DOES LAW NEED A THEORY OF TRUTH? A LOOK AT THE EPISTEMOLOGY OF THE NEW HAVEN SCHOOL OF JURISPRUDENCE

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ABSTRACT

Law and truth have a complicated relationship. Epistemologists' attempts to resolve this complication by articulating a coherent theory of truth have only exacerbated the issue. But is a theory of truth necessary for jurisprudence? If 'we are all pragmatists now',[†] might we not be better off rejecting standard accounts of epistemology altogether? This paper will outline how the pragmatist rejection of epistemology resolves the challenge of Gettier problems. It will trace the influence of the early pragmatists on American Legal Realism; particularly Holmes, Llewellyn and Frank. It will then suggest, following Lasswell and McDougal, that the American Legal Realists crucially misread Dewey, and that the New Haven School of Jurisprudence corrects this misconception. Properly understood as a radically pragmatist project, the New Haven School of Jurisprudence offers an account of legal theory that avoids standard epistemological controversies and still offers a coherent and effective approach to jurisprudential enquiry.

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† John D Arras, 'Freestanding Pragmatism in Law and Bioethics' (2001) 22(2) *Theoretical Medicine and Bioethics* 69, quoting Richard Rorty.

I INTRODUCTION

Standard accounts of epistemology proceed on the basis that knowledge is the possession of a justified true belief ('JTB').[1] One significant and persistent challenge to JTB theories of knowledge are Gettier problems: cases in which a subject holds a justified true belief that does not seem to be knowledge.[2] Standard accounts of epistemology deal with Gettier cases by nuanced restatements of their particular account of truth. Broadly, such accounts are usually foundationalist[3] or non-foundationalist.[4]

A third solution to Gettier problems exists. One might reject standard accounts of epistemology altogether. In fact, James,[5] Dewey[6] and Rorty[7] — indeed all philosophical pragmatists — take this approach. Pragmatism has been unpopular in legal theory. The historical links between James and Dewey's pragmatism and the perennially controversial American Legal Realists have compounded this unpopularity.[8]

Despite this, there is much to recommend the pragmatist position to legal theorists. It offers unique and pragmatic, in the vernacular sense, solutions to the problems of legal theory. Moreover, there is a fully articulated and *radically* pragmatist system of legal theory ready-made, though frequently overlooked: Lasswell and McDougal's New Haven School of Jurisprudence.[9]

This article will outline how the pragmatist rejection of epistemology resolves the challenge of Gettier problems. It will trace the influence of the early pragmatists on American Legal Realism, particularly Holmes, Llewellyn and Frank. It will then suggest, following Lasswell and McDougal, that the American Legal Realists crucially misread Dewey, and that the New Haven School of Jurisprudence corrects this misconception.[10] It will then demonstrate how, properly understood as a *radically* pragmatist project, the New Haven School of Jurisprudence offers an account of legal theory that avoids the epistemological controversy in jurisprudence.

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[1] Matthias Steup and Ram Neta, 'Epistemology' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, Summer 2020 ed, 2020) <https://plato.stanford.edu/archives/sum2020/entries/epistemology>.
[2] Edmund Gettier, 'Is Justified True Belief Knowledge?' (1963) 23(6) *Analysis* 121.
[3] As with doxastic or epistemic basicality: see Steup and Neta (n 1).
[4] As in coherentist accounts of epistemology.
[5] William James, 'Pragmatism's Conception of Truth' (1907) 4(6) *The Journal of Philosophy, Psychology and Scientific Methods* 141.
[6] John Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (Capricorn, 1960).
[7] Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press, 2009).
[8] Harold D Lasswell and Myres S McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven Press/Kluwer Law, 1992) vol 1, 130, 250, 255 ('*JfaFS*').
[9] Ibid 324 and, in particular, 217–18 n 21. But note the considerable academic controversy about its central claims: see, in particular, Hengameh Saberi, 'Love It or Hate It, but for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity' (2012) 35 *Boston College International and Comparative Law Review* 59.
[10] *JfaFS* (n 8) 265 n 197.

II EPISTEMOLOGY, GENERALLY

Epistemology is the study of knowledge. A sub-discipline of philosophy, it seeks to understand the nature of claims we make about knowledge. The possibility of knowledge is often taken for granted. So, too, is the possibility of truth; some propositions are true, others false. We assume it is possible, though often difficult, to distinguish between truth and falsehood. Epistemology, at its core, examines the processes by which we might determine how we know something — including how we might know whether a proposition is true or false. Additionally, epistemology is concerned to interrogate the conceptual framework by which we understand knowledge.

Consider the question of knowledge from the context of a law student. Suppose, in an exam, we ask a first-year student to identify which decision of the High Court of Australia established the common law principle that Native Title survived the Crown's acquisition of radical title. The student's answer — *Mabo v Queensland (No2)* ('*Mabo*')[11] — is correct. Can we infer that the student who has given that answer possesses certain 'knowledge' about the *Mabo* case?

Traditional approaches to epistemology posit that knowledge is, roughly, a justified true belief, or JTB.[12] Suppose our student, panicking as the exam clock ticks down, gave the answer because, having recently watched *The Castle*, they recalled the *Mabo* case was used by fictional lawyer Dennis Denuto as a catch-all authority for 'the vibe' that restrictions on federal government's powers over property are possible. The student had no particular belief that the *Mabo* case stood for any specific or concrete legal proposition. Their answer was, in essence a lucky — albeit vaguely informed — guess. A traditional epistemologist would contend that, despite giving a correct answer, the student did not possess knowledge, relevantly speaking. The answer given was true, but the justification of the answer was suspect and, arguably, the student lacked any relevant specific belief about the answer given. The student no more possesses knowledge about the state of the law than someone who answered the question by throwing a dart at an array of cases and happened to land on the *Mabo* case. Steup summarises the position as follows: '[W]e arrive at a tripartite analysis of knowledge as JTB: S knows that p if and only if p is true and S is justified in believing that p.'[13]

The conception of knowledge as the possession of a JTB is compelling. Yet, it is incomplete. Gettier's 1963 paper 'Is Justified True Belief Knowledge?' identified key shortcomings in the JTB account of knowledge, with examples that have since come to be known as Gettier cases.[14] In those cases, a person holds a true belief, and is justified in holding that belief, but their justification is in some way unsatisfactory or unreliable.

To take a slight variation on the example Gettier gives, suppose our law student is interviewing for a clerkship. So, too, is Ms Jones, another excellent candidate for the clerkship, who recently

[11] (1992) 175 CLR 1.
[12] Steup and Neta (n 1).
[13] Ibid.
[14] Gettier (n 2).

completed an internship at UNCITRAL in Vienna. Ms Jones still wears her UN pin on her lapel with pride. Our student has good reason to believe that Ms Jones will get the clerkship — specifically, they overheard the firm's HR manager tell another lawyer at the firm that Ms Jones was chosen for the position. Our student, who in a bout of nerves has forgotten Ms Jones' name, forms the belief that 'the person with the UN pin will get the clerkship'. As it happens, our student is in fact the successful applicant. While reaching into their suit pocket to retrieve a pen with which to sign the contract, their hand brushes against a UN pin, which had been given to them by a relative who visited Vienna as a tourist, which they had quite forgotten was there.

In this hypothetical, our student was in possession of a true belief: 'the person with the UN pin will get the clerkship'. That belief was, at least in a sense, justified. However, despite this, intuitively, they do not appear to possess knowledge. One might complain that this scenario is highly contrived. It is, and other more plausible scenarios might well be described. Yet the broad principle remains; there appear to be situations in which JTB is not sufficient to ground a claim that someone possesses knowledge.

This example largely mirrors Gettier's 'the person who gets the job has 10 coins in their pocket' hypothetical, spelled out in 'Is Justified True Belief Knowledge'. Controversy as to how best we might characterise the state of our student's knowledge is, therefore, largely coterminous with objections to Gettier's original scenario. Such objections posit, infra, that the scenario equivocates between testimony (overhearing that Ms Jones will get the job) and experience (having the visual perception 'that is a UN pin'); that the statement about which our student holds a belief ('the person with the UN pin will get the clerkship') is not genuinely equivalent to the ultimately 'true' proposition (our student, who is in possession of a UN pin they have forgotten about, was selected for the clerkship); and that the extent to which our student's belief is 'justified' is open to attack. Repeating the long history of philosophical discourse on Gettier cases is, the reader will be relieved to know, well beyond the scope of this article. It suffices at this point to identify that, at the very least Gettier cases give us good reasons for supposing that our intuition that knowledge is explicable as JTB is controversial, and that resolving that controversy will require further precision about what constitutes having a good justification for supposed knowledge.

A *Epistemologies: Foundational and Coherentist*

If we accept the premise that Gettier cases challenge the JTB theory of knowledge, then solving that problem requires identifying how we might systematically distinguish between actual knowledge and mere luck.

A common focus of this debate is the notion of justification. By developing a more rigorous notion of when a belief is justified, we might well do away with Gettier problems. Hence, epistemologists are concerned with what constitutes having a justification for a particular belief. Here, we can divide theories of epistemology into two broad kinds: foundationalist and non-foundationalist (usually coherentist).

Foundationalists contend that beliefs are justified by virtue of their dependence upon other beliefs. Our set of beliefs is, therefore, akin to a building: one belief rests on other, underlying beliefs. The foundationalist account of justification posits that a belief is justified where it may be inferred from another, more basic belief. Applying this analogy, a person is justified in believing their watch to be accurate if they have set it from a source known to be accurate and have good reason for supposing that the watch's mechanism is keeping good time.

Broadly speaking, faced with Gettier cases a foundationalist seeks to shore up the notion of knowledge by reference to such a picture of justification. Beliefs are only good justifications, and therefore reliable as predictors of knowledge, to the extent that they can be properly inferred from other, more basic beliefs. What follows from this is that, to the extent that any of our more basic or foundational beliefs are called into question, the assault on those foundations will flow through to all our subsequent beliefs that rely upon them. If the radio clock at the station by which I set my watch is incorrect, then that error will infect the entire chain of beliefs that rest upon it.

A difficulty arises with foundationalist accounts of epistemology. If all beliefs depend for their justification upon more basic beliefs, how do we avoid the problem of infinite regression?

Foundationalist responses to this problem differ. Steup identifies a number of different approaches, among them doxastic and epistemic basicality and variations thereon, that attempt to answer this question.[15] However, one might also avoid the problem of infinite regression by rejecting a foundationalist account of justification altogether. Coherentists do just that.

A coherentist picture of justification is non-foundational in that it does not view beliefs as constructed upon — and therefore dependent upon — more basic, foundational claims. Rather than a building, coherentists urge the metaphor of a 'web of belief'; each of our beliefs is justified on the basis of its relation to other beliefs that we hold. For a coherentist, checking our watch gives rise to a belief about the time. The justification of that belief is not a series of prior, more basic beliefs. Rather, we might justify our belief about the time being correct by reference to other matters in our broader web of belief. For example, we might justify a belief that our watch keeps time correctly by noting that reliance on that watch allowed us to show up to a meeting on time, arrive at a station before the train did and otherwise coordinate time-sensitive activities with other people. Lawyers will recognise this style of inference as akin to circumstantial evidence. No one piece is itself determinative, but on the whole the confluence of events can be taken as good reason for supposing a particular conclusion. Or as Pollock CB puts it:

> It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence — there may be a combination of circumstances, no one of which would raise a

[15] Steup and Neta (n 1).

> reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.[16]

While this might sound reassuring, this passage contains a sting in the tail; 'as much certainty as human affairs can require or admit' leaves coherentists open to the charge that they have not given an account of knowledge at all. While foundationalists might struggle to find a basic claim that guarantees knowledge, coherentists struggle to find *sufficient* reasons. An accused might be convicted on the basis of circumstantial evidence, while we admit that we might never *know* what really happened.

The extent to which either of these accounts resolve the Gettier problem remains hotly debated, as does the question of which account is the preferable one. Yet insofar as both posit that knowledge is a characteristic of a thing whose status might be ascertained, they share a common premise. Hence, both theses share a common weakness: they must account for the gap (or the potential gap) between the messy world of our reason and experience and the possession of something we call knowledge, which might be had by various methods. Both standard accounts of epistemology wrestle with that gap, still. Yet, another path remains open. Coherentism and foundationalism address themselves to the question of how we might justify whether our beliefs are true. This engages with the J and B of the JTB account of knowledge. An alternative route is to tackle the concept of knowledge directly. That is, what work does a theory of knowledge even do? Is such a theory even necessary?

B *The Pragmatist Rejection of Epistemology*

Since its inception, pragmatism has been centrally concerned with epistemology. In 1907, pragmatist William James delivered a series of public lectures entitled 'Pragmatism: A New Name for Some Old Ways of Thinking'.[17] The sixth of those lectures concerns 'Pragmatism's Conception of Truth'.[18] It outlines James' characterisation of Dewey and Schiller's work in epistemology, whom James contends 'have given the only tenable account of this subject'.[19]

The pragmatist method, outlined by James in the first of his lectures, distills philosophical problems down to their practical consequences. James notes, 'whenever a dispute is serious, we ought to be able to show some practical difference that must follow from one side or the other's being right'.[20] Expanding on this theme in the lecture 'What Pragmatism Means', James contends:

> It is astonishing to see how many philosophical disputes collapse into insignificance the moment you subject them to this simple test of tracing a concrete consequence. There can BE no difference any-where that doesn't MAKE a difference elsewhere — no difference in abstract truth that doesn't express itself in a difference in concrete fact and in conduct consequent upon that fact, imposed on somebody, somehow, somewhere and somewhen. The whole function of philosophy ought to be to find out what

[16] *R v Exall* (1866) 4 F & F 922, 929.
[17] William James, *Pragmatism* (Courier Corporation, 1995).
[18] James, 'Pragmatism's Conception of Truth' (n 5).
[19] Ibid.
[20] James, *Pragmatism* (n 17) 2.

> definite difference it will make to you and me, at definite instants of our life, if this world-formula or that world-formula be the true one.[21]

A pragmatist, therefore, investigates philosophical problems by first determining what, if any, practical consequences turn on the dispute. By application of this method a pragmatist hopes to segregate genuine philosophical disputes from supposed ones — the illusory philosophical problems that Wittgenstein contended 'arise when language goes on holiday'.[22]

James turns this methodology to the central problem of epistemology: 'True ideas are those that we can assimilate, validate, corroborate and verify. False ideas are those that we cannot.' For James, it is inescapable that any actual process of assimilation, validation, corroboration or verification must be engaged in by an actual person. That person is engaged in that enquiry because it has real-world consequences. It follows that any process of verification is not — and cannot be — separate from the question of its consequences. Hence: '[T]he truth of an idea is not a stagnant property inherent in it. Truth happens to an idea.'[23] It happens because — and only because — we are engaged in a process of enquiry.

Indeed, James identifies this as the central pragmatist project:

> Pragmatism, on the other hand, asks its usual questions. 'Grant an idea or belief to be true,' it says, 'what concrete difference will its being true make in any one's actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth's cash-value in experiential terms?'[24]

Thus, James' approach to epistemology does not merely tackle the narrow question of justification; his critique is far more radical. James' account asserts that truth itself is the process of verification, not a status obtained once verification is complete. Truth is not a property an object or idea may possess. Truth is the means, not the end. It follows that, as a process, not a category, truth is not 'objective' in any relevant sense. Such a categorisation denies truth an ontological status. Further, truth, on James' account, is relative. It is the mechanism by which one fact 'relates' to others.

These views are contentious. They were in James' time. One might reasonably recoil at the suggestion that truth is coterminous with *mere* 'usefulness'. Particularly if we ask: useful to whom? It seems plainly objectionable to call any account of facts that happens to serve a useful purpose — no matter how nefarious — 'truth'. James notes: 'A favorite formula for describing Mr. Schiller's doctrines and mine is that we are persons who think that by saying whatever you find it pleasant to say and calling it truth you fulfill every pragmatic requirement.'[25] This issue remains contentious today — indeed perhaps more so than in James' time, beset as we are by accusations of 'fake news'.

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[21] Ibid 25.
[22] Ludwig Wittgenstein, *Philosophical Investigations* (Wiley-Blackwell, 4th ed, 2009) 23.
[23] James, *Pragmatism* (n 17) 25.
[24] James, 'Pragmatism's Conception of Truth' (n 5) 142.
[25] Ibid 154.

James does not discuss truth's ontological status as such, though he touches on the point: 'When Berkeley had explained what people meant by matter people thought that he denied matter's existence. When Messrs. Schiller and Dewey now explain what people mean by truth, they are accused of denying its existence.'[26] That is, James contends that Berkeley is merely pointing out that there is an explanatory gap between our experience of matter and our idea of matter. Such a claim does not, contrary to the manner in which it is characterised by Berkeley's critics, deny that matter exists. But James does not settle the question as regards truth. It was left to later pragmatists to discuss truth's ontological status explicitly.

C *Richard Rorty's Neo-Pragmatism*

Rorty acknowledges that his seminal work, *Philosophy and the Mirror of Nature*, owes a debt to James,[27] though both Rorty and James identify the central idea as Dewey's. Unlike James, who avoids the question of the ontological status of truth, Rorty is open about where pragmatism's criticism of standard accounts of epistemology ultimately ends. Pragmatism's approach to truth is not simply an alternative coherentist epistemology, addressed to the narrow question of how we should best understand when a belief is justified. Rather, it implies a wholesale rejection of the possibility of epistemology, classically conceived. It is a radical critique, in the sense that it is a roots-and-all objection to epistemology per se, rather than an objection to any particular part of a standard account of epistemology.

Rorty specifically contends that this more radical critique is implied in James' work, noting that the 'occasional protests against … the pretensions of a theory of knowledge' found 'in, for example, Nietzsche and William James went largely unheard'.[28]

Setting out the project of *Philosophy and the Mirror of Nature*, Rorty notes, 'the aim of this book us to undermine the reader's confidence in … "knowledge" as something about which there ought to be a "theory" and which has "foundations"'.[29] Rorty contends that, properly understood, the work of Sellars and Quine lays the foundation for a 'revolutionary' approach to truth, which conceives of

> truth as, in James's phrase, 'what it is better for us to believe', rather than as 'the accurate representation of reality'. Or to put the point less provocatively, they show us that the notion of 'accurate representation' is simply an automatic and empty compliment which we pay to those beliefs which are successful in helping us do what we want to do.[30]

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[26] Ibid.
[27] Rorty (n 7) 4. Some scholars, like Saberi, distinguish between pragmatism and neo-pragmatism. It is not clear on what basis this distinction is drawn. Certainly, neo-pragmatism deals explicitly with the thornier implications for epistemology that earlier pragmatists were willing to pass over. But there appears to be no 'break' in the internal logic of pragmatism that warrants treating the epistemological positions of Dewey and Rorty differently. The better view — the one advanced by Rorty himself — is that his work merely brought to light the extent to which Dewey and James in particular had given an account that collapsed much of traditional epistemology.
[28] Ibid.
[29] Ibid 7.
[30] Ibid 10.

Rorty's work bells the cat. The key distinction between the pragmatist account of epistemology on the one hand and the coherentist on the other is that the latter still insists that knowledge is ascertainable to the extent that our coherent beliefs mirror or copy an external reality — one that exists prior to the inquiries that gave rise to those beliefs. Pragmatism collapses that distinction. It contends that there is no work to be done by the concept of knowledge aside from the process of verification, so discards it as a vestigial relic of a bygone platonic era. The abstraction from the act of verification to the concept of knowledge is dispensed with entirely.

In doing away with this abstraction, the pragmatist rejection of standard accounts of epistemology similarly does away with Gettier problems. The problem of knowledge only arises if you grant knowledge some special or separate ontological status aside from the mechanisms by which you make enquiry. For a pragmatist, the thing to do is to describe the way in which drawing inferences from the matters before you — recollections of cases or claims about pins — might go well or badly in practice. The idea that the knowledge that might be claimed by the student is somehow suspect *aside from the method of enquiry* simply does not enter into it. It is a mere linguistic confusion, on which nothing practical turns at all.

III EPISTEMOLOGY AND LAW

For lawyers — far more so than other disciplines — this is a particularly interesting point. The law has, by nature of its practical work, had to engage squarely with the question of knowledge. Unlike philosophy, it has not had the luxury of kicking tricky questions about the underlying theory of knowledge into the long grass indefinitely. Since legal disputes must be ultimately determined in a timely fashion, the law has had to develop strategies for solving contested claims about knowledge in a practical manner.

The law of evidence and trial procedure is the most obvious example of these pragmatic — in both the vernacular and philosophical sense — solutions. One excellent example is the High Court's treatment of circumstantial evidence in *Plomp v R*,[31] recently affirmed in *The Queen v Baden-Clay*.[32]

Indeed, law's approach to questions of knowledge has been so successful that the language of legal procedure has come to be applied outside its legal context. Take the notion of the 'burden of proof', a quintessentially technical question of the law of evidence that establishes which party carries the requirement to prove a certain claim to a particular standard. On the face of it, this is a discussion of interest only to the particular sub-section of lawyers, law academics and judges who consider the trial and appeal process.

Yet, the popular application of the notion of the 'burden of proof' is very broad indeed. We are likely to find assertions about the relevant burden of proof — who carries it and the standard to which it must be discharged — in all manner of extra-legal disputes. Even in ordinary

[31] (1963) 110 CLR 234.
[32] (2016) 258 CLR 308.

conversation, reference to burdens of proof are not uncommon.[33] Yet, displaced from its legal context, the 'burden of proof' is a clumsy beast. Situations that are not constrained by the demand for timeliness incumbent on the judicial process seem to have little reason to apply the notion at all. Its usefulness is a product of the thorough temporalisation of the law; the reality that since justice delayed is justice denied, processes must be adapted to meet that demand. What is served, for example, by physicists who offer competing explanations of how the four fundamental forces might be unified arguing about which of them must discharge the burden of proof?

The demands of temporalisation have pressed law into a thoroughly pragmatist approach to epistemology. So much so that the broader notion of a concept of truth (or a systematic epistemology) is largely absent from standard accounts of legal theory. This is one reason Arras has remarked — in the context of bioethics and the law — that 'we are all pragmatists now'.[34] Hence, even accepting that pragmatism's rejection of standard accounts of epistemology remains controversial in philosophy more broadly, it is worth considering this analysis carefully in jurisprudence.

Having discussed the broader pragmatists' rejection of epistemology and its relationship to jurisprudence, it falls to consider how the New Haven School of Jurisprudence adopts a pragmatist approach to/rejection of epistemology in this context.

IV THE NEW HAVEN SCHOOL OF JURISPRUDENCE

The New Haven School of Jurisprudence (hereafter 'NHSJ') has been described as 'the most visible, but ultimately the least influential, midtwentieth century project of disciplinary renewal' in international jurisprudence.[35] Its progenitors, Harold Lasswell and Myres McDougal, began a scholarly collaboration in 1935, and in 1943 published 'Legal Education and Public Policy',[36] 'one of the most quoted and cited law review articles ever published in the United States'.[37] After publication of that paper, the NHSJ project 'lived a life of celebrity scholarship — attracting some and repelling many others — in which fiery rebuttals trumped meaningful engagements'.[38]

Since then, a curious disjunction had arisen in the scholarship. On the one hand, the *Oxford Handbook of the Theory of International Law*, published in 2016, contains a chapter dissecting

[33] Alvin I Goldman, 'Argumentation and Social Epistemology' (1994) 91(1) *The Journal of Philosophy* 27.
[34] John D Arras, 'Freestanding Pragmatism in Law and Bioethics' (2001) 22(2) *Theoretical Medicine and Bioethics* 69, quoting Richard Rorty.
[35] Saberi (n 9) 62. For an excellent short introduction to the NHSJ, see W Michael Reisman, 'The View from the New Haven School of International Law' (1992) 86 *American Society of International Law Proceedings* 118.
[36] Harold D Lasswell and Myres S McDougal, 'Legal Education and Public Policy — Professional Training in the Public Interest' (1943) 52(2) *Yale Law Journal* 203.
[37] W Michael Reisman, 'Myres S. McDougal: Architect of a Jurisprudence for a Free Society' (1996) 66 *Mississippi Law Journal* 15.
[38] Saberi (n 9) 60.

the 'mainstream discipline's rejection of [the NHSJ]'.[39] At about the same time, *Jurisprudence for a Free Society* ('*JfaFS*'), the seminal NHSJ text, was being published in a Chinese language translation. Indeed, it is one of the first Western texts on jurisprudence to be so translated — leapfrogging such stalwarts of the Western jurisprudential canon as *Natural Law and Natural Rights*,[40] *The Concept of Law*,[41] *Pure Theory of Law*[42] and *Law's Empire*.[43] Presently, there is a striking disparity between the shared view from Europe and the UK — that the NHSJ is a failed project[44] — and the view from Asia, where NHSJ scholarship finds fertile ground.[45]

The disjunction arises, in part, because critics of the NHSJ have mischaracterised its central epistemological claim. The NHSJ's most vocal critics — principally Saberi and Freeman — contend that it proceeds on the basis of an incoherent foundational claim about law; that its account of human dignity is 'foundationalist antifoundationalism'.[46] Yet the NHSJ's critics have persistently failed to address, or have mischaracterised the nature of, the pragmatist epistemology that lies at the heart of the theory.

A *Is the NHSJ a Pragmatist Project?*

That Lasswell and McDougal conceived of their approach to jurisprudence as pragmatist is evident in their work. Despite this, the claim remains contentious. Some, such as Gould, squarely identify the NHSJ as a pragmatist project.[47] Dunn agrees with this characterisation, but notes that Lasswell and McDougal's treatment of the matter was sparing.[48] Nevertheless, what little Lasswell and McDougal did write on the matter was direct. Lasswell notes, 'the policy sciences are a contemporary adaptation of the general approach to public policy that was

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[39] Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016).
[40] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011).
[41] HLA Hart, *The Concept of Law* (Clarendon Law, 2nd ed, 1997).
[42] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange, 2005).
[43] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).
[44] Most notably, Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed, 2008); Orford and Hoffmann (n 39).
[45] See, for example 沈伟, '后金融危机时代的国际经济治理体系与二十国集团——以国际经济法-国际关系交叉为视角' (2016) 28(4) *中外法学* 1014 <http://www.oaj.pku.edu.cn/zwfx/CN/abstract/abstract62780.shtml>; Wang Chao, 'China's Preferential Trade Remedy Approaches: A New Haven School Perspective' (2013) 21 *Asia Pacific Law Review* 103; Seung Hwan Choi, 'The Applicability of International Human Rights Law to the Regulation of International Trade of Genetically Modified Organisms: A New Haven Perspective' (2014) 22 *Asia Pacific Law Review* 67; Shi Jingxia, 'Bridging the Gap between the Ideal and Reality: Services Liberalisation in the China–Japan–South Korea Free Trade Agreement' (2014) 22 *Asia Pacific Law Review* 45; John Shijian Mo, 'New Haven Solution to the Protection of Private Rights in China's FTAs' (2011) 19 *Asia Pacific Law Review* 135; Tai-Heng Cheng, 'Policy-Oriented Jurisprudence and Contemporary American Legal Education Part I: Solving Global Problems: Perspective from International Law and Policy: Preface' (2013–2014) 58 *New York Law School Law Review* 771.
[46] Saberi (n 9).
[47] Harry Gould and Nicholas Onuf, 'Pragmatism, Legal Realism and Constructivism' in Harry Bauer and Elisabetta Brighi (eds), *Pragmatism in International Relations* (Routledge, 2009) 26.
[48] William N Dunn, 'Rediscovering Pragmatism and the Policy Sciences' (2018) 4(1) *European Policy Analysis* 13, 13.

recommended by John Dewey and his colleagues in the development of American Pragmatism'.[49]

Yet contemporary critics, such as Saberi, claim that '[t]he Lasswell-McDougal policy-oriented international law does not include any direct or indirect mention of pragmatism'.[50] Plainly, however, this is incorrect. *JfaFS* makes explicit mention of pragmatism when it notes that 'the Realists, as a group, much influenced by pragmatist philosophy, were concerned with formulating and implementing policies, of relatively low level abstraction, to meet certain immediate, practical exigences'.[51] The text then continues with an extract from McDougal's 1940 article 'Fuller V. The American Legal Realists',[52] which cites the analysis undertaken by Cohen, particularly in 'The Problems of a Functional Jurisprudence'.[53] Cohen's work is equally explicit about the influence of pragmatism on American Legal Realism, noting that the 'viewpoint' he applies to law in that paper 'is something common to logical positivism, pragmatism, operationalism, and Whitehead's "method of extensive abstraction"'.[54] That footnote continues, citing the three main proponents of early pragmatism: Peirce, James and Dewey.

Indeed, indirect reference to pragmatism is frequent. Reference to the work of the early pragmatists — particularly Dewey — is made a number of times in *JfaFS*. These references usually note the influence of philosophical pragmatism on American Legal Realism, for example, James' influence on Pound,[55] and Dewey's influence on Cook[56] and Cohen.[57] More interesting, for our purposes, is the broader reference to Dewey's influence on American Legal Realism generally, as opposed to any particular proponent of that theory. The general theme of Dewey's influence abounds.[58] Specifically, *JfaFS* suggests that while American Legal Realism followed Dewey's work broadly, it deviated from his central claims in important respects. As we shall see, it is precisely this criticism of the American Legal Realists' take on Dewey that is central to understanding the error made by scholars who accuse the NHSJ of 'foundationalism'. At this stage, however, it will suffice to note that Lasswell and McDougal see pragmatism as the intellectual genesis of American Legal Realism and the NHSJ project as the intellectual successor to American Legal Realism — albeit one that corrects what the NHSJ

[49] Harold Dwight Lasswell, *A Pre-View of Policy Sciences* (Elsevier, 1971) xiii–xiv.
[50] Saberi (n 9) 90.
[51] *JfaFS* (n 8) 226.
[52] Myres S McDougal, 'Fuller V. The American Legal Realists: An Intervention' (1940) 50 *Yale Law Journal* 827.
[53] Felix S Cohen, 'The Problems of a Functional Jurisprudence' (1937–1938) 1 *Modern Law Review* 5.
[54] Ibid 8.
[55] *JfaFS* (n 8) 130.
[56] Ibid 250.
[57] Ibid 255.
[58] Ibid 59, 89, 211, 218, 265, 318–19.

takes to be the Realists' persistent misreading of Dewey's epistemology.[59] As they put it in NHSJ:

> It is the aim of the policy sciences frame to suggest theory and procedures better designed to take appropriate account of the unique complexities and difficulties that attend authoritative decision. It rejects the deterministic teleologies of the natural law, historical and positivist frames and builds upon the conception of the American Legal Realists that the final, culminating commitment in decision is inescapably an expression of choice.[60]

Evidently, Lasswell and McDougal take American Legal Realism, and consequently pragmatism, to be the intellectual progenitors of the NHSJ. On that basis, and commensurate with the positions they set out in *JfaFS*, the NHSJ looks to be a thoroughly antifoundationalist account of jurisprudence. Not merely in the sense that Lasswell and McDougal take a 'pragmatic', in the vernacular sense, approach to determining legal problems. Certainly, they do, and this is at one with the pragmatist method conceived of broadly. However, their approach to jurisprudence is radically pragmatist. Consistent with both early pragmatists like James and Dewey and later pragmatists such as Rorty, they chase the implications of a pragmatist's account of epistemology through to its logical conclusion.

What follows from this is an implicit rejection of the notion that law as a thing 'out there' to be 'discovered' or even 'assessed' by reference to some objective criteria is, for McDougal, inapt. Just as pragmatism denies truth an ontological status, so too does McDougal deny such a status to law. On this view we cannot describe law as though it is a thing separate from the processes that instantiate it.

Indeed, the notion of 'law as process' is a touchstone to which consistently *JfaFS* returns. Lasswell and McDougal contend that 'the legal process is part of the process of decision which in turn is part of the social process as a whole'.[61] They argue that a workable conception of jurisprudence requires 'a clear focus upon the whole of the comprehensive and continuing process of authoritative and controlling decision'.[62] This decision-making is, for Lasswell and McDougal, an iterative mechanism by which claims about authority, control and values are made, settled, contested and reinforced. They advance a picture of law that is both deeply amorphous and self-referential. They do not attempt to identify a Kelsenian grundnorm.[63] Nor

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[59] Relevantly, this difference between the NHSJ and American Legal Realism avoids the criticisms Fuller levels at the Realists, which are well set out in McDougal (n 52). This is important to note, since one who adopted Fuller's criticisms of American Legal Realism might contend that, to the extent the NHSJ joins with the Realists in adopting a pragmatist epistemology, it is open to similar critique. Yet, precisely because of their difference with the Realists on the question of how best to read Dewey's claims about epistemology — noted above — the NHSJ do not share the kind of moral skepticism that Fuller contends is fatal to the Realists' attempts to set out a plausible account of jurisprudence. It is worth noting, however, that even despite a reading of Dewey that avoids the specific problem Fuller identifies in the Realists, McDougal nevertheless largely rejects Fuller's overarching critique of American Legal Realism.

[60] *JfaFS* (n 8) 324.

[61] Ibid 335.

[62] Ibid 191.

[63] Hans Kelsen, *Pure Theory of Law* (Berkeley, 1967).

is there any attempt to articulate foundational 'secondary rules' that bind decision-makers,[64] and thereby provide the building blocks for epistemic claims about law. No such foundationalist picture is presented. Rather, *JfaFS* contends that legal systems are inherently dynamic. That is, law is the part of the social process that simultaneously makes authoritative decisions and determines what the process is for making authoritative decisions. It both reflects social values and reinforces — sometimes even creates — social values. Specifically, Lasswell and McDougal note, 'the processes of authoritative decision in any particular community will be seen to be an integral part, in an endless sequence of causes and effects, of the whole social process of that community'.[65] Law is the process by which authoritative and controlling decisions are made in any given society — and any attempt to describe its features beyond this evaporates into platonic otherworldliness. Rather than resting on a grundnorm, secondary rules, or even an account of basic goods,[66] that process does not 'rest' on anything. It does not need to. Rules are unseated as the mechanism for decision, and in their place stand 'human beings — all human beings, to varying degrees — as deciders'.[67]

V CONCLUSION

Pragmatists reject standard accounts of epistemology by inviting us to descend the ladder of philosophical abstraction. They disavow the standard metaphor of epistemology, which posits that we might possess something called knowledge that — in some relevant sense — 'mirrors' a reality that antecedes our experience of it. Rather, they insist that this picture is thoroughly muddled, that knowledge is inseparable from the process of knowing itself. By giving up that view, pragmatism dissolves the perennial challenge of Gettier problems. Rather than attempting to draw ever-finer definitions of justification, it instead focuses our attention on better describing how and in what circumstances our processes of knowing might fall short of our intended goals.

Pragmatism's motivation is a thorough-going attempt to temporalise every aspect of philosophy. There is a direct analogy between this motivation and the reason that law must focus on processes of evidence rather than epistemology. This article suggests that this shared motive is not only of academic interest, but also suggests the possibility that pragmatism might be a fruitful area of jurisprudential enquiry.

Despite the claims of its critics, the New Haven School of Jurisprudence represents a ready-made, thoroughly pragmatist approach to legal theory. Insofar as standard accounts of jurisprudence suffer from a tendency to become mired in questions that involve competing claims about epistemology — for example, questions about how we might *know* which claims about values are correct — it is perhaps worth revisiting the long-maligned New Haven School

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[64] Hart (n 41).
[65] *JfaFS* (n 8) 25.
[66] Finnis (n 40).
[67] W Michael Reisman, 'Theory about Law: Jurisprudence for a Free Society' (1998) 108 *Yale Law Journal* 935, 937.

of Jurisprudence. We might well find that the change in perspective we gain from descending the ladder of abstraction offers valuable new insights on intractable jurisprudential disputes.