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A PRAGMATIC JUSTIFICATION OF THE JUDICIAL HUNCH

*Mark C. Modak-Truran**

I. INTRODUCTION

Judges currently face a daunting task. On the one hand, they are increasingly aware of the indeterminacy of the law, while on the other hand, they face an explosion of fact. Judges are floating on shaky legal timbers in a sea of documents, deposition transcripts, affidavits, oral courtroom testimony, and expert opinions. The explosion of fact alone presents monumental problems for deciding cases without unduly simplifying or reducing this factual complexity. For example, both federal and state judges are implementing case management systems to deal with their crushing case loads and the increasing complexity of their cases. In addition, there appears to be an overwhelming consensus that the law is indeterminate, but there is little consensus as to what that means.¹ For instance, extreme-radical deconstructionists such as Anthony D'Amato have argued that even the constitutional requirement that the President be thirty-five years of age is inde-

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1. See, e.g., Ken Kress, *Legal Indeterminacy and Legitimacy*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 201 (Gregory Leyh ed., 1992). Ken Kress notes that

versions of indeterminacy differ according to whether they claim that the court has complete discretion to achieve any outcome at all (execute the plaintiff who brings suit to quiet title to his cabin and surrounding property in the Rocky Mountains) or rather has a limited choice among a few options (hold for defendant or plaintiff within a limited range of monetary damages or other remedies), or some position in between.

Id.

terminate.² Furthermore, even contemporary legal formalists, such as Ernest Weinrib, claim that “[n]othing about formalism precludes indeterminacy.”³

How are judges to deal with this factual explosion in an uncertain legal world? With the advent of legal indeterminacy, most theorists have given up on the aspirations of strong legal formalism that judging can become a science where judges, like technicians, determine the right decision as a matter of deductive logic.⁴ Although giving up on strong legal formalism, some still maintain that judging is a matter of technical reasoning. Judicial reasoning has to do with reasoning correctly either about the applicable legal rules or principles or about how the decision achieves an aim or end such as economic efficiency.⁵ Still others argue that judicial decision making is not circumscribed by reason, but is an assertion of political power. To explain judicial decision making, they claim that we must deconstruct judges’ reasoning to deter-

2. Anthony D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 NW. U. L. REV. 250, 252-53 (1989). D’Amato notes that “deconstructionists say that all interpretation depends on context. Radical deconstructionists add that, because contexts can change, there can be no such thing as a single interpretation of any text that is absolute and unchanging for all time.” *Id.* at 252. See also Anthony D’Amato, *Aspects of Deconstruction: The Failure of the Word “Bird,”* 84 NW. U. L. REV. 536, 536 (1990) (viewing Frederick Schauer’s doctrinal statements about birds and pelicans from the standpoint of a deconstructionist); Anthony D’Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 149 (1990) (replying to criticism from formalistic scholars on his deconstructionist view of Pragmatic Indeterminacy).

3. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 1008 (1988).

4. See A. SUTHERLAND, *THE LAW AT HARVARD* 175 (1967) (discussing Christopher Columbus Langdell’s claims that “law is a science” and that “all the available materials of that science are contained in printed books.”). For further discussion of the dominance of Langdell and strong legal formalism from the Civil War to World War I, see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977).

5. Ronald Dworkin argues that “[j]udges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.” RONALD DWORKIN, *LAW’S EMPIRE* 255 (1986). Judge Richard Posner also argues that legal reasoning is technical but maintains that it should emulate the instrumental reasoning of economic analysis. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 208 (1999). Posner contends that “[j]udges have got to understand that the only sound basis for a legal rule is its social advantage, which requires an economic judgment, balancing benefits against costs.” *Id.* He further claims that “[m]ost economic analysis of law is pragmatic” and that “pragmatist judges always try to do the best they can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past.” *Id.* at 239, 241. Posner’s legal pragmatism, however, is not the same as philosophical pragmatism so that it is entirely consistent with resorting to the technical reasoning employed by the economic analysis of law. See *id.*

mine what hidden presuppositions, such as race,⁶ gender,⁷ or class,⁸ are guiding it.

By contrast, Judge Hutcheson's hunch theory of judicial decision making provides another way out of this quandary. Although writing over seventy years ago, Hutcheson acknowledged legal indeterminacy and the importance of judges as vital decision makers in our society.⁹ He argued that law cannot be reduced to logic and that judges are not technicians mechanically applying the law. Nevertheless, Hutcheson does not embrace either the idea that judicial decision making is a matter of technical reasoning or the idea that it can be reduced to politics. Rather, Hutcheson argues for a pragmatic and empirical method of judging. He maintains that judges intuit or feel their way to their decisions. Once the judge has considered all the available material, the judge waits for the intuition or the hunch which leads to the solution. The imagination lifts the judge's brooding mind above the constricting, conflicting facts and precedent that impede the just decision. The judge's mind is thereby exposed to the fullness of experience which allows for a just resolution of the case.

6. See, e.g., Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Sense*, 44 VAND. L. REV. 1, 7 (1991) (arguing that Critical Race Theorists have tried to show that "areas of law ostensibly designed for our benefit often benefit whites even more than blacks"). See generally Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) (tracing the history and themes surrounding Critical Race Theory through a comprehensive bibliography of articles).

7. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988), reprinted in FEMINIST JURISPRUDENCE 493 (Patricia Smith ed., 1993) (claiming that masculine jurisprudence proceeds from the presupposition of individuals as essentially separate from one another ("separation thesis") while feminist jurisprudence proceeds from the presupposition that individuals are essentially connected or related to one another). See generally FEMINIST LEGAL THEORY (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (providing a compilation of essays examining feminist legal theory and feminist jurisprudence).

8. See, e.g., Roberto M. Unger, *The Critical Studies Movement*, 96 HARV. L. REV. 563, 565 (1983) (arguing that the Critical Legal Studies Movement rejects the claims that law and morality can be based on an apolitical method or procedure of justification and that the legal system can be objectively defended as embodying an intelligible moral order). Unger further suggests that the legal order is merely the outcome of power struggles or practical compromises and thus advocates "the purely instrumental use of legal practice and legal doctrine to advance leftist aims." *Id.* at 567. See also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 13 (1987) (characterizing CLS as maintaining "that the legal system is invariably simultaneously *philosophically committed* to mirror-image contradicting norms, each of which dictates the opposite result in any case (no matter how 'easy' the case first appears)" and "that settled *justificatory schemes* are in fact unattainable").

9. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 275 (1929), reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 16 (1938) [hereinafter *Judgment Intuitive*].

Hutcheson thus contends that judges should embrace factual complexity and attempt to determine its legal significance without arbitrarily reducing or containing it through the powers of technical reason.

On the one hand, Hutcheson's account of judicial decision making seems familiar and similar to the imprecise and indirect way of making practical decisions that we experience in our everyday life. On the other hand, Hutcheson's use of terms such as "hunch" and "intuition" suggest a certain crudeness and potential arbitrariness that seems contrary to how we usually understand what judges do.¹⁰ Are judges just guessing? Can judges justify decisions based on hunches? In other words, the idea that judges should decide cases based on hunches must be given an adequate epistemological justification. Otherwise, Hutcheson's hunch theory of judicial decision making could be crassly characterized as advocating the position that "law is only a matter of what the judge had for breakfast."¹¹ Anything would be permitted.

This article argues that William James's pragmatism¹² provides a compelling epistemological justification for the hunch theory of judicial decision making and saves the hunch from arbitrariness.¹³ If this philosophical justification is successful, the

10. See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 471 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986) (noting that Kalman's characterization of legal realism suggests that "nothing prevents judges from acting arbitrarily and oppressively")).

11. DWORKIN, *supra* note 5, at 36 (claiming that this phrase summarizes some accounts of legal realism).

12. The term pragmatism, especially in reference to a group of philosophers, can be misleading. I will refer to James as a pragmatist because he is commonly referred to as such. Sticking with convention will eliminate the need to justify the alternative classification, process philosopher, which I would normally apply to James. Others have also referred to James as a process philosopher along with John Dewey and especially Alfred North Whitehead. See WILLIAM DEAN, *AMERICAN RELIGIOUS EMPIRICISM* 83 (1986). In addition, legal pragmatism can take forms substantially different from philosophical pragmatism. See, e.g., POSNER, *supra* note 5; Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937, 937 (1990) (presenting a pragmatist theory of legal discourse). See generally Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996) (presenting a collection of eight essays defining and analyzing legal pragmatism).

13. Cf. Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 543 (1988). Hantzis similarly argues for a pragmatic interpretation of Oliver Wendell Holmes's jurisprudential thought. She argues that Holmes can best be understood as part of the wider intellectual tradition of pragmatism, especially as espoused by Charles S. Peirce, rather than as part of legal positivism. *Id.* at 544.

hunch theory of judicial decision making presents a practical solution to the explosion of fact and the indeterminacy of the law. Judges will then be warranted in relying on their hunches to the extent they meet the pragmatic conditions set forth by this justification. These pragmatic conditions do not provide a false sense of legal certainty and judicial constraint like strong legal formalism. Surprisingly, however, requiring that judges experience a subjective sense of certainty about their decisions and that they pragmatically test the consequences of their hunched decisions provides a disciplining effect on judges indiscriminately relying on idiosyncratic hunches.

In addition, this justification challenges the usual classification of Hutcheson as a legal realist.¹⁴ Some have argued that legal realism has pragmatic origins,¹⁵ but I will argue that James's pragmatism is contrary to the central tenants of most legal realists. Legal realists are usually characterized as "rule skeptics" and argue that legal interpretation is not a science.¹⁶ However, they embraced the scientific method and its narrow view of experience and attempted to reform the law by making it more rational and scientific.¹⁷ Once the deficiencies of conventional legal

14. See JEROME FRANK, *LAW AND THE MODERN MIND* 108-26 (1930) (describing Hutcheson's decision making process as judicial rationalization which is characteristic of legal realism); W. TWING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 76 (2d ed. 1985) (showing Hutcheson within a chart displaying Karl Llewellyn's realists); Karl N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 603-04 (1940) [hereinafter Llewellyn, *Newer Jurisprudence*] (stating that the problem of finding additional guidance was at the center of Hutcheson's writings); Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1258 (1931) [hereinafter Llewellyn, *Some Realism*] (listing Hutcheson as a source reviewed by Llewellyn to develop a test or definition of legal realism); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Twentieth Century America*, 58 VA. L. REV. 999, 1016 (1972) (describing Hutcheson's judicial decisions as "impressionistic or subjective" and as typical of legal realism) [hereinafter White, *Sociological Jurisprudence*]. For further background information on the life of Judge Hutcheson and an account of his views on the role of courts in our legal system, see Charles L. Zelden, *The Judge Intuitive: The Life and Judicial Philosophy of Joseph C. Hutcheson, Jr.*, 39 S. TEX. L. REV. 905 (1998).

15. See Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 235 n.13 (1990) (arguing that legal realists relied in part on the American pragmatism of John Dewey and Morris Cohen).

16. See Singer, *supra* note 10, at 503-04 (describing the general characteristics of beliefs held by legal realists).

17. Laura Kalman claims that one of the main facets of legal realism is its functionalism or instrumentalism. *Id.* at 468. She also claims that legal realists understood legal rules in terms of their social consequences through the help of the social sciences to "enable them to reform the legal system to achieve efficiency and social justice." *Id.* at 469.

discourse were demonstrated, they maintained that scientific analysis could provide a more adequate way of resolving legal disputes.¹⁸ By contrast, Hutcheson does not espouse the scientific method or any other form of technical reasoning to assist judges in deciding cases. Instead, he maintains that the judge must intuit or hunch the just result from the fullness of experience. Thus, unlike most legal realists, Hutcheson does not advocate that judges conquer factual complexity by submitting legal questions to scientific analysis.

My pragmatic justification for the hunch theory of judicial decision making will proceed in four steps. First, I will summarize and analyze Hutcheson's hunch theory of judicial decision making. Second, I will consider several epistemological justifications for the hunch theory and argue for a pragmatic justification of it. Third, I will argue that James's pragmatism further provides pragmatic conditions that discipline idiosyncratic hunching. Finally, I will challenge Hutcheson's classification as a legal realist.

II. THE HUNCH THEORY OF JUDICIAL DECISION MAKING

Originally, Judge Hutcheson was a strong legal formalist like Christopher Columbus Langdell.¹⁹ Hutcheson studied the law and developed sections and compartments into which he arranged and

Allan Hutchinson and Patrick Monahan argue that "[t]he [Legal] Realists were ideologically and practically wedded to the New Deal. Their underlying assumption could only have been that issues of public policy merely raised technical questions of the best means to achieve shared ends—questions that were amenable to the expertise of state staffers." Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 204 (1984).

18. See Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1043 (1999).

19. Langdell may have agreed or disagreed with Hutcheson's description of judicial decision making, but he would have argued that it ought to be different. Langdell made the normative argument that legal decision making ought to entail a process of distilling the finite body of fundamental legal doctrines from the cases. SUTHERLAND, *supra* note 4, at 175. Langdell also argued that the number of legal doctrines discovered by the case method was fewer than commonly supposed and that the common law cases could be reduced to a formal system. *Id.* at 174. By pigeonholing the case in the formal system, the judge, like a technician, can determine the right decision as a matter of deductive logic. See *id.* Hutcheson and the legal realists rejected Langdell's normative theory of judicial decision making because their positive analysis indicated that judges made decisions in other ways. *Judgment Intuitive*, *supra* note 9, at 279-80, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 22-24 (1938). For example, Hutcheson claimed that his experience indicated that judges intuit their decisions. *Id.* at 280, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 24 (1938).

re-arranged the facts of cases to fit the compartments.²⁰ He believed that the creation of law by judges had ceased. The law was a definitive system of rules, precedents, categories, and concepts. Judicial decision making was only a process of searching out the proper rule, category, or concept and deducing the proper result. Thus, judging was a matter of “logomancy.”²¹

Judge Hutcheson’s ideas about law and judicial decision making, however, underwent a radical change. He became convinced that technical definitions could lead to a deduction of consequences unrelated to the name applied.²² Rules, he thought, must be considered tentative because the many and varying facts cannot be foreseen. He further became convinced that change, adaptation, and conformity were instincts in the nature of the law. Law was a “thing of life.”²³ He now believed that the “power of the brooding mind” created and changed jural relationships and that judges were instruments of change in the law.²⁴ In every case, he maintained, judges use their intuitive faculties to create bridges from the past to the new future.²⁵ He even embraced Justice

20. *Judgment Intuitive*, *supra* note 9, at 274-75, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 15-16 (1938) (discussing the compartmentalization of law).

21. *Id.* at 274, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 18 (1938). In Judge Hutcheson’s rationalistic period, he commented on four types of judgments:

[F]irst the cogitative, of and by reflection and logomancy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or ‘hunching;’ and fourth, asinine, of and by an ass. And in that same youthful, scornful way I regarded the last three as only variants of each other, the results of processes all alien to good judging.

Id. at 275-76, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 17 (1938).

22. *See id.* at 276, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 17-18 (1938).

23. *Id.* at 276, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 18 (1938).

24. *Id.* at 276-77, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 18 (1938). The full context of this quote will provide a fuller understanding of the radical nature of Hutcheson’s statements. Hutcheson stated that:

I came to see that instinct in the very nature of law itself is change, adaptation, conformity, and that the instrument for all of this change, this adaptation, this conformity, for the making and the nurturing of the law as a thing of life, is the power of the brooding mind, which in its very brooding makes, creates and changes jural relations, establishes philosophy, and drawing away from the outworn past, here a little, there a little, line upon line, precept upon precept, safely and firmly, bridges for the judicial mind to pass the abysses between that past and the new future.

Id.

25. In reference to this bridge building process, Hutcheson quotes Holmes’s statement

Holmes's famous claim that "every opinion tends to become a law."²⁶

Judge Hutcheson's conversion to a view of law as changing and fluid also included a change in his views of judicial decision making. He argued that "the judge really decides by feeling, and not by judgment; by 'hunching' and not by ratiocination."²⁷ Judge Hutcheson described the faculty used for hunching or feeling as imagination or intuition.²⁸ Imagination is described as a "sensitivity to new ideas" which "when the track is cold" has the power to cast "ever widening circles to find a fresh scent."²⁹ Imagination enables poetic genius and scientific discovery. It is the "power of expansion" or the "power of creation" that enters in during the "simple brooding upon facts."³⁰ The creative process in law is thus analogous to the creative process in art. The legal precedents, principles, and analogies are necessary but only as a springboard or as a medium for the imaginative leap to the just result.³¹ He claims that intuition is "more subtle than any major premise."³² It lifts "the mind above the mass of constricting matter whether of confused fact or precedent that stands in the way of a just decision."³³ Judges listen to testimony and arguments

that "[j]udges do and must legislate, but they can do so only interstitially. They are confined from Molar to molecular motions." *Id.* at 277 n.10, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 18 n.10 (1938) (quoting *Southern Pacific v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting)).

26. *Id.* at 276, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 18 (1938) (quoting *Lockner v. New York*, 198 U.S. 45, 76 (1905)).

27. *Id.* at 285, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 30 (1938).

28. *Id.* at 280, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 24 (1938). In Hutcheson's words, this faculty is described as:

Now, what is this faculty? What are its springs, what its uses? Many men have spoken of it most beautifully. Some call it "intuition"—some, "imagination," this sensitiveness to new ideas, this power to range when the track is cold, this power to cast in ever widening circles to find a fresh scent, instead of standing baying where the track was lost.

Id.

29. *Id.*

30. *Id.* at 281, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 25 (1938).

31. See *id.* at 281, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 26 (1938) (describing the benefits of imagination).

32. *Id.* at 282, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 27 (1938).

33. *Id.* at 288, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 34 (1938).

and study the law but must wait to feel one way or the other. Judge Hutcheson describes his experience of the process as follows:

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.³⁴

In other words, the hunch or feeling performs a leading or connecting function between the past and the future; it provides the necessary “jump-spark” to get from the question to the decision.

Despite the appeal of Hutcheson’s description of judicial decision making, the hunch theory has several confusing aspects that need clarification. One element of confusion is Hutcheson’s use of terms. He uses many terms interchangeably such as hunch, feeling, intuition, faculty, and imagination. Nevertheless, he seems to use these terms in three distinct ways. First, hunching and feeling appear to refer to the whole process of decision making which can be contrasted with rational decision making.³⁵ Second, a feeling, a hunch, and an intuition seem to signal the subjective leading to or confirmation of a good or just decision.³⁶ Finally, the words faculty, faculty of feeling, intuition, and imagination seem to refer to the human capacity for decision making.³⁷ He even refers to imagination as “the noblest attribute of man.”³⁸ These last two categories will be the most important in determining the best epistemological justification for the hunch theory.

A second source of confusion stems from Hutcheson’s failure to make clear whether the hunch leads to or confirms the decision,

34. *Id.* at 278, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 21 (1938). Robert Burns has recently tried to provide “an account of the felt certainty that emerges in the course of the trial” which he also refers to as “an epiphany.” ROBERT P. BURNS, A THEORY OF THE TRIAL 3 (1999). In this account, Burns cites this quote by Hutcheson to establish that others have also claimed that nonformal intelligence informs the manner in which judges and juries actually decide. *Id.* at 210.

35. See *Judgment Intuitive*, *supra* note 9, at 277, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 19-20 (1938).

36. See *id.* at 278, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 21 (1938).

37. See *id.* at 280, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 24-25 (1938).

38. *Id.*

or both. In many cases, the hunch seems to perform primarily a leading function. Hutcheson adopts the Webster's International Dictionary definition of a hunch as "[a] strong, intuitive impression that something is about to happen."³⁹ He also refers to the hunch as the "jump-spark connection between question and decision"⁴⁰ and the "triumphant precursor of the just judgment."⁴¹ In other cases, however, the hunch additionally seems to signal the conclusion of the process. He claims that "the decision is an intuitive sense of what is right or wrong for that cause."⁴² For example, he argues that the determination of whether something is a novel invention warranting patent protection cannot be determined by any objective criteria. The judge must have the "same imaginative response to an idea, something of that same flash of genius that there is in the inventor . . . that luminous quality of the mind, that can give back, where there is invention, an answering flash for flash."⁴³ Furthermore, if the hunch does not also refer to a confirmation of a correct decision, Hutcheson's hunch theory would fail to explain how to determine whether the judge's decision was a warranted one. Hutcheson does not talk about validating the hunch or about any later stages of decision making after the hunch. Hutcheson only refers to hunching out the just decision which implies a vector quality to the hunch rather than a preliminary step function. One reason for this interpretation is Hutcheson's frequent, if not exclusive, use of the article *the*, as in *the hunch*. Hutcheson's use of *the* hunch suggests that it is a sign or indication that the decision makes sense even though the justification of the decision cannot be fully articulated or understood. It is a sudden experience of how the whole fits together or what decision makes sense. The post-hunch justification is a rationalization of this process that cannot fully capture the fullness of this experience. The judge works backward from the hunch or "from a

39. *Id.* at 274 n.1, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 14 (1938). Similarly, Webster's Ninth New Collegiate Dictionary defines hunch as a "strong intuitive feeling concerning a future event or result." MERRIAM WEBSTERS COLLEGIATE DICTIONARY 565 (10th ed. 1998).

40. *Judgment Intuitive*, *supra* note 9, at 278, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 21 (1938).

41. *Id.* at 287, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 33 (1938).

42. *Id.* at 285, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 30 (1938).

43. *Id.* at 284, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 28-29 (1938).

desirable conclusion back to one or another of a stock of logical premises."⁴⁴ Thus, the judicial hunch has a dual function of leading to and confirming the proper judicial decision.

III. EPISTEMOLOGICAL JUSTIFICATIONS OF THE HUNCH THEORY

Hutcheson's use of the terms hunch, feeling, intuition, faculty, and imagination, however, imply many possible epistemological justifications of the hunch theory of judicial decision making. This section will explore three possible epistemological justifications of the hunch theory: intuitionism, moral sense theory, and pragmatism. The first part of this section will explore and reject arguments for an intuitionist or moral sense theory justification of the hunch theory. The subsequent part will explore interpreting Hutcheson as a pragmatist and argue that William James's theory of pragmatism provides the best epistemological justification for the hunch theory.

A. *Intuitionism and Moral Sense Theory*

To explore intuitionism as an epistemological justification of the hunch theory, I will focus on the use of intuitive knowledge in practical decision making in ethics as an analog to this process in judicial decision making.⁴⁵ There are two types of intuitionism.⁴⁶ One type claims that humans intuit or are directly aware of self-evident first principles of conduct.⁴⁷ From these first principles, one must deduce the correct particular ethical judgment. This process of practical reasoning is rationalistic and similar to mathematics. Once self-evident first principles are established, the process of reasoning becomes primarily deductive.

44. *Id.* at 287, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 34 (1938) (quoting Max Radin, *Theory of Judicial Decision*, 2 A.B.A. J. 359 (1925)).

45. The use of an ethical form of intuitionism as an analog to judicial decision making is not done to suggest that Hutcheson considered ethical and legal decisions to be the same or similar. The reason that an ethical form of intuitionism will be helpful for analysis stems from the fact that both ethics and law are forms of practical reasoning. In other words, the metaethical description of the intuitive process of practical reasoning in ethics should be very similar, if not identical, to the intuitive process of practical reasoning in law. Also, in both cases, intuitionism provides an epistemological explanation of how we obtain knowledge in order to make practical decisions.

46. See III ENCYCLOPEDIA OF PHILOSOPHY 128 (1967).

47. See, e.g., HENRY SIDGWICK, *THE METHODS OF ETHICS* (Hackett ed., 1981) (1907) (arguing that basic premises of utilitarianism are self-evident or grasped by intuition).

Some evidence supporting an intuitionist interpretation of the hunch theory can be seen in Hutcheson's claim that judges must resort to "first principles" to find a solution.⁴⁸ Also, he mentions that judges' hunches must lead to the "abstract solution."⁴⁹ Despite this evidence, Hutcheson rejects a rationalistic view of judicial decision making. He refers to the process of judicial decision making as creative and as a process of growth and change.⁵⁰ In the beginning of *The Judgment Intuitive*, he even describes and explicitly rejects the deductive prototype of judicial decision making suggested by this type of intuitionism.⁵¹ Thus, Hutcheson seems to have at least implicitly rejected this deductive form of intuitionism by his explicit rejection of deductive judicial decision making.

The second type of intuitionism has some similarities to a moral sense theory of ethics. In both of these theories, an ethical decision maker becomes directly aware of the rightness or goodness of a particular action. Intuitionists claim that goodness is an unanalyzable or indefinable quality which must simply be apprehended.⁵² Normative judgments are self-evident and can be known only by intuition. Similarly, moral sense theorists claim that we have a moral faculty, different from reason and similar to one of the five senses, by which we sense the good or right course of action.⁵³ In both of these cases, goodness or rightness refer to objective goodness and rightness. This quality is apprehended or perceived in the particular action to be taken and not just a subjective feeling about that course of action itself. In other words, the right or correct decision is found not made.

48. *Judgment Intuitive*, *supra* note 9, at 276, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 18 (1938) (quoting *Old Colony Trust Co. v. Sugarland Indus.*, 296 F. 129, 138 (S.D. Tex. 1924)).

49. *Id.* at 286, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 32 (1938).

50. *See id.* at 275, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 15 (1938).

51. *Id.* at 274, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 14 (1938).

52. *See, e.g.*, G.E. MOORE, PRINCIPIA ETHICA § 15 (rev. ed. 1993) (1903) (claiming good is "a simple, indefinable, unanalysable object of thought," which is like the color yellow in that we know what it is if we have experienced it).

53. *See, e.g.*, FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE (1725) (Francis Hutcheson's quintessential definition of "moral sense"). That Joseph C. Hutcheson, Jr. shared the same last name with Francis Hutcheson is not any evidence that they shared similar philosophical ideas but that they shared a Scottish ancestry. GEORGE F. BLACK, THE SURNAMING OF SCOTLAND: THEIR ORIGIN, MEANING, AND HISTORY 371-72 (1979).

Both the second type of intuitionism and moral sense theory could provide an epistemological justification of the hunch theory. Hutcheson's references to intuition and feeling could be implying a theory of apprehending the goodness or rightness of particular judicial decisions. Hutcheson also refers to the "faculty of feeling" and the "intuitive faculty" which could be inferring a moral sense theory of judicial decision making.⁵⁴ Both of these theoretical explanations are possible given Hutcheson's references to the hunch as leading to the "just judgment," "the just solution," "the hidden truth," and "justice."⁵⁵ The use of these terms seems to imply that there is some objectively true or correct judgment which is passively apprehended or perceived.

Conversely, Hutcheson's other comments contradict this interpretation of decision making. As discussed above, Hutcheson views judicial decision making as a process of subjective creation.⁵⁶ The judge's brooding mind "makes, creates, and changes jurial relations."⁵⁷ Further, what is relevant to feeling the just decision is not merely the facts of the case, as with intuitionism and moral sense theory, but also includes the case law, statutes, and "all the available material" at the judge's command.⁵⁸ From this material, the judge engages in an active and subjective process of imagination to create a bridge between the past and the future.⁵⁹ Consequently, judging is not a passive and objective process of finding (apprehending or perceiving) the bridge already built. As a result, Hutcheson's references to faculty of "feeling" and intuition are best understood as active events of imagination rather than passive events of perception or apprehension as in the second type of intuitionism and moral sense theory.

54. See *Judgment Intuitive*, *supra* note 9, at 283, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 28 (1938).

55. See *id.*

56. See *supra* text accompanying notes 27-44.

57. *Judgment Intuitive*, *supra* note 9, at 276, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 18 (1938).

58. *Id.* at 278, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 21 (1938).

59. See *id.* at 276-77, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 18 (1938).

B. *Pragmatism*

By contrast, pragmatism provides a better epistemological justification of the hunch theory. It is important to note that I am not arguing that Hutcheson was a legal pragmatist but that his hunch theory of judicial decision making can be philosophically justified by a pragmatic epistemology. Thomas Grey has argued that “pragmatism in legal theory can stand free of *philosophical* pragmatism.”⁶⁰ Richard Rorty has also noted that he agrees “with Posner that judges will probably not find pragmatist philosophers—either old or new—useful.”⁶¹ In other words, my focus is on providing a pragmatic philosophical justification of the hunch theory but not on arguing that Hutcheson is a legal pragmatist. In fact, the last section of this article could be read, in part, as an argument against classifying Hutcheson as a legal pragmatist to the extent legal realism can be classified as a form of legal pragmatism.⁶² Accordingly, rather than focusing on whether Hutcheson was a legal pragmatist, this section will briefly consider the pragmatic philosophies of Charles S. Peirce and William James

60. Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21, 21 (1996). Grey argues that philosophical and legal pragmatism both embrace an antifoundational account of inquiry as contextual and instrumental but that they mean different things by this. Pragmatic philosophers emphasize that “human thought is constituted out of a background of *practices*, cultural and individual, as well as being *practical* in the sense of purposively directed to action.” *Id.* at 22. Pragmatic philosophers criticized traditional philosophers for attempting to answer issues such as the nature of Being, Truth, and Reality which they claim make no practical difference in how we act. Philosophical pragmatism is instrumental, then, in the sense that it claims that ideas are meaningful and true only if they have some practical implications for human activity. By contrast, pragmatic jurisprudence is also contextual and instrumental but in different senses. For example, judging is by nature a practical activity; it cannot dwell on theoretical issues that fail to have practical implications. Consequently, pragmatic jurisprudence is instrumental in a different sense in that it asks how the adjudication of legal disputes can serve human purposes. In other words, Grey emphasizes that “[l]egal pragmatism does not depend on and can make no use of the pragmatist philosophers’ critiques of metaphysics and epistemological foundationalism.” *Id.* at 28.

61. Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1815 (1990). Michel Rosenfeld argues, however, that this does not mean “that Posner, Rorty, and other pragmatists see *no* relationship between pragmatism in philosophy and in law.” Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner’s and Rorty’s Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, 103 (1996). Rosenfeld argues instead that “pragmatist philosophy’s antifoundationalism has a liberating effect on law, by freeing the legal theorist from having to justify practical solutions to legal problems under any comprehensive theory,” and he specifies three ways in which he thinks that this liberation can be understood. *Id.* at 104.

62. See *infra* Part V.

as possible epistemological justifications for the hunch theory and argue that James's theory provides the best justification.

1. Charles S. Peirce

Peirce has been considered the father of pragmatism.⁶³ His epistemology begins with an analysis of what he claims is a constant cycle of belief and doubt in human thought.⁶⁴ He argues that inquiry and action occur because of this constant cycle of belief and doubt. When we experience novelty, doubt arises because our current propositional beliefs cannot provide a coherent explanation of this novelty.⁶⁵ This doubt then provokes us to investigate in order to attain the state of belief by finding a set of propositions that can account for this novelty.⁶⁶ Once we have discerned these propositions, we can reenter the state of belief which is a condition of readiness to act when the occasion arises.⁶⁷ For example, in easy cases, the claims of the parties do not raise novel issues, and the judge can resolve the dispute based on the current legal norms. No state of doubt arises; the judge can resolve the dispute from her pre-existing state of belief. In hard cases, however, the parties' conflicting positions cannot be resolved by the current legal norms, and the judge is put into a state of doubt. The judge has to resolve this state of doubt by discerning a set of coherent legal norms that can resolve the dispute.

To resolve the state of doubt, Peirce proposed a scientific method of adjudicating opinions which he called pragmatism.⁶⁸ This scientific method of doubt reduction depends upon a par-

63. See 6 *ENCYCLOPEDIA OF PHILOSOPHY* 70 (1967) (describing Peirce as "the founder of pragmatism"). See generally JOSEPH BRENT, *CHARLES SANDERS PEIRCE: A LIFE* (1993).

64. See CHARLES S. PEIRCE, *The Fixation of Belief*, in CHARLES S. PEIRCE: *SELECTED WRITINGS (VALUES IN A UNIVERSE OF CHANCE)* 98-99 (P. Wiener ed., 1958).

65. See *id.* at 100.

66. See *id.* at 99-100.

67. See *id.* at 100.

68. See CHARLES S. PEIRCE, *What Pragmatism Is*, in CHARLES S. PEIRCE: *SELECTED WRITINGS (VALUES IN A UNIVERSE OF CHANCE)* 183 (P. Wiener ed., 1958) [hereinafter PEIRCE, *Pragmatism*]. Peirce's pragmatism was originally announced in the form of a maxim: "consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." CHARLES S. PEIRCE, *How to Make Our Ideas Clear*, in CHARLES S. PEIRCE: *SELECTED WRITINGS (VALUES IN A UNIVERSE OF CHANCE)* 124 (P. Wiener ed., 1958).

ticular understanding of the meaning of propositions. Rather than determining the meaning of propositions based on some abstract meaning of terms and logical connection among them, pragmatism defines the meaning of a proposition by the effects or practical bearing that that proposition has for your conduct.⁶⁹ The effects are conceived exclusively in terms of their sensible affects on the senses. Pragmatism then experimentally tests the consequences of the conflicting beliefs against experience to ascertain the "one true conclusion"⁷⁰ and achieve doubt reduction. The method of pragmatism results in agreement as to the superior course of action. This agreement is not just a matter of agreement with an individual's mind. Like a scientific experiment, Peirce claims that in principle, anyone who followed the method of pragmatism would come to the same "one true conclusion" about the propositions in question. The state of belief is, Peirce maintains, the same for all of us. Consequently, in hard cases, judges would be required to scientifically test the consequences of alternative legal norms to resolve the doubt by determining the "one true conclusion" to the dispute. The method of pragmatism would thus resolve the hard case and bring the law back into a state of belief.

Peirce's pragmatism, however, appears foreign to the method employed by the hunch theory of judicial decision making. Although the courtroom is a conflict between two different opinions, Hutcheson does not describe the judge's task as an empirical experiment to test the different effects of the solutions offered by the litigants. According to Hutcheson, the brooding mind creates and changes jural relations, but this is not accomplished by developing propositions that are then scientifically tested. The bridging function of the hunch is an imaginative act like an artist, not an experiment like a scientist. Further, the hunch does not seem limited to the ordinary sensory awareness. The judge, in some sense, engages her imagination to rise above the "constricting matter whether of confused fact or precedent"⁷¹ to feel the just decision. This process of feeling the just result seems foreign to the rational scientific process of analyzing the empirical effects of different legal norms. Finally, the judge is not attempt-

69. See PEIRCE, *Pragmatism*, *supra* note 68, at 192.

70. *Id.* at 108.

71. *Judgment Intuitive*, *supra* note 9, at 288, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 34 (1938).

ing to determine which litigant proposes the best logical solution to the dispute. Recall that Hutcheson rejected “logomancy” and any emphasis on the logical or conceptual resolution of legal disputes.⁷² The hunch, not logical analysis, leads to and confirms the judge’s decision. Consequently, even this cursory analysis of Peirce’s pragmatism seems to indicate that it cannot justify the hunch theory.

2. William James

Conversely, the hunch theory seems closer to James’s pragmatism, which is psychological rather than logical. Rather than Peirce’s method of testing the meaning of propositions by their logical and experimentally verifiable consequences, James tested the meaning of propositions against their “immediately felt sensations or personal reactions.”⁷³ This psychological focus immediately seems quite similar to Hutcheson’s emphasis on the felt sensation of the hunch. The purpose of this section is to demonstrate the similarities in Hutcheson’s and James’s thinking and to provide a pragmatic epistemological justification for Hutcheson’s hunch theory of judicial decision making.

Before considering the philosophical similarities, there is some historical and textual support for a pragmatic epistemological justification of the hunch. First, James’s theory of pragmatism was surely part of the philosophical context within which Hutcheson wrote. James published the seeds of his theory, *The Sentiment of Rationality*,⁷⁴ in 1879, long before Hutcheson’s article, *The Judgment Intuitive*, which was published in 1929.⁷⁵ Further, James’s more mature theory of pragmatism was outlined in a public lecture and published in 1907.⁷⁶ In addition, Hutcheson was clearly aware of James’s work. He cited to James in *The Judgment Intuitive* for the proposition that “when the conclusion is there, we have always forgotten most of the steps preceding its

72. See *supra* note 21 and accompanying text.

73. PEIRCE, *Pragmatism*, *supra* note 68, at 181 (editor’s introduction).

74. WILLIAM JAMES, *The Sentiment of Rationality*, in *ESSAYS IN PRAGMATISM* 3 (1948) [hereinafter JAMES, *Sentiment of Rationality*].

75. *Judgment Intuitive*, *supra* note 9, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14 (1938).

76. See WILLIAM JAMES, *PRAGMATISM* (1907).

attainment."⁷⁷ Thus, even though my argument is primarily philosophical, these historical and textual factors suggest that Hutcheson may have been directly influenced by James's pragmatism. In that case, the following could be looked at either as an attempt to draw out Hutcheson's unarticulated pragmatic epistemological presuppositions or as an attempt to show that James's pragmatic epistemological presuppositions justify the hunch theory of judicial decision making.

James's cosmological theory of experience claims that our direct particular experience includes the conjunctive and disjunctive relations between things as well as the things themselves.⁷⁸ The "parts of experience" are held together "by relations that are themselves part of experience."⁷⁹ In other words, no "trans-empirical connective support" holds the universe together.⁸⁰ James refers to this inclusive view of experience as the vast wholeness of experience or the fullness of experience.⁸¹ Also, pragmatism includes abstractions or theories in this wholeness of experience.⁸² "Her only test of probable truth," according to James, "is what works best in the way of leading us, what fits every part of life best and combines with the collectivity of experience's demands, nothing being omitted."⁸³ Pragmatism, then, takes both logic (or theory) and the external senses as valid experiences. Rationalism limits itself to logic (theory), and empiricism

77. *Judgment Intuitive*, *supra* note 9, at 282, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 27 (1938) (quoting 1 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 260 (Alice H. James, 1918) (1890)).

78. WILLIAM JAMES, *The Meaning of Truth*, in PRAGMATISM AND OTHER ESSAYS 133, 138 (1963) [hereinafter JAMES, *Meaning of Truth*]. James also commented that: "Realities mean, then either concrete facts, or abstract kinds of thing[s] and relations perceived intuitively between them. They furthermore and thirdly mean, as things that new ideas of ours must no less take account of, the whole body of other truths already in our possession." WILLIAM JAMES, *Pragmatism's Conception of Truth*, in ESSAYS IN PRAGMATISM 159, 165-66 (1948) [hereinafter JAMES, *Conception of Truth*].

79. JAMES, *Meaning of Truth*, *supra* note 78, at 138.

80. *Id.*

81. James claimed that: "Your acquaintance with reality grows literally by buds or drops of perception. Intellectually and on reflection you can divide these into components, but as immediately given, they come totally or not at all." ALFRED NORTH WHITEHEAD, PROCESS AND REALITY: AN ESSAY IN COSMOLOGY 68 n.4 (David Ray Griffin & Donald W. Sherburne eds., corrected ed. 1978) [hereinafter WHITEHEAD, PROCESS AND REALITY] (quoting WILLIAM JAMES, SOME PROBLEMS OF PHILOSOPHY ch. VII (Frederick H. Burkhardt et al. eds., Harvard Univ. Press 1979) (1911)).

82. WILLIAM JAMES, *What Pragmatism Means*, in ESSAYS IN PRAGMATISM 141, 154 (1948) [hereinafter JAMES, *Pragmatism*].

83. *Id.* at 157.

limits itself to the external senses. James's pragmatic empiricism, however, includes all experience—physical and mental. James gave his pragmatic empiricism the name "radical empiricism."⁸⁴

With the complexity of experience in radical empiricism, how does one make a practical decision about what the future will become? James says that we will recognize answers to practical problems as we do everything else, "by certain subjective marks."⁸⁵ These subjective marks include "a strong feeling of ease, peace, rest" and a transition from a puzzled or perplexed state to a state of rational comprehension.⁸⁶ James calls these subjective marks the "Sentiment of Rationality."⁸⁷ He argues that we experience the justification of the decision and feel a lack of the need to justify or explain it, which he alternatively calls a feeling of the lack of irrationality.⁸⁸

The Sentiment of Rationality means that the decision agrees with our mind or fits with our past beliefs and anticipation of the future consequences. As with Hutcheson's hunch, this agreement with the mind performs a leading and confirming function. Agreement, in its broadest sense, means to guide you to the point where the relations between things (ideas and external sense experience) can be felt.⁸⁹ Since it produces this easy feeling of rationality, however, agreement also means a confirmation or that there is agreement with that person's mind. Thus, the Sentiment of Rationality, like the hunch, is a sign that the decision fits with the past (facts of the case, precedents, statutes) and the future.

James, like Hutcheson, criticized rationalistic explanations of decision making. He argues that concepts do not provide "magic words" or "solving names" which solve disputes.⁹⁰ *Theories thus*

84. JAMES, *Meaning of Truth*, *supra* note 78, at 138; WILLIAM JAMES, *The Will to Believe*, in *PRAGMATISM AND OTHER ESSAYS* 185, 187 (1963).

85. JAMES, *Sentiment of Rationality*, *supra* note 74, at 3.

86. *Id.*

87. *Id.* at 4.

88. *Id.* James defines the Sentiment of Rationality as a "feeling of the sufficiency of the present moment . . . [the] absence of all need to explain it, account for it, or justify it." *Id.*

89. James stated that: "[t]o 'agree' in the widest sense with a reality *can only mean to be guided either straight up to it or into its surroundings, or to be put into such working touch with it as to handle either it or something connected with it better than if we disagreed.*" JAMES, *Conception of Truth*, *supra* note 78, at 166.

90. JAMES, *Pragmatism*, *supra* note 82, at 145; *cf.* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 820 (1935) ("So too are

become instruments, not answers to enigmas, in which we can rest."⁹¹ Ideas, including legal concepts and decisions, become true if they help make a satisfactory relationship to other parts of our experience.⁹² For an idea to be "true" means that it performs a marriage process—the new belief melds with our existing true (melded) beliefs—and that it produces the sentiment of rationality. Truth, according to James, happens to an idea. It is *made* true by its agreement with your mind. Consequently, for new theories or ideas to *work*, they "must mediate between all previous truths and certain new experiences" and produce the subjective marks of ease, peace, and rest (i.e., the Sentiment of Rationality).⁹³

Likewise, Hutcheson says that jural relations are created and constantly changed by the power of the brooding mind.⁹⁴ The active, subjective process of brooding and hunching creates bridges for the judicial mind. Hutcheson goes so far as to argue that the best chance for justice comes from the hunch.⁹⁵ Truth, in James's sense, could be inserted for justice in the preceding sentence. The best chance for justice or truth comes from the hunch or sentiment of rationality because this method makes a decision based on the wholeness of experience. Ratiocination reduces experience to try to fit it into predetermined categories. The fullness of the felt relationships in and between the facts of the case and the legal precedent are lost. This seems to be the "hidden truth" that is felt by the judge. Thus, Hutcheson seems to agree with James that true decisions are most likely to result when the fullness of experience, espoused by the doctrine of radical empiricism, is taken into account by the method of pragmatism (hunching).

In their pragmatic methods of decision making, both Hutcheson and James indicate a "brooding" or perplexity from which the hunch or sentiment of rationality arises to marry the past and the

title, contract, conspiracy, malice, proximate cause, and all the rest of the magic 'solving words' of traditional jurisprudence.")

91. JAMES, *Pragmatism*, *supra* note 82, at 145.

92. *See id.* at 147.

93. *Id.* at 167.

94. *Judgment Intuitive*, *supra* note 9, at 276, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 17-18 (1938).

95. *Id.* at 280, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 24 (1938).

future.⁹⁶ According to Hutcheson (and James), the judge (practical decision maker) must consider all the evidence, precedent, and her life experience as relevant to the decision making process.⁹⁷ She then tries to connect the past with the future. Once the judge achieves the sentiment of rationality or hunch as to a decision, then that decision agrees with her mind. She must then have faith in that sentiment of rationality or hunch and act upon it. Further, the laws or truths created by this process are tentative. Future decisions cannot be made simply by classifying novelty within past structures. Each decision requires a reassessment of old truths; each decision redefines the truth.

Finally, Hutcheson and James also both emphasize that cognition of the steps in reaching the conclusion is unimportant. Hutcheson even cites James in *The Judgment Intuitive* for the proposition that “[w]hen the conclusion is there we have already forgotten most of the steps preceding its attainment.”⁹⁸ According to James, cognition is but a “fleeting moment.”⁹⁹ Its chief purpose is to guide action rather than provide philosophical insight. This description of cognition coincides with Hutcheson’s comments that often the best judges, who decide by hunching, are unable to rationalize their decisions adequately.¹⁰⁰ Also, Hutcheson argues, and James would agree, that judicial opinions are just a rationalization of the experiential basis of the judge’s decision.¹⁰¹ Thus, for both James and Hutcheson, the practical person (judge) takes life in its concrete fullness to feel a course of action, without necessarily being able to explain its relation to the whole of experience.

96. *Id.* at 282, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 27 (1938) (quoting BENJAMIN N. CARDOZO, *PARADOXES OF LEGAL SCIENCE* 59, 60 (1928)); JAMES, *Sentiment of Rationality*, *supra* note 74, at 13.

97. *Judgment Intuitive*, *supra* note 9, at 285, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 30 (1938); see JAMES, *Pragmatism*, *supra* note 82, at 145.

98. *Judgment Intuitive*, *supra* note 9, at 282, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 27 (1938) (quoting BENJAMIN N. CARDOZO, *PARADOXES OF LEGAL SCIENCE* 61 n.155 (1928)).

99. JAMES, *Sentiment of Rationality*, *supra* note 74, at 18.

100. *Judgment Intuitive*, *supra* note 9, at 287, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 33 (1938).

101. *Id.* at 285, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 30 (1938).

IV. PRAGMATIC CONDITIONS OF WARRANTED BELIEF

The preceding discussion has attempted to provide a pragmatic justification for the hunch theory of judicial decision making. Despite this justification, a good pragmatist would still ask what practical difference this pragmatic epistemological justification makes. What is its cash-value for an account of when judges are warranted in trusting their hunches? Without saying more, it might seem as if Hutcheson and James are proposing that a decision is justified merely by a feeling that it is rational. This seems to suggest a form of relativism where anything is permitted. Judges would be warranted in relying on any old hunch no matter how arbitrary it seems to others. This section, however, tries to dispel these concerns by demonstrating that James's pragmatism includes some pragmatic conditions that discipline the process of decision making and that help save the judicial hunch from arbitrariness.

To fully understand James's radical proposal to practical decision making, the metaphysics of radical empiricism needs to be further explored. First, it is essential to understand that James's metaphysics radically rejects the subject/object split.¹⁰² Hilary Putnam has noted that since Descartes, most philosophers have argued that "in perception we receive 'impressions' that are immaterial, totally different—separated by a metaphysical gulf—in fact from all the material objects we normally claim to perceive; and from the character of our internal mental impressions we infer how things are in the external physical world."¹⁰³ In other words, we first have consciousness of an impression of physical objects and then somehow derive or postulate the physical world we are "experiencing" from that impression. By contrast, James argues that we actually experience the objects themselves as related to us in some way.¹⁰⁴ Perception is direct or unmediated. When I perceive your body, I do not perceive an impression of your body that is mysteriously related to your actual body. I perceive your actual body. Certainly, my conception of your body is an abstraction from that perception, but James maintains that I have a direct experience of your actual body prior to formulating

102. Hilary Putnam, *Pragmatism and Realism*, 18 *CARDOZO L. REV.* 153, 164 (1996).

103. *Id.* at 160.

104. *Id.* at 164.

this conception.¹⁰⁵ Experience is prior to and more inclusive than our consciousness of it. Furthermore, Hilary Putnam has characterized James's thought as a form of "direct realism" or natural realism.¹⁰⁶ Putnam further clarifies that James is claiming that

the properties and relations we experience are the stuff of the universe; there is no non-experiential "substratum". . . and these experienced or experienceable properties and relations (James is unfortunately a little vague at this crucial point) make up both minds and material objects. Moreover, minds and material objects, in a sense "overlap."¹⁰⁷

In other words, James argues that we have access to a common world via our experience. The properties and relations that seem to make up material objects are also part of our minds. We are related to material objects and a common world not separated from them by a mysterious and unbridgeable metaphysical gulf.

In this respect, Alfred North Whitehead has argued that the apprehension of a vague and inarticulate causation is primary while consciousness is secondary.¹⁰⁸ In other words, what we are conscious of is a reduction of that vague sense of causation. James seems to agree with Whitehead, or more likely Whitehead agrees with James, by claiming that the wholeness of experience is primary and our conscious beliefs secondary.¹⁰⁹ James indicates this by arguing that an idea is true if it agrees with your mind.¹¹⁰ This agreement is not a conscious idea but the sentiment of rationality. Likewise, Hutcheson advocates the hunch, a subjective sign, as the best bet for a just decision.¹¹¹ For Hutcheson and James, rational precepts constrain our experience of that vague and inarticulate wholeness of experience. Thus, hunching is the best way to make practical decisions because it takes into account the fullness of experience and not just a selective part of it.

James's rejection of the subject/object distinction further means that even though he is defining practical deliberation subject-

105. *Id.* at 165.

106. *Id.* at 164.

107. *Id.* at 165.

108. See WHITEHEAD, *PROCESS AND REALITY*, *supra* note 81, at 173, 178.

109. See JAMES, *Conception of Truth*, *supra* note 78, at 161-64.

110. *Id.*

111. *Judgment Intuitive*, *supra* note 9, at 280, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 24 (1938).

tively, he is not claiming that it is merely subjective. Since our minds “overlap” with a common world, subjectivity is not isolated from the world. It is primarily related to it and has a direct experience of it. In the wholeness of experience, the mind (subject) and the world (object) are one. Further, James rejects the idea that there is an objective truth, like economic analysis, that can resolve practical problems.¹¹² Our truths are subjectively defined, and he refers to pragmatism as a subjective method of determining the truth.¹¹³

Consequently, applying James’s pragmatic epistemology to judging means that the process of judging must be looked at from the inside. Judging is not about how an objective truth or an abstract legal principle can resolve the case at hand. James recognizes that “[a]bstract rules indeed can help,” but he claims that “they help the less in proportion as our intuitions are more piercing.”¹¹⁴ Hence, judging is about the judge taking in all the relevant legal materials, factual information, and other factors and trying to determine the outcome. Once the judge has come to a resolution of the case, the judge should have a sentiment of rationality or hunch that her decision makes sense. This subjective sign is not an “objective justification” of the judge’s conclusion. Rather, it is a confirmation that the judge’s decision resonates with what the judge believes is true about the law, the facts, and how they should relate. If a judge does not have a sentiment of rationality, this should be a sign that the judge’s decision is ill-formed. As a result, the first disciplining pragmatic condition of this approach is that the judge must be relying on a hunch or sentiment of rationality for the decision to be justifiable.

Under this first pragmatic condition, James and Hutcheson are saying that the hunch is essential to signaling a subjective closure to the judge’s deliberation. Without the hunch, the judge is not subjectively resolved about the best outcome. Although James has more to say about the nature of the best outcome that we ought to seek,¹¹⁵ here he is concerned with the subjective process

112. See JAMES, *Conception of Truth*, *supra* note 78, at 161-64.

113. *Id.*

114. WILLIAM JAMES, *The Moral Philosopher and the Moral Life*, in *ESSAYS IN PRAGMATISM* 65, 83 (1948) [hereinafter JAMES, *Moral Philosopher*].

115. James argues that there is no final static good state we should try to achieve. Rather, he claims that “the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times *as many*

of belief formation and what makes a belief one that we are warranted in relying on. He argues for "personal belief as one of the ultimate conditions of truth. For again and again success depends on energy of act; energy again depends on faith that we shall not fail; and that faith in turn on the faith that we are right—which faith thus verifies itself."¹¹⁶ In other words, a subjective belief that we are right (signaled by a hunch) is a precondition to justifying one's decision. Initially, this appears to have little or no disciplining effect on judges. Upon further reflection, however, this is not a trivial condition of action. It requires judges to search legal precedent, deposition and trial transcripts, and whatever else is required until the judge feels subjectively justified in her decision. For example, consider the situation where the defendant has a good technical legal argument and the plaintiff has a good factual argument but a less persuasive interpretation of the relevant law. Accepting the defendant's argument may allow the judge to be subjectively resolved about the law but not about the facts. Conversely, accepting the plaintiff's argument may allow the judge to be subjectively resolved about the facts but not necessarily about the law. For James and Hutcheson, the judge cannot choose either of these options. The judge must be resolved subjectively about the whole case. The judge must study the case again and again until she finds an interpretation of the law and the facts that allows her to have a subjective belief in the rightness of her decision about the whole case. Uneasiness about the result means that the decision is not warranted. In other words, the judge must do the best she can to resolve all the loose ends in the case and come to a decision that she feels confident is right. The judge knows that this has occurred when she feels a flash of insight or sentiment of rationality about her decision.

demands as we can." *Id.* at 80. In other words,

[t]hat act must be the best act, accordingly, which makes for the *best whole*, in the sense of awakening the least sum of dissatisfactions. In the casuistic scale, therefore, those ideals must be written highest which *prevail at the least cost*, or by whose realization the least possible number of other ideals are destroyed.

Id. He further claims that "ethical science is just like physical science, and instead of being deducible all at once from abstract principles, must simply bide its time, and be ready to revise its conclusions from day to day." *Id.* at 82. In other words, he proposes a casuistic process of paying attention to the concrete and making normative judgments about what ought to be in terms of a continual process of struggling "from generation to generation to find the more and more inclusive order." *Id.* at 80. He asks us to "[i]nvent some manner of realizing your own ideals which will also satisfy the alien demands that and that only is the path of peace!" *Id.*

116. JAMES, *Sentiment of Rationality*, *supra* note 74, at 29.

Further, James would argue that the sentiment of rationality must be achieved with respect to the judge's decision in each case. The reason for this is that "[f]or every real dilemma is in literal strictness a unique situation; and the exact combination of ideals realized and ideals disappointed which each decision creates is always a universe without a precedent, and for which no adequate previous rule exists."¹¹⁷ Therefore, deciding cases on hunches or the sentiment of rationality does not allow judges to decide cases arbitrarily based on any hunch and has a disciplining effect in all cases, not just hard ones.

Once the judge has received a hunch or a sentiment of rationality, this is not the end of the story. James argues that we must use the pragmatic method to test these decisions in accordance with their consequences.¹¹⁸ The second disciplining pragmatic condition, which is absent from Hutcheson's account, is thus the pragmatic testing of the judge's decision. Subsequent to the first pragmatic condition of coming to a subjective hunch, the judge should test her decision based on its consequences. In other words, despite James's confidence that we all experience a common world and have access to a common truth, he is not naive about the possibility of disagreement about our interpretations of that world.¹¹⁹ He recognizes that there is a plurality of decisions that different decision makers may feel confident are right or produce the sentiment of rationality. Hence, James argues that we must test these judgments by their fruits; "[t]he results of the action corroborate or refute the idea from which it flowed."¹²⁰ The verification of a theory or claim means

that if you proceed to act upon your theory it will be reversed by nothing that later turns up as your action's fruit; it will harmonize so well with the entire drift of experience that the latter will, as it were, adopt it, or at most give it an ampler interpretation, without obliging you in any way to change the essence of its formulation.¹²¹

By contrast, if your decision is mistaken, James notes that

the course of experience will throw ever new impediments in the way of my belief, and become more and more difficult to express in its

117. JAMES, *Moral Philosopher*, *supra* note 114, at 83.

118. JAMES, *Pragmatism*, *supra* note 82, at 142.

119. JAMES, *Sentiment of Rationality*, *supra* note 74, at 12.

120. *Id.* at 33.

121. *Id.*

language. Epicycle upon epicycle of subsidiary hypotheses will have to be invoked to give to the discrepant terms a temporary appearance of squaring with each other; but at last even this resource will fail.¹²²

Consequently, to test their hunches judges must follow the consequences of their decisions. They must test whether their subjective feeling of rightness has consequences that verify it.

This will be a change from judges' traditional orientation toward legal doctrine to an orientation toward the effects of their decision. In this respect, James emphasizes that the pragmatic method entails "[t]he attitude of looking away from first things, principles, 'categories,' supposed necessities; and of looking towards last things, fruits, consequences, facts."¹²³ Justice is not achieved by aiming at any fixed ideal of justice or legal principle but by paying attention to the concrete actuality of the case and deciding in a way that establishes the proper relationship between that case, prior precedent, and the future consequences of the decision. Accordingly, if the judge's decision is based on the sentiment of rationality, it is the best probable truth because it "works best in the way of leading us" to a decision about "what fits every part of life best and combines with the collectivity of experience's demands."¹²⁴ This probable truth must then be tested by its consequences. Judges must pay attention to what effects their decisions have. They should discern whether the parties were able to live up to the terms of the decision and stick to the court's resolution of the case. Judges should also determine whether other similarly situated parties changed their behavior because of the decision. In other words, the court should determine whether the opinion furnished good or bad incentives for future actors. The court should also look at the effect on other courts. Has the force of this decision been verified or contradicted by other courts? Judges already appear to do some of these things. However, they often do not look at these things as tests of the rightness of their decision. By contrast, James argues that the merits of the decision are determined by the decision's consequences. For example, if future cases demonstrate that justifying the legal decision requires numerous "subsidiary hypotheses"

122. *Id.*

123. JAMES, *Pragmatism*, *supra* note 82, at 146; cf. POSNER, *supra* note 5.

124. JAMES, *Pragmatism*, *supra* note 82, at 157.

that eventually undermine the original decision, James would argue that the decision has been determined to be false or misguided and ought to be corrected.¹²⁵ In other words, James insists that the judicial hunch be subjected to the pragmatic method of testing.¹²⁶ Hunches must be verified by their consequences for the parties, future claimants, future precedent, etc.

Further, James is not saying that this verification will necessarily occur within the "life of a single philosopher" or judge.¹²⁷ He argues that "the experience of the entire human race must make the verification, and that all the evidence will not be 'in' till the final integration of things, when the last man has had his say and contributed his share."¹²⁸ For example, with respect to the moral life, James claims that "[t]he course of history is nothing but the story of men's struggles from generation to generation to find the more and more inclusive order."¹²⁹ By following this path, he maintains that society has attained "one sort of relative equilibrium after another by series of social discoveries quite analogous to those of science."¹³⁰ For example, "[p]olyandry and polygamy and slavery, private warfare and liberty to kill, judicial torture and arbitrary royal power have slowly succumbed to actually aroused complaints."¹³¹ Consequently, the judge should strive to test her decision against these social discoveries but also realize that her decision is always provisional in that the future experience of the human race can later determine it null and void.

In sum, James's pragmatic epistemology provides two pragmatic conditions to discipline judicial decision making. First, before a judicial decision is warranted, the judge must experience a subjective sense of certainty about her decision (a sentiment of rationality) after taking into consideration all the relevant facts and the law. This subjective sense of certainty prevents judges from prematurely resolving a case based on a partial understanding of it and requires that judges examine and account for

125. JAMES, *Sentiment of Rationality*, *supra* note 74, at 33.

126. *See id.* at 142, 157.

127. *See id.* at 34.

128. *Id.*

129. JAMES, *Moral Philosopher*, *supra* note 114, at 80.

130. *Id.*; *cf.* JOHN RAWLS, *POLITICAL LIBERALISM* 8 (1993) (arguing that his political conception of justice can be tested against "considered convictions" to accomplish a state of reflective equilibrium warranting that the political conception of justice be adopted).

131. JAMES, *Moral Philosopher*, *supra* note 114, at 80.

all aspects of the case in their decision. If the judge cannot reconcile all these elements, the judge will not attain the sentiment of rationality that is a prerequisite to a justified decision. Second, James adds the pragmatic condition that judges' decisions must be pragmatically tested to determine if their fruits verify the decision. This test provides a manner in which bad hunches can be weeded out. Even if the judge decided a case based on a legitimate feeling of certainty, subsequent developments may indicate that the judge's decision was unjust and that it should be overturned. Thus, although the hunch theory cannot provide the certainty of outcomes promised by strong legal formalism, it does, with the help of James's pragmatic epistemology, include two pragmatic conditions that discipline judges' hunching and that increase the possibility of a just result.

V. DISTINGUISHING HUTCHESON FROM THE LEGAL REALISTS

Basing the hunch theory on James's pragmatism means that Hutcheson can be classified as a realist in the philosophical sense.¹³² As indicated above, James proposed a direct realism which is a form of philosophical realism.¹³³ The following will argue, however, that the philosophical realism of the hunch theory is contrary to the epistemological basis of legal realism. Consequently, this section challenges the traditional classification of Hutcheson as a legal realist.

Traditionally, Hutcheson's hunch theory of judicial decision making has been classified as part of the legal realist movement in the United States.¹³⁴ Both Karl Llewellyn and Jerome Frank, probably the two leading legal realists, referred to Hutcheson as a realist.¹³⁵ Most interpreters of legal realism have also considered

132. By realism, I mean someone who believes that the experience of vague and inarticulate causation (the wholeness of experience) is primary and that consciousness is secondary. Conversely, an idealist thinks that "apart from concepts there is nothing to know" and that "the objective world [is] a construct from subjective experience." WHITEHEAD, *PROCESS AND REALITY*, *supra* note 81, at 156. In other words, consciousness is primary and causation is derived from it. Kant is an example of an idealist, while Hutcheson, James, and Whitehead are realists. See *supra* text accompanying notes 116-122.

133. See *supra* text accompanying notes 102-113.

134. See *supra* note 14.

135. See FRANK, *supra* note 14, at 6; Llewellyn, *Newer Jurisprudence*, *supra* note 14, at 603-04; Llewellyn, *Some Realism*, *supra* note 14, at 1258.

Hutcheson a realist.¹³⁶ This raises the question of what it means to be a legal realist.

Llewellyn made several attempts to identify some of the key legal realists and to define the ideas associated with them.¹³⁷ In *Karl Llewellyn and the Realist Movement*,¹³⁸ however, William Twining criticized Llewellyn's attempt to define legal realism as a legal theory.¹³⁹ He argued that legal realism can be better understood as a historical phenomenon and only as a "discrete phenomenon" until 1928.¹⁴⁰ These criticisms have some validity when the differences between Llewellyn, the scientific realists, and the policy realists are identified. Conversely, to call something a historical phenomenon means that it has characteristics which distinguish it from other historical phenomena. Thus, Llewellyn's attempts to define the characteristics of legal realism can be helpful to determine whether Hutcheson was part of the historical phenomenon called legal realism.

Llewellyn identified nine "common points of departure" for legal realists.¹⁴¹ Hutcheson exhibits at least three of these characteristics. First, as most realists believe, the hunch theory of judicial decision making views law as changing and tentative. Law is a "thing of life," and the judge is its creator. Second, Hutcheson refers to a common realist claim that judicial opinions are a rationalization of a decision made on other grounds. Hutcheson stated that decisions are based on hunches or intuition and that "the ratiocination appears only in the opinion."¹⁴² The judge works backward from her hunch using a stock of logical premises to justify the result. Finally, as other legal realists, Hutcheson promoted reform in law schools. He called for a "change in the methods of study and of the teaching of the law in our great law schools" to eliminate the misconception that judicial decision

136. See White, *Sociological Jurisprudence*, *supra* note 14 at 1016.

137. See Llewellyn, *Newer Jurisprudence*, *supra* note 14, at 587-614; Llewellyn, *Some Realism*, *supra* note 14, at 1235-56.

138. WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (2d ed. 1985).

139. *Id.* at 74-83.

140. *Id.* at 82.

141. See Llewellyn, *Some Realism*, *supra* note 14, at 1235-56.

142. See *Judgment Intuitive*, *supra* note 9, at 285, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 30 (1938) (stating that the "intuitive sense' is the grounds upon which judicial decisions are made").

making is logical and to produce better judges and lawyers.¹⁴³

Despite the concordance between these legal realist points of departure and the hunch theory, the hunch theory differs substantially from the views espoused by Llewellyn, the scientific realists, and the policy realists. First, although Llewellyn recognized a role for intuition and the pragmatic testing of the social and political effects of judges' decisions, he espoused a much more scientific understanding of legal adjudication than Hutcheson.¹⁴⁴ For instance, Llewellyn argued that "[r]ealism is not a philosophy, but a technology."¹⁴⁵ By a technology, he means a method which can be used in the service of any end. He claims that the method is to check accepted doctrine against its results.¹⁴⁶ Initially, this seems similar to James's pragmatic method of testing the consequences of decisions, but Llewellyn approaches this question from an "empirical perspective" which is based on a sociology of law.¹⁴⁷ By this, Llewellyn

mean[s] not just that the operative legal rules can actually be found in law books, but the *content* which the doctrines say these rules possess is drawn in the first instance from *observation* of actual decision making, rather than from how legal scholars respond to the words of the rule.¹⁴⁸

In other words, he maintains that there must be an empirical analysis of actual cases to determine "that court decisions in fact follow the stated rule, that the rule is thus *sociologically* valid."¹⁴⁹ His own attempt to do this, in *On Warranty of Quality and Society*,¹⁵⁰ is a long and tedious historical analysis of warranty cases, of the particular judges involved, and the policy that develops. Likewise, Llewellyn views the judge as someone who has experi-

143. *Id.* at 288, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 34 (1938).

144. KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 78-81, 89-95 (Paul Gewirth ed. & Michael Ansaldi trans., 1989) [hereinafter LLEWELLYN, CASE LAW SYSTEM].

145. KARL N. LLEWELLYN, THE COMMON LAW TRADITION 510 (1960) [hereinafter LLEWELLYN, THE COMMON LAW]; see also KARL N. LLEWELLYN, BRAMBLE BUSH 9-10 (1930) (arguing that legal realism "was and still is an effort at more effective legal technology").

146. Llewellyn, *Newer Jurisprudence*, *supra* note 14, at 587.

147. LLEWELLYN, CASE LAW SYSTEM, *supra* note 144, at 90.

148. *Id.*

149. *Id.*

150. Karl N. Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699 (1936); Karl N. Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341 (1937).

ence in a particular area, like one of his case law studies. Based on this specialized knowledge of the case law, Llewellyn argues that there is a distinct judicial ability to make decisions by something like the specialized horse sense of the horse trader; "the balanced shrewdness of the expert in the art."¹⁵¹

Conversely, Hutcheson argues that the judge needs to utilize her imagination to lift "the mind above the mass of constricting matter whether of confused fact or precedent that stands in the way of a just decision."¹⁵² The kind of scientific examination of precedent followed by Llewellyn seems alien to Hutcheson. Imagination tries to grasp the wholeness of experience and the relationships between all that the judge has considered. A scientific examination of precedent is not part of the process of hunching.

The underlying difference between Llewellyn and Hutcheson is hidden by Llewellyn's failure to indicate that form can limit substance. In other words, the method of realism can limit one's philosophical assumptions. For example, the method of realism advocates a separation of *is* from *ought*¹⁵³ for description, observation, and establishing relations between the things described.¹⁵⁴ To be able to describe, observe, and establish relations, we must limit our inquiry to conscious experience. As a result, Llewellyn's empiricism is much more limited than Hutcheson. This becomes very evident in Llewellyn's interpretation of the hunch theory as merely marking out what the judge's limitations are and how judges can at times come close "to being *controlled* by [the] precedent."¹⁵⁵ Llewellyn appears to be imposing a limited form of empiricism on the hunch theory. If judges are not conscious of the basis of their decision, then they are not really deciding the case in a manner that the legal realists would understand. A legal realist decision is informed by description, observation, and establishing conscious relations between things. Hutcheson, however, advocates making judicial decisions based on the hunching from

151. LLEWELLYN, *THE COMMON LAW*, *supra* note 145, at 121.

152. *Judgment Intuitive*, *supra* note 9, at 288, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 34 (1938).

153. A pragmatic consideration of the fullness of experience would not even be able to make the fact/value distinction in the decision making process.

154. Llewellyn, *Some Realism*, *supra* note 14, at 1236-37.

155. Llewellyn, *Newer Jurisprudence*, *supra* note 14, at 604.

the fullness of experience.¹⁵⁶ Hutcheson even admits that we often forget most of the steps to the conclusion by the time we get there.¹⁵⁷ In essence, the method of legal realism eliminates the fullness of experience which Hutcheson advocated as the best way to ensure a just decision. Thus, the limitation of Llewellyn's formal method on the substance of experience countable in a legal realist decision is radically different from the hunch theory.

Hutcheson can also be distinguished from the scientific realists in that his description of the hunch seems to go beyond ordinary sense experience which is the basis for their decisions.¹⁵⁸ For example, the judge seeking justice according to the hunch method would not decide a parking ticket dispute on the basis of empirical studies of parking done in New Haven, Connecticut.¹⁵⁹ She would try to feel the relations between the parties, the situation, the community, and the law. The hunch method would not want to limit the fullness of experience to this scientific data because the violator could be a statistical aberrant.

Further, unlike the noted legal realist Jerome Frank, Hutcheson does not indicate that judges' hunches can be scientifically explained.¹⁶⁰ Frank talks about the hunch theory as if, through psychoanalysis of judges, we could, in principle, determine the "hunch-producers."¹⁶¹ Frank, then, does not interpret the hunch theory as advocating that judges decide cases based on the fullness of experience or radical empiricism. He interprets it as explaining how judges' biases determine their decisions.¹⁶² From Frank's and Llewellyn's interpretation of Hutcheson and legal realism, it is evident that legal realism has a narrow view of experience. The narrow scientific experience allowed by the method of legal realism is alien to the fullness of experience in the hunch

156. See *Judgment Intuitive*, *supra* note 9, at 288, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 34 (1938).

157. See *id.* at 287, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 33 (1938).

158. See *id.* at 288, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 34 (1938).

159. For the parking studies as an example of the scientific realists, see Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 *YALE L.J.* 11 (1943).

160. See *Judgment Intuitive*, *supra* note 9, at 288, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 34 (1938).

161. FRANK, *supra* note 14, at 111-15.

162. See *id.*

theory. Thus, Hutcheson should not be labeled a legal realist but as a pragmatist and radical empiricist.

VI. CONCLUSION

The explosion of fact and the indeterminacy of law have not eliminated the possibility of justice. Hutcheson's hunch theory of judicial decision making provides a pragmatic and empirical solution to these current dilemmas in a way that has not been fully appreciated. Initially, the hunch theory seems to suggest that judges can arbitrarily decide cases based on a subjective feeling. Further analysis indicates, however, that hunching is warranted given a pragmatic epistemological justification. William James's pragmatic epistemology saves the hunch theory from arbitrariness by positing a compelling case for direct realism and by providing two pragmatic conditions that help discipline judicial hunching. These two pragmatic conditions require that judges base their decisions on a subjective sense of certainty or a sentiment of rationality and that they pragmatically test their decisions to verify them by their consequences. Furthermore, this pragmatic justification demonstrates that Hutcheson embraced a form of radical empiricism which is foreign to the narrow scientific view of experience embraced by legal realists. Thus, Hutcheson should no longer be considered a legal realist even though he agrees with some aspects of legal realism.

Given this pragmatic epistemological justification of the hunch theory, judges are warranted in adopting this method to tackle the factual and legal complexity of our times. Judges should be taught that judging is not a matter of deductive logic as advocated by strong legal formalists or technical reasoning as advocated by law and economics. Rather, the best way of determining the just result is for judges to consider all the relevant facts and legal precedent and to wait for a hunch or a "jump-spark connection between the question and decision."¹⁶³ In other words, judges should expose their minds to the full complexity of their cases and use their intuition or imagination to determine just decisions. As

163. *Judgment Intuitive*, *supra* note 9, at 278, reprinted in JOSEPH C. HUTCHESON, JR., *JUDGMENT INTUITIVE* 14, 21 (1938).

long as judges honor the pragmatic conditions which discipline hunches, this method of judicial decision making has the potential of improving the administration of justice despite the explosion of fact and the indeterminacy of law. Furthermore, the hunch theory may finally lead to the "change in the methods of study and of the teaching of the law in our great law schools"¹⁶⁴ that Hutcheson advocated over seventy years ago.

164. *Id.* at 288, reprinted in JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 34 (1938).
