual

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[15] In other work, I have argued that this formulation is the best way to understand James's infamous adage that "truth is what works."

[16] I discuss these other understandings (Donelson, 2020, 103-104).

[17] Susan Haack (2005) details some of the mischief surrounding the term *legal pragmatism*.

[18] *Utility-maximizing norm* is shorthand for something more complicated. What must be maximized is not Bentham's utility; instead, Dworkin means the cases are decided by whatever the particular pragmatist has in mind as *the good*. Of course, making the view this broad creates a problem for Dworkin: his own theory of adjudication just becomes a species of what he calls *pragmatism*. This is not a huge problem, as Dworkin can claim that his version is the best one.

position can create confusion, leading supporters and critics not to recognize other voices to which they should respond. Moreover, as I have claimed, referring to the school as a *pragmatist* school has some virtues. First, this name denotes a category broad enough to capture the variation among the different champions of this view. Second, this name acknowledges the larger and more familiar intellectual tradition in which this new school participates. There are downsides to the term, but one hopes that these are outweighed by the aforementioned benefits.

3. Not Normative Positivism

The stance of the pragmatist school comes into sharper relief if one distinguishes it from nearby views. One view with which it might be confused is the view that goes by the name *normative positivism*.[19] Though some authors (Campbell, 1998-99) prefer *ethical positivism* or (Schauer 2021) *normative legal positivism*. To begin to see the differences, it might help to distinguish between four claims, two of which are evaluative and two of which are prescriptive.

> (A) It would be good if legal positivism were true.
> (B) It would be good if many people believed (or accepted) that legal positivism were true.
> (C) We should make legal positivism true of the world.
> (D) "Legal positivism is true" should be accepted if it would be good to do so.

Normative positivists endorse (A), (B), or (C), while the pragmatists endorse (D). Pragmatists, in contrast, would defend a view like (D), which offers a standard, albeit vague, by which to assess first-order jurisprudential claims. These two positions differ starkly in what they concern. While normative positivists are arguing about what would be a good state of affairs and which states of affairs we should bring into existence, pragmatists are offering a prescription about how to conduct jurisprudential debate. Also, while one view is wholly concerned with legal positivism, the other concerns the standard by which one would assess any answer to the jurisprudential question (or component thereof), not just legal positivism.

Now, to an outsider to some of these conversations, it may seem strange that anyone should confuse the pragmatist position with normative positivism. Confusion may stem from a few things. First, there has been little self-conscious work to delineate the pragmatist project. Second, Liam Murphy, a key pragmatist, also defended (B). For Murphy, (D) is a major premise, (B) is the minor premise, and we should conclude that legal positivism is the correct view. Of course, (B) is no necessary commitment of the pragmatist view.

A third reason for confusion relates to the idea of conceptual engineering. Both (C) and (D) might be spoken of as advocating for conceptual engineering. Pragmatists, to borrow from Plunkett, are largely speaking on the conceptual level, not the object level: pragmatists advance claims about how we should think, about how our inquiry ought to proceed. For many purposes, it is fine to speak of this as *conceptual engineering*. Bayón, as I mentioned, does speak this way. However, normative positivists who accept (C) also think that law *as a kind* is both something malleable and something whose characteristics depend on what a sufficient number of people think. As such, these normative

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[19] Schauer (2021) is one person who lumps the positions together under one moniker, which, granted, does not necessarily connote a confusion. Genuine confusion comes when Coleman (2003, 201n36), for instance, says that Murphy's view "simply collapses" into normative positivism. Such confusion happens enough that pragmatists (Nason, 2013, 431n1; Plunkett, 2016, 243) often take time to mention that their view is different.

positivists suggest (Schauer, 2021, 73) that while legal positivism may not be true now, we can – and ought – to make it true. One could call this a kind of conceptual engineering too.[20] Of course, calling two things by the same name does not make them any more similar, but it can lead to confusion. The pragmatist need not to have any view about the object-level question of whether law is amenable to conscious engineering because her claim only concerns the concept-level claim about *how* to answer those first-order questions.

4. Liam Murphy and his Critics

Perhaps the most famous practitioner of pragmatist jurisprudence is Liam Murphy. As such, his work has been subject to longstanding critique from anti-pragmatist quarters. This section of the Essay reiterates the three most common criticisms of Murphy's view (or views thought to be like his). I then demonstrate why these criticisms ultimately fail. There are other sorts of worries that one might raise about Murphy, but I only consider and reject those critiques that portend to imperil the pragmatist jurisprudential project generally.

From surveying the representationalist literature, commentators have regularly raised three criticisms for pragmatist jurisprudence. First, they say pragmatists offer non-sequiturs in mentioning pragmatic concerns.[21] Second, they say pragmatists engage in wishful thinking.[22] The third worry is that pragmatist, in urging people to adopt first-order jurisprudential claims for practical reasons, necessarily holds a flawed theory of belief-formation.

4.1 The Criticisms

In two separate articles, Philip Soper (1989, 214; 1986) can be read as making the first kind of critique. In each article, Soper criticizes Neil MacCormick (1985), a theorist who actually defends normative positivism, but part of the criticism gets at what some anti-pragmatists find troubling. In one article, Soper (1986) declares, "The question for legal theory is not whether it would be a good or a bad thing for such a claim to be accepted as true, but whether it is true." Three years later, Soper (1989, 214) essentially repeats the same criticism: "The question is not whether it would be a good thing if morality and law were connected; the question is whether they are connected." Now, Soper is fairly sophisticated, and he recognizes that MacCormick is making a different point than the one that pragmatists make. Still, the gist of his remark is that practical considerations just have nothing to do with answering the jurisprudential question. Others (Marmor, 2006), following Soper, explicitly use the non-sequitur language in talking about Murphy specifically.

In a more recent paper, Alex Langlinais and Brian Leiter (2016, 684) offer a version of the second kind of critique. Here, Langlinais and Leiter (684) directly critique Murphy.

> A theory of law is a theory of what we should *believe* are the central features of a particular kind of social institution, but Murphy's practical-political methodology suggests that it is up to the legal theorist to decide what to believe—but belief does not work that way! The truth of a theory of law is not determined by the

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[20] Schauer (2021, 73) calls it "conceptual prescription" and "conceptual revision."

[21] Andrei Marmor (2006, 691), for example, writes that deriving a theory of law from the moral or political benefits of believing that law has a particular nature "is all too clearly a non sequitur."

[22] For example, Pavlos Eleftheriadis (2008, 20): "And to say, with Murphy, that that a wide concept of positivist law is practically desirable to a narrower morally laden concept, is to engage in wishful thinking." Other authors (Langlinais & Leiter, 2016, 684; Dickson, 2004, 148) have agreed.

moral or political consequences of widespread adoption of that theory. To suppose otherwise turns large swaths of legal theory into wishful thinking.[23]

There are actually two criticisms registered in this passage. First, Langlinais and Leiter (2016) say Murphy's methodology instances wishful thinking, which is a fallacious kind of reasoning. Second, Langlinais and Leiter (2016, 684) say that Murphy is encouraging others to engage in wishful thinking, but this requires doxastic voluntarism, the (implausible) theory that one can modify one's beliefs at will.[24]

Before explaining what is misguided in these objections, we should become clearer about them. Specifically, I distinguish between non-sequiturs and wishful thinking, so that it becomes clear both how the objections differ and how they connect.

First, let us start with some definitions. A non-sequitur is a conclusion that does not follow from the premises; that is, an argument ending in a non-sequitur is, definitionally, a logically invalid argument. An argument that instances wishful thinking is not necessarily invalid, but it is necessarily unsound. To engage in wishful thinking is to rely on a false premise of the general form *if* p *has pragmatic property* x, p *has the relevant epistemic property* y, *where* x *does not imply* y.[25]

With these definitions on the table, we see that a non-sequitur objection alleges a different error than does the wishful thinking objection, i.e. invalidity versus unsoundness. We also can begin to see that these objections are deeply connected. A critic of pragmatist jurisprudence can claim either (1) the conclusion about the nature of law does not follow from premises about what would be practically best to believe about the nature of law, i.e. the conclusion is a non-sequitur or (2) the conclusion about the nature of law *does* follow from the premises in question but only because there is a (suppressed) premise of the wishful thinking form. The critic cannot assert both (1) and (2) because the wishful thinking premise is either there or not. Of course, a critic can argue disjunctively, and one suspects that each of the critics surveyed above would endorse a disjunctive argument against pragmatist jurisprudence.[26] Thus, in the end, the non-sequitur objection differs from the wishful thinking objection in being the reverse of the same coin. There is only one coin and only one objection here, the disjunctive argument.

4.2 The Response

So far as I am aware, nowhere Murphy did not defend himself against these criticisms,[27] but this is not because no defense can be made. Indeed, pragmatists can rebut the disjunctive argument. I do this by taking on each disjunct in turn. I handle the doxastic voluntarism bit in the wishful thinking part because that objection relies on the wishful thinking objection to stick.

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[23] Langlinais and Leiter 2016, 684.

[24] One statement of the standard problem with doxastic voluntarism comes from Montplaisir (2021, 411): "Once the agent is faced with convincing evidence that *p*, the formation of the belief that *p* that follows is not intentional." In other words, we do not believe at will; we believe in accord with the evidence as we understand it.

[25] It might seem that I should have said, where a thinker **does not believe** *y* implies *x*. This seems like a necessary addition because it may be that *y* does imply *x*, but the thinker in question does not believe this. In such a case, we might still want to call that thinker wishful because it is by mere luck the argument is sound. I tried to capture this possibility by talk of *relying on a premise*.

[26] In fact, it may be the best way to read Langlinais and Leiter (2016).

[27] I am not sure that anyone else has come to Murphy's defense either. Bayón (2013, 13) does say that the engineering project "does not amount to indulging in a form of wishful thinking," but this seems a little conclusory.

Let us begin with the non-sequitur objection. This criticism can just be assumed away: let us just assume that there is a suppressed premise of whatever sort which would make the pragmatist's argument valid. One might wonder *why* we can just assume this criticism away. The answer is simple once we think about this discussion as an actual exchange. If a critic says, "Murphy is wrong because he's missing a premise," this falls flat as a response unless that critic can also say, "And whatever premise you insert is going to be false or problematic." Without that extra bit, a non-sequitur critique looks like complaining about a paper because the author forgot to dot an *ı*. Thus, the question is whether the suppressed premise is *necessarily* a wishful thinking premise, which would be problematic. If the suppressed premise must be a wishful thinking premise, the pragmatist is in trouble, but if it could be something else, the disjunctive argument comes up lacking.

Before directly arguing against the wishful thinking objection, I want to offer an example of good, non-wishful thinking that superficially looks like wishful thinking. Having this example in mind will later help us to see why the wishful thinking objection fails.

Suppose that a merchant is trying to decide whether a complaining customer really bought a defective product, such that she deserves a refund or replacement, or whether the customer broke the product herself such that she deserves nothing. Suppose further that the merchant is genuinely uncertain about whether the product is defective or whether the customer broke it. In this case, it would not be wild for the merchant to choose the 'theory' which would yield the best consequences, and maybe the best theory is the one on which the customer is truthful. This might be best to accept because holding this as true will produce a loyal set of customers.[28] I take it that no one thinks that the merchant's reasoning is fallacious, wishful, or problematic in any way.

To rebut the wishful thinking objection, we first revisit my gloss of it, then review an argument that clearly instances wishful thinking. After this, we revisit the merchant example to see how it avoids wishful thinking. This discussion will enable us to see that engaging in pragmatist jurisprudence, which is analogous to the merchant's reasoning, also avoids wishful thinking.

Recall the characterization of the wishful thinking premise: *if* p *has pragmatic property* x, p *has the relevant epistemic property* y, *where* x *does not imply* y. Let us populate the variables to see how this works. Let *p* stand for "Chris never curses." Let pragmatic property *x* stand for "belief in it makes A feel good." Let the relevant epistemic property *y* stand for "is true."

Now suppose someone reasoned in the following manner.

> Premise 1:   It makes me feel good to believe that Chris never curses.
> Conclusion: Chris never curses.

This argument is clearly invalid; that is, its conclusion is a non-sequitur. Of course, we can insert the wishful thinking premise, and this would make the argument valid.

> Premise 1:   It makes me feel good to believe that Chris never curses.
> Premise 2:   If "Chris never curses" is such that believing it makes me feel good, "Chris never curses" is true.

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[28] I've taken this example from Ullmann-Margalit and Margalit (1992).

Conclusion: Chris never curses.

This argument is valid.[29] The argument, however, is unsound because Premise 2 is false.[30]

With that, we have an illustration of wishful thinking, and we see why it is problematic. Let us modify the preceding argument a bit to make it more like our merchant case.

Premise 1:   It makes me feel good to believe that Chris never curses.
Premise 2`:   If "Chris never curses" is such that treating it as true makes me feel good, I should treat "Chris never curses" as true.
Conclusion`:   I should treat "Chris never curses" as true.

This argument is valid. Now, we may wonder whether Premise 2` is true. Maybe there are folks who, prudentially speaking, really ought to treat "Chris never curses" as true because it makes them feel good. So maybe this argument is sound for some. Certainly, we can admit that an argument like the following is sound.

Premise 1`:   It is great for business to treat my customer's allegation as true.
Premise 2``:   If it is great for business to treat my customer's allegation as true, I should treat my customer's allegation as true.
Conclusion``:   I should treat my customer's allegation as true.

While one might find fault with Premise 2``, it is not wishful thinking. This is fairly good reasoning. A reason a merchant might rely on Premise 2`` is that she only cares about whether to treat her customer's allegation as true because she cares about the business effects of so treating the allegation. If that is how she feels, she should rely on Premise 2``.

Finally, we can turn to Murphy's version of pragmatist jurisprudence.

Premise 1``:   It has great political benefits to treat exclusive legal positivism as true.
Premise 2```:   If it has great political benefits to treat exclusive legal positivism as true, I should treat exclusive legal positivism as true.
Conclusion```: I should treat exclusive legal positivism as true.

A jurisprudent might rely on Premise 2``` because she only cares about whether to treat exclusive legal positivism as true because she cares about the political effects of so treating the theory. If that is how she feels, she should rely on Premise 2```.

The forgoing has been quick, but it should be clear that a wishful thinking objection does not apply to the pragmatist. Before concluding this section, it is important to tie up one loose end. Langlinais and Leiter (2016) allege that Murphy was encouraging others to engage in wishful thinking, but such encouragement would require doxastic voluntarism to be true, yet this view looks false. The pragmatist is not telling people how to modulate their *beliefs*, which would require doxastic voluntarism; rather, the pragmatist tells people how to modulate their acceptances, or what they will

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[29] Unless one wants to quibble about disquotation.
[30] For ease of illustration in the example, I did not stipulate that the fact that "Chris never curses" is such that believing it makes A feel good does not imply "Chris never curses."

treat as true.[31] This does not require doxastic voluntarism. It does not require doxastic voluntarism any more than it requires doxastic voluntarism for the merchant to tell her new employees, "At our shop, the customer is always right."

5. Arguments against Representationalist Jurisprudence

As mentioned above, pragmatist jurisprudents all minimally maintain that we should answer the jurisprudential question by relying on some set of practical norms. The previous section sought to show why this methodology is not as flawed as detractors have said. Of course, the pragmatists are not content simply to maintain that theirs is just one possible way to conduct jurisprudential inquiry. Indeed, they go further than that, contending that their method is the right one and, accordingly, philosophers should abandon representationalist jurisprudence at least sometimes. In this section, I review three principal arguments for this, starting with the least ambitious and moving to the most ambitious. The aim is to put the anti-pragmatists on the defensive for a change.

5.1 Stoljar's Worries

Stoljar's view on replacing representationalist jurisprudence with pragmatist jurisprudence is modest. She does not claim that representationalist jurisprudence is impossible or foolhardy. Instead, she offers two reasons why we might temporally halt our participation in representationalist jurisprudence on occasion in favor of pragmatism.

The first reason concerns the resolution of conflicts. For Stoljar, the representationalist claims that a jurisprudential theory is correct insofar as it coincides with law. But this is ambiguous between two things, our shared concept of law and law itself, regardless of our conceptions. Perhaps, these will be extensionally equivalent in lots of cases, but sometimes they may diverge. What to do then? Stoljar's answer: we should engage in ameliorative analysis, which is to say, pragmatism.

The second reason also concerns the resolution of conflicts. Stoljar imagines a legal theorist who is part of a community whose concept of law is in question. If that theorist practices representationalist jurisprudence, she can only report what the shared concept is, and there may not be anything to say. This person, says Stoljar (2013), ought to be able to say something to help legislate the new concept of law. Presumably, once the conflict has died down and the newly-forged concept has been fixed, the theorist can return to representationalism. However, before that, the theorist should try to ameliorate the concept of law.

Stoljar's challenges are awfully interesting and powerful. The strident representationalist must explain why, even in the face of these conflicts, pragmatist jurisprudence must be barred.

5.2 The Epistemic Challenge

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[31] I follow Cohen (1989, 368) in defining acceptance as the following: "to accept that *p* is to have or adopt a policy of deeming, positing, or postulating that *p*—that is, of going along with that proposition (either for the long term or for immediate purposes only) as a premiss in some or all contexts for one's own and others' proofs, argumentations, inferences, deliberations, etc."

While Stoljar claimed that we may need to supplement representationalist jurisprudence in certain instances, I have argued more ambitiously that practicing representationalist jurisprudence is beyond our epistemic ken.

5.3 The Metaphysical Challenge

The most trenchant critique of all comes from Murphy and Bayón. While I have maintained that representationalist jurisprudence is possible if we change. If we can solve this skeptical puzzle, we can evaluate answers to the jurisprudential question based on their accuracy. For Murphy and Bayón, the representationalist venture is impossible unless the world changes. For both of them, representationalist jurisprudence assumes we all share a univocal concept of law. On that methodology, an answer to the jurisprudential question is correct insofar as it coincides with that univocal concept. Murphy and Bayón both argue that there is no shared concept.

Both point to the rife disagreement between various legal philosophers as evidence. While Murphy concentrates most on the disagreement between Dworkin and Raz, Bayón (2013) produces a great list of disagreements between various legal philosophers. It is worth quoting (Bayón, 2013, 9) this list in full:

> It has been sustained both that every legal system is necessarily coercive and also that resort to sanctions is not a necessary feature of our concept of law. That it is implicit in our concept of law that every legal system claims to possess legitimate authority and also that there is no convincing reason to suppose that. That the gunman situation writ large— *pace* Hart—could in certain circumstances be considered law and, to the contrary, that a purely arbitrary power which violates the principles of the rule of law altogether cannot be called a legal system. That a claim to supremacy is essential to the law and also that this does not have necessarily to be so.[32]

Now, how is this evidence of disagreement relevant? Well, for Murphy and Bayón, these disagreements call out for explanation, and the absence of a shared concept of law is the best explanation of the many disagreements.

The challenge then for representationalists is to explain why, in the face of rife disagreement about the essential features of law, it remains plausible to believe that there *is* a shared concept of law.

And if the expert disagreement were not enough, some experimental work (Flanagan & Hannikainen, 2020) has also revealed everyday people also seem to possess different concepts of law.[33]

Moreover, as Bayón (2013) quickly but astutely notes, a rejection of criterialist semantics will not get one all the way there. Even if having a shared concept is *consistent* with disagreement, that does not mean that a shared concept, rather than the absence thereof, *better* explains disagreement.

If Murphy and Bayón are right, representationalist jurisprudence is impossible unless and until the world changes and people converge (perhaps for the first time) on a univocal concept of law.

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[32] I have removed the numerous footnotes in the passage which support his claim that jurisprudence scholars have rife disagreement.

[33] To be clear, they read their data to suggest that the "folk" endorse natural law theory. However, I think it is also fair to say of the data that roughly a third of the response pattern reflects positivists intuitions, a third reflects weak natural law intuitions, and a third reflects strong natural law intuitions. Table 3 is especially helpful here. Instead of seeing this as a win for natural law theory, I think it's a win for the indeterminacy claim of Murphy and Bayón.

6. The Work Ahead

In this Essay, I have tried to present the pragmatist school in analytic jurisprudence in its very best light. I have shown that, starting with Liam Murphy about twenty years ago, a small cadre of scholars has forged a methodological program according to which we should decide the jurisprudential question by practical criteria. While some pragmatists have been content to state their view generally and in opposition to non-pragmatist alternatives, others have defended particular pragmatist principles, such as claiming that the jurisprudential question should be settled by what would eventuate in the best legal doctrine or by the best across-the-board political consequences. Despite this variation, it is right to call this intellectual development a single school and specifically a *pragmatist* school because this name emphasizes the deep continuity between this jurisprudential methodology and the American pragmatist metaphilosophical program.

This pragmatist method stands opposed to the two dominant methodological views on offer, methodological positivism and methodological anti-positivism. Both of those views share what I called the representationalist assumption, namely that an answer to the jurisprudential question can only be correct if it accurately reflects what law is. Pragmatists have lodged a number of complaints against this assumption. They have argued that the ordinary concept of law is too equivocal for the representationalist project to get off the ground. They have pointed out hard questions that representationalists simply cannot answer, such as what to do when different representationalist methods offer opposing answers. They have also pressed representationalists to explain how we have the epistemic resources to settle the jurisprudential question, when understood as a descriptive affair.

In addition to summarizing the work of pragmatist thinkers, this Essay has broken new ground in defending the approach. Anti-pragmatists have dismissed the approach on grounds that pragmatist argumentation necessarily features non-sequiturs, wishful thinking, and a commitment to doxastic voluntarism. However, upon closer inspection, we see that the pragmatist approach requires nothing of the kind. I wish to close this Essay by briefly noting four areas for further work by pragmatists.

First, it would be helpful to better understand the historical antecedents for the pragmatist jurisprudential methodology. As noted above, some contend that Dworkin is part of the fold, while others disagree. I think there is a good question of how to treat John Finnis as well. It would be fruitful to understand who were the fellow travelers, not just for the sake of curiosity (though this is worthwhile) but also to determine if there are argumentative dead-ends that have already been discovered or opportunities already plumbed.

Second, in the future, pragmatists should be in contact with experimental philosophers and other empirical researchers. At present, there is precious little experimental philosophy of law, but the little there is could be of value to pragmatists. Some pragmatists, especially those of the Murphy persuasion, are concerned about the political consequences that may obtain if certain jurisprudential theories were widely accepted. It may interest such pragmatists to know which theories currently have currency, and some of the experimental philosophy (ex-phi) literature (Donelson & Hannikainen, 2020; Flanagan & Hannikainen, 2020) speaks to this. More generally, to the extent that pragmatists care about effects of certain beliefs or acceptances, social scientists will be invaluable.

Third, there has to be more discussion of why it is important to develop views on the jurisprudential question, when the representationalist assumption is dropped. So far, I have offered no general answer and have instead argued conditionally: if we wish to continue jurisprudential inquiry, we should shift our criteria of assessment from a representationalist norm to a pragmatic norm. This leaves open whether we should continue such inquiry. Murphy (2001, 383) asserts that what we say about the concept of law "affects political practice," which is just another way of saying what he (Murphy 2005, 9) would say four years later: our jurisprudential musings have "political significance." This needs some unpacking. Murphy (2001, 383-84) also claims that the "political dimension of the dispute [over the concept of law] matters more than any purely intellectual [or representational] concerns we might have [about the concept of law]." This claim, while likely true, also fails to move the dial very much. That A matters more than B is no reason to do A or B, and no reason not to do A *and* B.

Fourth, most of the discussion of the pragmatist methodology, when it is has occurred at all, has taken the form of a frontal attack on the entire approach. This has left little space for discussing the finer details of, and differences between, particular pragmatist accounts. Thus, I urge more intramural conversation. For instance, Murphy thinks that the jurisprudential theories that ordinary people hold will have appreciable political effects, but Bayón doubts this. This would be an interesting debate to see at some length, and this is another matter where ex-phi and other empirical work may prove helpful. To turn to another worry, Bayón thinks that officials' implicit jurisprudential theories have appreciable doctrinal consequences. While I suggested one area where this looks plausible, it is a serious question of whether legal doctrine abounds with such instances. If it does not, is Bayón-style jurisprudence valuable? Yet another example: Stoljar thinks that the concept of law is univocal enough that we may be able to do representationalist jurisprudence, but Murphy and Bayón doubt this, and I have claimed, regardless of the state of our concept, we lack the epistemic resources to practice representationalist jurisprudence. This marks a major disagreement within the school, and, for that reason, it is ripe for exploration.

These four areas for future research are not meant to be exhaustive, and they may not even be the most pressing. I list them both as a genuine plea for others to do work that I would like to see and as a way of emphasizing a point repeatedly made in the Essay, that the pragmatist methodology is a *project*. It is not *just* a view about what things a thinker should consider in coming up with an answer to an abstract philosophical question. For this methodology to be actionable, to be something that someone can actually use, lots of coordinated action is required. As I have suggested, we need historians of philosophy, experimental philosophers, other researchers from the social sciences, legal theorists and doctrinalists, and those who relish internecine disputes. Pragmatism, as an approach, is a big tent, and many people should be in it.[34]

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