Book Review

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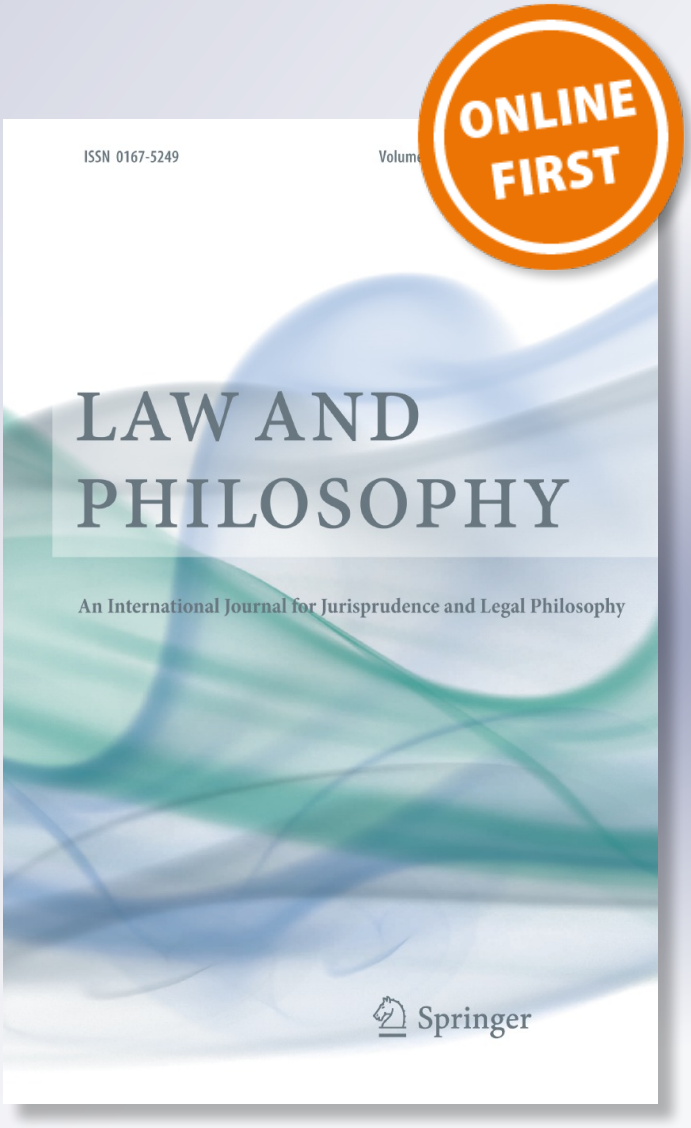

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Graham Hubbs and Douglas Lind, eds. *Pragmatism, Law, and Language*. New York: Routledge, 2014, pp. 316.

Pragmatism, Law, and Language features 16 essays, earlier versions of which were presented at the *2012 Inland Northwest Philosophy Conference*. At first blush, the book seems to lack thematic unity, transitioning from tightly argued specialist's essays on the legal-normative implications of something called ''semantic pragmatism'' to more historical, impressionistic contributions on figures within the tradition of classical American pragmatism to a handful of papers on pragmatism in contemporary American jurisprudence. That first blush judgment would be mistaken, however. The essays that compose *Pragmatism, Law, and Language*, disparate though they may be, are consolidated under the stated goal of exploring ''the interconnections between law and language that have been or can be drawn under the head 'pragmatism'.'' (p. ix) Indeed, it is the central claim of the volume's helpful introduction—''Some Varieties of Pragmatism,'' written by co-editor Graham Hubbs—that a ''wide vista of topics and views'' (p. 2) can plausibly be counted as ''pragmatist'' under some description of that term.

Pragmatism, Law, and Language is organized into two large parts, each of which is divided into two sections. Part I—''Semantic Pragmatism''—features 5 essays on semantic pragmatism and its relation to legal discourse in sections 1, and 3 more papers on semantic pragmatism's implications for other forms of normative discourse in section 2. The second part of the volume is less thematically coalescent. The first section of part II collects 4 essays under the broad banner ''Democracy and Classical American Pragmatism.'' The book's fourth and final section—''Pragmatism in Contemporary American Jurisprudence''—contains 4 papers on ''legal pragmatism.''

The volume begins with Robert Brandom's long and ambitious essay, ''A Hegelian Model of Legal Concept Determination.''

Brandom is interested in a brand of skepticism in the philosophy of law that derives from the semantic indeterminacy of legal concepts. He wonders how (or if) legal concepts can be understood as semantically contentful, and how they can be properly deployed to support ''assessments of what legal principles formulated in terms of those concepts rationally permit and require.'' (p. 20) Unsurprisingly, Brandom's solution invokes Hegel, who helps us understand how ''the practice of actually applying norms can at the same time be the practice that institutes determinate norms for doing so.'' (p. 30) Hegel's ''social reciprocal recognition account'' is a large part of the story for Brandom, but so too is the fact that Hegel's account of determinateness ''crucially depends upon the historical dimension of concept use.'' (p. 31) What makes this argument a distinctively pragmatist one—and this applies to virtually all of the essays in the first part of this volume—is the reliance on *practices* of applying norms (rather than foundational principles, say) as determining legal meaning. For pragmatists like Brandom will insist that our practices go all the way down: there is nothing that is not another kind of practice, nothing non-human and fixed, to which our practices are normatively and ultimately answerable.

Barbara Baum Levenbook's, ''Soames, Legislative Intent, and the Meaning of a Statute'' defends a theory she calls *the social salience theory of statutory applications*. Against the originalism of Scott Soames, Levenbook argues that ''inference to alleged intentions do no explanatory work'' in determining legal meaning. (p. 49) Instead, such meaning is established through complex social practices that track salience. In what strikes me as good pragmatist fashion, Levenbook argues that the ability to detect what is or would be socially salient is best thought of as a kind of linguistic competence. (p. 47) The next essay, ''Antipositivist Arguments from Legal Thought and Talk: The Metalinguistic Response,'' by David Plunkett and Tim Sundell, argues that the best way to understand the practices of multiparty disagreements over a statute's meaning is in terms of what they call ''metalinguistic negotiation.'' Their claim is that legal actors settle antecedently indeterminate facts about meaning by engaging in disputes about what an expression does or should mean, ''expressed via metalinguistic usages of that very expression'' (p. 61).

Heidi Li Feldman's contribution, ''Appellate Adjudication as Conceptual Engineering,'' offers reflections on the role of appellate courts in the U.S. in determining and reshaping the meaning of legal concepts. She provides a fascinating case study involving *Macpherson v. Buick Motor Company*, which brilliantly demonstrates how presiding Judge Benjamin Cardozo effectively engineered the concept ''negligence'' in place of the overly indeterminate (for this case) concept of ''imminent danger.'' The final essay in section I, Daniele Santoro's ''Responsibility and Causation: A Pragmatist View,'' argues that typical counterfactual approaches to the relationship between legal causation and responsibility are inadequate. Instead, Santoro thinks that an inferentialist account, drawn explicitly from Brandom's famous work in this area, is better suited to the task.

Section 2 of the volume offers three essays on the relationship between semantic pragmatism and other (non-legal) forms of normative discourse. Matthew Chrisman's ''Attitudinal Expressivism and Logical Pragmatism in Metaethics'' considers, and ultimately rejects, two brands of metaethical expressivism—unimaginatively named Type I and Type II. Drawing on Sellars and Brandom, Chrisman defends a kind of antidescriptivist view which understands the difference ''in expressive role between normative and matter-of-factual discourse as based…on the distinction between descriptive content-providing and framework-constituting/articulating roles.'' (p. 133) Karl Schafer's contribution to the volume, ''Quasi-Realism, Projectivism, and the Explanatory Challenge,'' explores the apparent difficulty faced by moral realists about explaining the reliability of our moral judgments. Shafer argues that the quasi-realist is at least in one respect better placed than the realist on this score. (p. 136) The next essay, Lynne Tirrell's ''Studying Genocide: A Pragmatist Approach to Action-Engendering Discourse,'' examines how ordinary people in 1990's Rwanda were partly reshaped into ''génocidaires'' by the ''action-engendering'' role of ''hate speech'' or ''slurs.'' Tirrell endorses a Brandom-inspired inferentialist semantics in the hope that it can help mitigate the unfavorable consequences of this kind ''discursive violence.''

Section 3 of the volume moves in a different direction. Robert Talisse's essay, ''Deweyan Democracy and the Absence of Justice'' observes that John Dewey's political theory offers us virtually

nothing on the topic of justice, and contends that committed Deweyan democrats ought to be: (a) resourcists about the metric of justice; (b) institutionalists about the ''site'' of justice; (c) democratic egalitarians about the ground of justice; and (d) nationalists about the scope of justice. (p. 187) Forcing Dewey onto the contemporary chessboard of positions about distributive justice strikes me as a little odd and artificial, but Talisse is right to point out that pragmatists (both classical and ''neo'') have not theorized justice as well or as carefully as they should have, and that, ''the current neglect of justice among pragmatist political philosophers cannot continue.'' (p. 177)

Thomas Burke's contribution, ''Truth, Justice, and the American Pragmatist Way,'' invokes C.S. Peirce's ''operationalism'' to offer definitions for ''democracy'' and ''justice.'' Burke, it seems, is more interested in the pragmatist *method* than on any substantive thesis about democracy or justice, but his essay does offer some interesting reflections on what an understanding of ''democracy'' and ''justice'' operationalized along Peircean lines would recommend in the way of certain theories, laws, policies, and practices. The next essay, Brian Butler's ''Pragmatism, Democratic Experimentalism, and Law,'' rightly places experiment and possibility at the center of pragmatism and pragmatist approaches to questions of democratic and legal practice. Butler surveys the work of many authors—Cass Sunstein, Roberto Unger, Michael Dorf, and Charles Sabel, among others—and concludes that a properly pragmatist approach to law will eschew ''conceptual exercises in linguistic analysis'' and will embrace instead a ''comparative and experimental project of construction.'' (p. 221) In the final paper of section 3, Katherine Logan expresses sympathy for Joan Williams's redescription of ''work-family conflict'' in terms of a conflict between ''visible'' market work and ''invisible'' family work. Logan argues powerfully that this redescription brings into view forms of injustice and inequality about which theorists have been less alert and responsive. Logan contends that Williams's work is ''radical'' in the very same sense as Dewey's ''because of its attention to the historical specificity of our most dearly held ideals and most deeply engrained practices.'' (p. 227)

Section 4 begins with Benjamin Zipursky's contribution in which he distinguishes ''Legal Pragmatism'' from ''Legal Pragmaticism.''

The latter invokes a term Peirce coined (''pragmaticism'') in order to differentiate his views from others'—notably William James's—that were routinely lumped together under the label ''pragmatism.'' (Peirce was confident that the term ''pragmaticism'' was ''ugly enough to be safe from kidnappers''.) Whereas the legal pragmatism Zipursky disparages is crudely instrumental and philosophically quietest (here he has in mind the legal pragmatism of Richard Posner), the legal pragmaticism he favors is ''a competitor to legal positivism and legal realism as theories of what (if anything) makes legal statements true.'' (p. 249) The next essay, Seth Vannatta's ''Pragmatism without the 'Fighting Tag','' compares Richard Posner's version of legal pragmatism with Oliver Wendell Holmes's classically realist view. Holmes was closely associated with the classical American pragmatists. He was one of the founding members of the ''The Metaphysical Club'' and was good friends with both James and Chauncey Wright. His relationship with Peirce, though intellectually fruitful, was apparently frostier.[1] Nevertheless, according to Vannatta, Holmes's functionalist-realist legal theory shares important affinities with the pragmatisms of C.S. Peirce and John Dewey. This makes it plausible to conclude, *pace* Posner, that legal pragmatism cannot be wholly cleaved off from philosophical pragmatism. Sari Kisilevsky's paper, ''Against Legal Pragmatism: Greenberg and the Priority of the Moral,'' repudiates what she calls the ''pragmatist-ish'' legal theory of Mark Greenberg. While the difference between pragmatist and pragmatist-ish legal theories is never made fully clear, Kisilevsky charges that the problem with Greenberg's account is that it fails to appreciate that law ''coheres as a system of rules or propositions that persists over time, despite changes in the moral circumstances of a community, and its moral significance in these circumstances.'' (p. 269) The volume ends with ''Four Qualms About Legal Pragmatism'' by Martin Stone. Stone thinks that legal pragmatism is ''mostly useless in thinking about law.'' (p. 288) Rather than becoming embroiled in skeptical (merely philosophical) battles as pragmatists do, Stone argues that a more promising approach involves taking up the lawyer's point of view, and attending to the ways in which the law is concretely and practically engaged with.

[1] Cheryl Misak, *The American Pragmatists* (Oxford: Oxford University Press, 2013), p. 77.

The meaning of the word ''pragmatism'' clearly differs across the volume's 16 chapters. Sometimes, as in the papers in the first half of the book, it refers to an anti-representational, practice-centric position (or a tightly knit cluster of positions) in the philosophy of language. At other times, as in Seth Vannatta's contribution, ''pragmatism'' basically means ''legal realism.'' Elsewhere, as in F. Thomas Burke's essay, it refers more generally to that homegrown American philosophical tradition which began with Charles Sanders Peirce and was carried forward in various ways by William James, John Dewey, George Herbert Mead, and others.

The volume performs a valuable service in my judgment by showing the breadth and dexterity of pragmatism. This is welcome, since, among legal scholars at least, pragmatism has been understood almost exclusively in terms of the view advanced by Richard Posner and repudiated by Ronald Dworkin. Pragmatism, Dworkin wrote in *Law's Empire,* is a ''skeptical conception of law'' according to which judges ''do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake.''[2] There is a kernel of truth in that characterization, of course, but one of the abiding lessons of the volume—and this is much to its credit—is that pragmatism is much larger and more capacious than many legal theorists have been wont to suppose. Overall, this is a rich, well-edited, interesting, and timely volume. It will be read with profit by virtually all legal philosophers—even those who, like Dworkin, think pragmatism is hopelessly on the wrong track philosophically speaking.

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[2] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), p. 95.